RAMA-CHANDRA RAO v. RAMA-CHANDRA RAO. — SESHAGIRI AYYAR, J.

Judicial Committee in *Surajmani* v. *Rabi Nath Ojha*(1), where one of the widows, who had acquired her property under a deed of gift from her husband, disposed of it by a testamentary instrmnent. Their Lordships upheld the will of the Hindu widow. Reference may also be made to *Fateh Chand* v. *Rup Chand*(2), where it was held that a widow could dispose of by will property which had come to her under a deed of gift. I am unable to find any valid reason for the view that properties in which a Hindu widow has an absolute estate cannot be disposed of by her by a testamentary instrument. These two Madras decisions must be deemed to have been overruled by *Surajmani* v. *Rabi Nath Ojha*(1), and *Fateh Chand* v. *Rup Chand*(2). A portion of the property in suit is governed by the decision of this Court (*vide* Exhibit A). To that extent, the defendants' claim is barred by *res judicata*. The decree of the Subordinate Judge must be reversed and the suit should be dismissed with costs except in respect of the property which was the subject matter of the suit under Exhibit A. The Memorandum of Objections is also dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Spencer.

1918, October 9.

NANIKUTTI *alias* NARAINIKUTTI AMMA AND THREE OTHERS (PLAINTIFFS), APPELLANTS,

v.

ACHUTHANKUTTI NAIR AND EIGHTEEN OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar Law—Partition—Tarwad—Division by tavazhis—Right of minor members to upset partition—Division per stirpes *and not per* capita, *whether sufficient ground—Authority in favour of division per* stirpes *or per* capita, *preponderance of.*

Members of a Malabar tarwad, who were minors when a partition was made with the consent of all the adult members at the time, cannot upset the

(1) (1908) I.L.R., 30 All., 84 (P.C.). (2) (1916) I.L.R., 38 All., 446 (P.C.).

* Second Appeal No. 1266 of 1917.

partition on the ground that the division was *per stirpes*, i.e., by tavazhis, and not *per capita*.

Sulaiman v. *Biyaththumma* (1917) 32 M.L.J., 137 (P.C.), and *Veluthakkal Chirudevi* v. *Veluthakkal Tarwad Karnavan* (1916) 31 M.L.J., 879, referred to.

NARAINI-KUTTI AMMA *v.* ACHUTHAN-KUTTI NAIR.

SECOND APPEAL against the decree of A. NARAYANA NAMBIYAR, the Subordinate Judge of Palghat at Calicut, in Appeal Suit No. 784 of 1914 preferred against the decree of the District Munsif of Alattur, in Original Suit No. 45 of 1913.

This suit was brought by certain members of a Malabar tarwad to set aside two partition deeds (Exhibits B and C) executed by the then adult members of the tarwad in respect of different sets of properties. It was alleged that the plaintiffs were minors at the time of the partition deeds and that the deeds were invalid on account of mistake, fraud and illegality and the plaintiffs prayed that a re-partition should be made of all the properties belonging to the family. The material defences were that the suit was bad for misjoinder of causes of action in respect of the two partition deeds, and that there was no mistake, fraud or illegality in the partition deeds. The District Munsif who tried the suit modified the partition deeds in some respects and allowed them to stand in other respects. Both sides appealed to the Subordinate Judge, who dismissed the whole suit holding that the suit was bad for misjoinder of causes of action and also that there was no legal consent to partition apart from allotment of shares and that therefore the suit for partition would not lie; he further held that Exhibit B was a valid document, that the objections urged against Exhibit C were unfounded and were not urged before him, and that the partitions were valid and that the suit should be dismissed. Against the decree of the Subordinate Judge the plaintiffs preferred this Second Appeal.

C. Madhavan Nayar for the appellants.

C. V. Anantakrishna Ayyar for the eighteenth and nineteenth respondents.

T. Eroman Unni for the respondents.

The JUDGMENT of the Court was delivered by

SPENCER, J.

SPENCER, J.—In view of the findings of the lower Appellate Court in these cases, Mr. C. Madhavan Nayar, who appears for the appellants, has only questioned the decision as regards the partition deed, Exhibit C. This raises a question of Malabar

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SPENCER, J.

Law of some importance on which we have derived much assistance from his argument, and those of Mr. K. P. M. Menon and Mr. C. V. Anantakrishna Ayyar for various respondents. The division under Exhibit C is a division of the tarwad properties *per stirpes*, that is to say, allotting an equal share to each *stirps* or tavazhi. It is of course well settled in Malabar that there can be no partition at all except by the consent of all the adult members. As regards the minor members of the tarwad, it was observed by SANKARAN NAYAR, J., in *Veluthakkal Chirudevi* v. *Veluthakkal Tarwad Karnavan*(1):

"Such a partition would ordinarily be binding on the minors, but if on attaining majority they are able to show that they have been prejudiced, that partition could be reopened so far as they are concerned, and they would be awarded the share which should have been set apart for them; but subject to this the partition is final as between those who were parties to it."

This appears to be an application of the similar principle which has been applied with regard to partitions on the East Coast. As to such partitions Mr. Anantakrishna Ayyar has referred us to the decision of SRINIVASA AYYANGAR, J., in *Yechuri Ramamurthi* v. *Yechuri Ramamma*(2) where it was pointed out that partitions effected by the adult members of the family are binding on the minor members, in the absence of negligence or fraud.

The only question then is whether this partition which is by consent can be upset at the instance of certain members of the tarwad who were minors on the ground that the division was *per stirpes* and not *per capita*. Now the authorities to which Mr. Anantakrishna Ayyar has called our attention show conclusively that partition *per stirpes*, or, what comes to the same thing, partition *by tavazhis*, has, to say the least, a greater body of authority in its favour than partition *per capita*. He has referred us to Strange's Manual of Hindu Law, section 389, where it is said that where such divisions are made, they would naturally be by tavazhis. Mr. Ormsby, who was Chief Justice of Travancore, in his book on Marumakkattayam Law, says at page 2, paragraph 4:

"Where division takes place it will usually be according to the Taivaries, or number of daughters of the original ancestress. Each

(1) (1916) 31 M.L.J., 879 at 881. (2) (1916) 30 M.L.J., 308.

Taivari may similarly be subdivided, should the members consent thereto, and so on until individual proprietorship is arrived at. I am not aware that this rule has ever been questioned."

The fullest discussion of the question is to be found in Dr. Pandalai's Marumakkattayam Law, 1914, page 146 (which was not referred to before us) where the same result is arrived at, and several decisions of the Travancore High Court are referred to. In a recent case which came before the Privy Council, *Sulaiman* v. *Biyaththumma*(1), their Lordships alluded at page 141 to this method of division *by tavazhis* as the proper mode of division. They say that this division

"was merely an application of the rule that division for the purpose of partition is *stirpital*, though as between the members of any one class it is *capital*."

Mr. Madhavan Nayar explained this by saying that it only meant that divisions should be by tavazhis, but did not lay down that each tavazhi should have an equal share. But a division *per stirpes* which gave each stirps an unequal share depending on the number of members in it would be very like a division *per capita* and was not, we think, what their Lordships intended. This division by Exhibit C has been made in what appears upon authority to be the more approved form, and therefore we think that the plaintiffs can have no right to question a partition effected in this manner.

Further we have to bear in mind that a partition in Malabar depends upon the consent of all parties and if we were to uphold the plaintiffs' contention, the only result would be to set this partition aside and to restore the original state of unity, because division *per capita* would in this case be without the consent of all the adult members. It appears that with regard to some of the property of this family, it was divided *per capita* by Exhibit B. That division is not attacked in the present case and we have not to consider it. What is contended is that the partition under Exhibit C should also have been *per capita* and should be upset because it is *per stirpes*. We are clearly of opinion that there is no ground for this contention.

Therefore the Appeal fails and must be dismissed with costs.

K.R.

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(1) (1917) 32 M.L.J., 137 (P.C.).