ORIGINAL JURISDICTION (*a*)

NÁGALINGA MUDALI *against* SUBBIRAMANIYA MUDALI and others.

A grandson may, by Hindu law, irrespective of all circumstances, maintain a suit against his grandfather for compulsory division of ancestral family property.

1862. *November* 24.

THIS was a suit for an account and division of the undivided property of a Hindu family, the founder of which was one Tirumala Mudali, who died many years ago leaving two sons, the defendants Subbiramaniya and Virásámi. The defendant Subbiramaniya had two sons, one named Perumál, the plaintiff's father, who died in 1850 : the other was the defendant Darmalinga. The bill was filed in the late Spreme Court on the 12th December 1861.

The defendants' answer stated that the property left by the founder Tirumala Mudali was very trifling, and had been exhausted in his funeral ceremonies ; and that the landed property subsequently acquired had been obtained by the defendant Subbiramaniya, who, in 1854, had given the bulk of it away.

The Advocate General, for the defendants, contended that the plaintiff's father, if alive, could not sue for division living his father, the defendant Subbiramaniya; and that therefore the plaintiff's suit could not be sustained. He cited Sir Thomas Strange's *Hindu Law*, vol. I, p. 179.

Branson, contra, cited Mr. Justice Strange's *Manual of Hindu Law*, sec. 238 : *The Mitakshara*, chap. I, sec. V. par. 11.

SCOTLAND, C. J. :—The plaintiff may, I think, maintain the suit. I have had some difficulty in seeing how chapter I, sec. II, par. 7 of the Mitákshará is to be reconciled with the placita in the 5th section of the same chapter. But upon consideration I think that they are not necessarily inconsistent, and that sons may compel a division of ancestral family property at the hands of their father. I must however be distinctly understood as deciding this

(*b*) Present Scotland, C. J. and Bittleston, J.

1862. November 24.

with reference to ancestral property only. The Advocate General refers to Sir Thomas Strange's work on Hindu law, and no one can read the passages cited without coming to the conclusion that the opinion of that author was that, except in the instances he gives, namely, of civil death by entering into a religious order, and of degradation working a forfeiture of civil rights, sons could not compel a division. Sir Thomas Strange (i. 179), says "Whatever might be the case among the Hebrews, no Hindu can, according to the law as it prevails in the Bengal provinces, under any circumstances, say to his father, in the peremptory language of the prodigal, "Father, give me the portion of goods that falleth to me." The father may abdicate in favour of one, or of all, according to the limits imposed upon him by the law, if he thinks, proper; but, with the exception of two cases, partition among the Hindus in the life-time of the father, whether of ancestral or acquired property, would seem to be at his will, not at the option of his sons," and in support of this he cites Manu IX. 104 and the Mitákshará, ch. I. sec. II. Turning to the latter we find at paragraph 7 "One period of partition is when the "father desires separation, as expressed in the text 'When "the father makes a partition.' Another period is while "the father lives, but is indifferent to wealth and disinclined "to pleasure, and the mother is incapable of bearing more "sons; at which time a partition is admissible at the "option of sons against the father's wish." Sir Thomas Strange proceeds (i. 179, 180):—"A text, indeed, of Manu "is referred to, as shewing, that, of ancestral property "belonging to the father, the sons may at their pleasure "exact a division of him, however reluctant; and it is "true (as has been already intimated,) that their claim "upon property descended is stronger than upon what has "been otherwise acquired; but the inference drawn in the 'Mitákshará, is at variance with the current of authorities "including Manu himself; whose obvious meaning, in the "text referred to is simply that ancestral property *recovered*, "without the use of the patrimony, classes, upon partition, "with property *acquired*." And, passing on to consider the law applicable to this Presidency, the same learned author says, (i.184) "In the provinces dependent on the government of Madras, and elsewhere in the peninsula, the right

1872.
November 24

of the son to exact partition of ancestral property, independent of the will of the father, appears authorized, but not without the existence of circumstances to warrant the measure; such as the father having become superannuated, and the mother past child-bearing, the sisters also married. And there are two occasions upon either of which, wherever the Hindu law prevails, dominion may be transferred from the father in his life, without his consent, whether the property claimed by the sons to be divided be ancestral, or acquired. These are, voluntary *devotion*, by which the father is considered as having renounced it, and *degradation* from caste, by which it is forfeited."

I do not find in Sir Thomas Strange's work anything to get rid of this qualification as to the right of sons to a division in their father's lifetime ; and my mind was at one time in considerable doubt on the subject. But in Mr. Justice Strange's Manual of Hindu Law, the learned author states the law in the broadest possible terms. He says in sec. 238. "Sons may at their will, and irrespective of all circum- "stances compel their father to divide with them the an- "cestral property." And for that he cites the Mitákshará, chap. I, sec. V, par. 8 Turning to that passage we find he is abundantly confirmed. It is in these words : "Thus, while the mother is capable of bearing more sons, and the father retains his wordly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." Certainly nothing can be more explicit,—and at par. 11 Vijnánecvara says, "Manu likewise shows that the father, however reluctant, must divide with his sons at their pleasure, the effects acquired by the paternal grandfather ;" and then he refers to the text in Manu, IX. 209, to which Sir Thomas Strange alludes when he says that the inference drawn in the Mitákshará is at variance with the current of authorities.

I think we must consider the Mitákshará, chap. I, sec. II, par. 7, as applicable to the law governing the division of property generally, and sec. V, paragraphs 8 and 11, as applying to divisions of ancestral property.

The Mitákshará, therefore, in my opinion, confirms the view taken by Mr. Justice Strange in his Manual—and in

1852. November 24.

this Presidency the Mitákshará is the governing authority. I think, therefore, that as to ancestral property a son—and therefore a grandson—may compel a division against the will of his father or grandfather.

BITTLESTON, J. :—I come to the same conclusion. The authorities appear to stand thus: Sir Thomas Strange seems to have formed an opinion that sons could not demand a division except under particular circumstances, even as regards ancestral property. But he admits, that, in coming to that opinion, he differs from the Mitákshará. Arguing from Manu, Sir Thomas Strange arrives at one conclusion, and the author of the Mitákshará, also arguing from Manu, comes to another. Referring to the Mitákshará, it is not easy to follow its reasoning on the subject. But it is desirable to arrive at some definite rule. The learned author of the Manual,—bringing to the matter the long experience which he has had, and probably the decisions which have taken place subsequently to the publication of his father's book—says broadly, that, so far as ancestral property is concerned, sons "may at their will, and irrespective of all circumstances, compel their father to divide with them the ancestral property;" and in that proposition he is supported by the statement in the Mitákshará that, though the mother be capable of bearing sons, and though the father retain his worldly affections and does not desire partition of the ancestral (grandfather's) estate, partition does nevertheless take place by the will of the sons. This, doubtless, is not easily reconcileable with the statement in the earlier section. But they may, perhaps, be reconciled by saying that in the earlier section, division generally is treated of, and that the latter section is confined to the division of ancestral property. On the whole it seems to us more satisfactory to decide that the right exists absolutely, than that it should depend on the feelings or disposition of the father or the physical condition of the mother.

A decree was then taken by consent for an account of the undivided family-property come to the hands of the defendants(*a*).

(*a*) *Ex relatione* Mr. Branson.

NOTE.—See 3 Coleb. Dig. 35