APPELLATE JURISDICTION (*a*)

Special Appeal No. 83 *of* 1862.

MUNDA CHETTI.....*Appellant.*

TIMMAJU HENSU.....*Respondent.*

Division of family property cannot be enforced by one of the members of a family governed by the law of *Aliya Santana.*

In Canara females only are recognzed as the proprietors of family property.

Per Holloway. J.:—The *Aliya Santana* system of inheritance differs only from that of Malabar in more consistently carrying out the doctrine that all rights to property are derived from females.

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THIS was a Special Appeal against the decree of the Principal Sadr Amin's Court of Mangalore in Regular Appeals, Nos. 381 and 392 of 1861, modifying the decree of the District Munsif's Court of Mangalore, in Original Suit No. 1252 of 1859. This suit was brought by a female member of a family governed by the rule of Áliya Santána to enforce a division of family property.

Tirumalachariyar, for the appellants, the defendants, contended that the division sought by the plaintiff was illegal as contravening the law of *Bhutalapandiya.*

Srinivasachariyar, for the respondent, the plaintiff.

FRERE, J. :—This was a suit for the division of family property in the district of Canara, and for the recovery of a moiety claimed by the plaintiff, a female.

The District Munsif passed judgment in favour of the plaintiff generally, but disallowed her claim to the land No. 2, on the ground that it was shewn to be the self-acquired property of the second defendant.

Both parties appealed against this decision, and in modification of the original decree, the Principal Sadr Amin, Ganappáya, now deceased, awarded to the plaintiff the entire lands claimed in the plaint, being of opinion that the point of self-acquisition had not been substantiated by satisfactory evidence.

The defendants have now preferred a Special Appeal from this judgment. On the case coming on for hearing, it was urged by the vakil for the defendants, now special appellants, that in families in Canara in which inheritance is governed by the " Áliya Santána" rules, division of family property cannot legally be enforced. Adverting therefore

(*a*) Present : Frere and Holloway, JJ.

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to the fact, that neither the District Munsif, nor the late Principal Sadr Amin had pronounced any opinion on this point, the High Court resolved to forward an issue to the Civil Judge, under section 354 of the Code of Civil Procedure, with instructions to take evidence with respect to the existing custom and usage, and to decide the above point judicially.

In his return made under date 26th February last, the late Civil Judge observed that such division of family property had been allowed in numerous suits sincethe year 1825, and has submitted these decrees for the information of the High Court. The late Civil Judge has also furnished copies of the written opinions of experienced officers in the District of Canara, which, however, do not partake of the nature of evidence, and are not therefore such as now require particular notice.

On the important question now before us, it is necessary in the first place to remark that the practice of the division of family property at the instance of individual members is undoubtedly at direct variance with the ancient law on the subject. It is admitted that the law-book called after Bhutálapándiya constitutes the basis of the Aliya Santána system, which prevails in Canara; and in a portion of this book which is quoted by Mr. Findlay Anderson in his decree in Appeal No. 82 of 1843, such division is repeatedly prohibited, and in express terms. (*a*) It remains therefore to con-

(*a*) This is the quotation :—"The eldest child of the eldest sister, be it male or female, is to be the *yajamana* (manager) and is to hold the property as such ; but it cannot be divided among the family. The remaining members are to act under the authority of such female or male manager. If a disagreement takes place between the sisters, the elder sister is to provide the younger sister with a separate house and its necessary apparatus, retaining the general managership and the performance of ceremonies. But no division of property can be made. To the dignities of chief families held by the manager of the senior branch, the members of his own *santana* will on his demise be entitled to succeed. Those of the junior branch shall have no right. If all the members of the senior branch be extinct, then those of the junior will have a right. The husband is not permitted to confer upon his wife any gifts but the marriage present—if he give one pice (*sic*) more, the family may resume it. The father may give whatever self-acquired property he likes, but no ancestral property to his children. This his private property may be inherited by his children. On failure of collateral descendants a female of the same *bulli* must be adopted. Males cannot be adopted. From failure of heirs aliya santana estates cannot be sold, nor transferred to the wife's children. He must adopt a female who is to inherit the property. If a family becomes extinct without such an adoption, the elders of the caste should assemble and adopt another couple of people from the same lineage, whose offspring then succeeds to the property."

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sider whether this ancient law, which is in conformity with that of Malabar, has been superseded by any custom or usage which has by long prescription or otherwise, acquired the form of law.

On a full consideration of the papers before us, we are of opinion that this question must be decided in the negative. Of the decrees submitted by the late Civil Judge severel award division in favour of males, and are thus clearly opposed to the local law as now settled in the district of Canara. In none does the question of compulsory division between the females who alone are now recognized as the proprietors of the family estate, appear to have been judicially tried and decided. It it true that in his decree No. 82 of 1843, in which he quotes Bhutálapándiya as already noticed. Mr. Findlay Anderson, the late experienced Judge of Mangalore, has expressed an opinion, in favor of such division, but simply on the ground of expediency, for he admits that it is contrary to the intent of the Aliya Santána law; and it is important to observe that the question at issue in that case was not that of division between females, but of the respective rights of a male and female member of the same family, so that the judgment can form no precedent as respects the point now under consideration.

In Suit No. 376 of 1833 also quoted by the Civil Judge, the suit was not for division but for recovery of the self-acquired property of the plaintiff's male cousin Dummatikarre. It was finally decided that the property should be divided between the four branches of the family, but this was by express agreement between the counsel of the several parties, and in this case therefore also it is clear that the result can form no precedent for the present case.

On a review therefore of the entire subject, we arrive at the conclusion that the ancient law which prohibits any compulsory division of the family estate in Canara generally, has not been in any way legally abrogated or superseded; that the decree of the late Principal Sadr Amin in the present case must consequently be reversed, and the claim of the plaintiff disallowed, with all costs of suits.

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HOLLOWAY, J. :—It has not been disputed, as indeed it could not be, that the compulsory division of the family property is wholly opposed to the authorities upon which the Aliya Santána system of inheritance rests. It is equally opposed to the principle of that system which vests the property in the females of a family. This system of inheritance differs only from that of Malabar is more consistently carrying out the doctrine that all rights to property are derived from females. If this indisputable rule had been abrogated by decisions of the highest Court of appeal upon the question distinctly raised before it, how much soever I should have lamented that the judges had overstepped their proper duty of declaring law, I should, as in the case of Hindu wills, have followed such decisions. Here, however, the only decisions produced are those of inferior courts evidently influenced by their views of expediency in the particular cases before them, and still more singularly decisions in which, while violating the law, those Courts have admitted its existence.

Decisions dividing family property have also been passed in Malabar, and it is one of the claims of our late colleague, Mr. Justice Strange, upon that respect which we all feel for him, that he successfully resisted the attempts of lower Courts also acting upon their own views of expediency to introduce foreign admixtures into a law of which, whatever may be thought of the policy, none can deny the consistency with the theory upon which it is based. The divisibility of family property in Canara is one of those propositions which fall within the category of law taken for granted, and is found when examined to have no solid foundation. The evidently moral precept to give women who cannot agree with the rest, subsistence out of the house, is not only no authority for this claim to compulsory division, but is a positive authority against it. If sitting here, I were justified, as I am not, in considering mere questions of policy, it would not, I think, be difficult to shew that this rule of non-divisibility is beneficial in a condition of property such as that of Canara. I adhere most strongly to the opinion that where a rule of law indisputably exists, it is the duty of judges not to fritter it away upon the specious pretence of bringing rules of law into

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harmony with what they may consider the requirements of society. If they are wrong in their view of such requirements, as is by no means unlikely, the evil done is unmixed: if right, the mischief still predominates over the good, because it prevents that systematic reform from which alone good can result. Such systematic reform is for the legislature.

Finding, as I do, that positive rule in this case, the result is that, in my opinion, in this and all the other cases depending on the same question, the decrees below must be reversed and the original suits be dismissed with costs.

Appeal allowed.

NOTE.—This decision was followed in S. A No. 12 of 1862.

As to the *Aliya Santana* (from Karn. *Aliya* 'son-in-law' and Skr. *Santana* 'offspring') see Chamier's *The Land Assessment and the Landed Tenures of Canara*, Mangalore, 1853, p. 16, where it is stated that the rule was introduced into Canara about the beginning of the 13th century, and T. L. Strange's *Manual of Hindu Law*, 2d. ed. § 404. The work attributed to Bhutálapándiya, who is said to have lived in the beginning of the era of Sáliváhana (A. D. 78), though printed in Canarese, is still untranslated into English.

ORIGINAL JURISDICTION *(a)*

Original Suit No. 84 *of* 1863.

LOGANÁDA MUDALI *against* RÁMASVÁMI and others.

Where a sale of landed property was made by a Hindu widow and administratrix to the estate of her deceased husband :—*Held* that she had power to dispose of the land for any purpose for which as administratrix she might properly do so.

Held also that an improper disposal of the property was not to be presumed against a purchaser from her, but that the sale must be taken to be proper and valid unless it appeared that to the purchaser's knowledge she was for an unlawful purpose converting the estate.

Held also that she having the right to sell as administratrix it could not be prosumed that she sold as widow.

1863. July 1 & 10. S. A. No. 84 of 1863.

THE quistion in this case was as to the validity of a sale of two gardens within the limits of Madras, which formerly belonged to one Appávu, by Kunram Shanmuga Ammál his widow and administratrix to his estate and also to that of his father Venkatáchalam. The plaintiff, the purchaser's administrator, sued for possession of the gardens and for an account and payment of the mesne rents and profits received by the first and third defendants, from the

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