APPELLATE JURISDICTION (*a*)

Special Appeal No. 505 *of* 1866.

SENGAMALATHAMMAL.....*Special Appellant.*

VALAYNDA MUDALI .....*Special Respondents.*

Accordingly to Hindu Law property acquired by a woman by inheritance is not to be classed as stridhanam.

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THIS was a a special appeal against the decree of F. M. Kindersley, the Principal Sadr Amin of Combaconum, in Regular Appeal No. 507 of 1865, reversing the decree of the Court of the District Munsif of Mannargudy in Original Suit No. 15 of 1863.

Srinivasa Chariyar, for the special appellant, the 4th defendant.

G. E. Branson, for the special respondent, the plaintiff.

The facts of the case and the authorities cited by Counsel on either side sufficiently appear in the following

JUDGMENT :—The plaintiff claims the land mentioned in the plaint as purchaser from the 1st defendant, in July 1862.

The 1st defendant admits the sale and alleges that the land in dispute devolved upon him from his wife Comalattammal, to whom it belonged. Both the plaintiff and 1st defendant alleged that Comalattammal and her sister, the 4th defendant, upon the death of their mother divided the property of the deceased ; and that the land in dispute fell to the share of Comalattammal.

The 2nd defendant alleges that the land in dispute belonged to Kanagatammah, who died 5 years ago, and descended to her daughter Sengamalathammal, under whom he (2nd defendant) rents the land.

The 3rd defendant disclaims all interest in the matter ; and the 4th defendant, Sengamalathammal, concurs in the statement made by the 2nd defendant ; alleging also that her sister Comalattammal died in the life-time of their mother.

(*a*) Present :—Bittleston, C. J., and Ellis, J.

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The District Munsif disbelieved the alleged division between the two sisters and held that, as they were undivided, the surviving sister, Sengamalathammal, succeeded to the whole property left by the mother, whether the other sister Comalattammal predeceased her mother or not. Accordingly, he dismissed the plaintiff's suit. Upon appeal, the Principal Sadr Amin reversed this decree. He was of opinion that if Comalattammal succeeded to the mother's estate jointly with her sister, her share would, on her death, devolve on her husband in preference to her sister ; and he therefore directed two issues to the lower Court. 1st. Did Comalattammal or her mother first die? 2nd. Whether plaintiff is entitled to recover the land and mesne profits claimed ?

These issues were found in favor of the plaintiff ; and the Principal Sadr Amin gave judgment accordingly.

Upon special appeal the argument was that, upon the facts found, the 1st defendant was not entitled as heir to his wife, and consequently could convey no title to the plaintiff ; and the question is, whether upon the death of one of two daughters who succeeded jointly to the stridhanam of their mother (for it must be taken that this was the mother's stridhanam), the husband of the deceased is entitled to her share in preference to the surviving sister, no division having taken place between the sisters.

The right of the husband to succeed to his deceased wife's property depends amongst other things upon the nature of the title which his wife had in the property, viz., whether it was her stridhanam—whether it came under the class of woman's peculiar property.

In the present case, the property came to the deceased wife by inheritance from her mother ; and though according to the Mitakshara property acquired by inheritance is classed as stridhanam—this is contrary to all the authorities in the other schools of Hindu Law, and is not supported by the Smriti Chandrika. It has also been questioned in the judgment of this Court in Special Appeal 81 of 1865, (II. M. H. C. Reps. 402) in which, following the Bengal authorities, the Court held that property inherited by a mother from her son was not stridhanam ; and that she took in it only a life-interest without power of alienation. On

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this point we find in Krishnasawmy Iyer's translation (Chapter XI, Section III, para. VIII) of the Smriti Chandrika, this passage " whatever the mother takes, she takes for herself *like* the stridhana called adhyagni and the like, and not for the benefit of both herself and her husband." The Adhyagni is that which is given to a woman at the time of her marriage near the nuptial fire, and descends according to the author of the Smriti Chandrika, to daughters, the unmarried and unprovided having the preference, and, on failure of daughters, to their issue, the female issue however taking before the male.

This instance suggests the explanation that though in the Mitakshara property acquired by inheritance is in general terms classed with the other descriptions of woman's separate property, no more is meant that *some* property acquired by women by inheritance will follow the rule of descent applicable to stridhanam, thought not falling strictly under any of the descriptions of such property. But in the passage above cited, the author of the Smriti Chandrika is dealing only with the question whether in default of the daughter's son parents inherit jointly or separately, in what order, and it is in reply to an opinion of Camboo that " no order need be stated, for whatever is taken by either of the two parents out of the common property is for the benefit of both," that he likens what the mother takes to the Stridhana called Adhyagni. He concludes that the father takes before the mother, another point in which this special authority of Southern India is found at variance with the Mitakshara, but in agreement with the Bengal School.

In the case already mentioned at II. M. H. C. Reps. 405, the Court suggest that probably property inherited from a mother would be rightly classed as stridhanam, and certainly if the stridhanam of the mother descending to the daughter loses by that descent its character of stridhanam, it is difficult to suppose any other case in which property acquired by inheritance could be held to be stridhanam. Nevertheless even in this case the Bengal authorities are clearly against it. Mr. McNaghten in his principles of Hindu Law (page 38 of the Madras Edition of 1865) says expressly, " that Stridhanam which has once devolved

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according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such and is ever afterwards governed by the ordinary rules of inheritance : for instance, property given to a woman on her marriage is stridhanam and passes to her daughter at her death ; but at the daughter's death, it passes to the heir of the daughter like other property, and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue, " and (Prankishen Sing *versus* Mohr Bhagurattee), (1 Morl. Dig. 335) is a decision in support of his position, and so in the Dáyakráma Sangraha, Chap. 2, Sec. 3, para. 6, where the author in treating of the succession to the separate property of a woman received by her at her nuptials, says, "On the death of a maiden daughter or of one affianced in whom the succession had vested, and who having been subsequently married is ascertained to have been barren, or on the death of a widow who has not given birth to a son, the succession to the property which has passed from the mother to her daughter would devolve next on the sisters having and likely to have male issue, and in their default on the barren and widowed daughters ; not on the husband of such daughter abovementioned in whom the succession had vested : for the right of the husband is relative to the woman's separate property and *wealth which has in this way passed from one to another can no longer be considered as the woman's separate property.* (See also Chap. 1, Sec. 3, para. 3, Chap. 2, Sec. 2, para. 12, and the Dáya Bhága, Chap. XI, Sec. 2, para. 30.) Upon the authorities the question stands thus :—

In the Mitákshara, Chap. II, Sec. 11, the commentator Vijnanecvara, first quotes the text of Yájnavalkya, " what was given to a woman by the father, the mother, the husband or a brother or received by her at the nuptial fire or presented to her on her husband's marriage to another wife, as also any other (separate acquisition) is denominated a woman's property ; " and then in his commentary enlarges the text, by substituting for the words " any other [separate acquisition]" which in the original text would properly be construed to mean " any other *of the same kind*," these

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words " and also property which she may have acquired by inheritance, purchase, partition, seizure or finding," which words are evidently taken from the text of Gautama quoted in para. 8 of Chapter 1, Sec. 1 of the Mitákshara descriptive of the different methods of obtaining ownership. "An owner is by inheritance, purchase, partition, seizure, or finding." It is, so far as we have been able to ascertain, this commentary, upon which the notion has been founded that property acquired by a woman by inheritance classes as stridhanama in Southern India. See Sir T. Strange's Hindu Law, Vol. 1, (Edn. 1830) page 31.

It is, however, quite certain that all property which a woman derives by inheritance cannot be so classed if it be meant thereby that the peculiar course of succession applicable to woman's special property is to be applied to it ; for in Southern India, as elsewhere, the property which a widow inherits from her husband cannot so descend ; nor, according to the case in this Court already mentioned, property inherited by a mother from her son. We may mention, in passing, that the passage of Sir T. Strange's work, which is supposed in the judgment in that case to have been accidentally omitted from Mr. Mayne's edition, was in fact omitted by the author himself in the edition of 1830 ; a circumstance which strengthens the inference that he had seen reason to alter the opinion expressed in the edition of 1825, that property so inherited by the mother became her stridhanam. Finding then how narrow is the basis of authority upon which the proposition rests ; and how clear and concurrent are all the other authorities, including even the Smriti Chandrika against it, we have arrived at the conclusion that, according to Hindu Law, property acquired by inheritance is not to be classed as stridhanam in Southern India, any more than in any other parts of the country. It is unnecessary to consider whether, as regards succession to a maternal estate except in cases otherwise expressly provided for, preference is to be given to daughters over sons, upon the principle referred to by Mr. Ellis (2 Vol., Sir T. Strange, page 405) that sons "shall succeed to the father and daughters to the mother," and with reference to such texts as that of Narada " Let daughters.

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divide their mother's wealth ; or on failure of daughters their male issue ;" or that of Yájnavalkya " the daughters share the residue of their mother's property after payment of her debts."

In the present case, the only question is as to the right of the husbahd of a deceased daughter in preference to her surviving sister ; and it seems clear that the husband can only be heir to his wife if the property be strictly her peculiar property.

But, independently of this question, it appears to us that, even if the property be assumed to have descended as stridhana jointly to the two sisters, the survivor of the two would take the share of the deceased in preference to her husband.

We do not think that the question of division or non-division between the sisters was material, for though sisters or co-widows may divide, the division will not alter the course of succession as Sir F. McNaghten (page 55) says, " among sisters or co-widows a division cannot be productive of more than convenience ,to the partitioning parties themselves ; it will not give any one of them a right to dispose of her separate share or in any manner vary the rules of inheritance ;" and as we held in a recent case where two widows having divided their joint estate, the next heirs of the deceased husband claimed to succeed to the share of the deceased widow in preference to the survivor. (*a*)

But whether the sisters were divided or not divided, it seems to us that so long as there was a daughter living, she was entitled to the mother's estate in preference to any other claimant ; for it is only on failure of daughters that any other claimant can come in. The general rule of Hindu Law is that amongst co-heirs survivorship takes place ; and Sir. F. McNaghten (R. 34) puts the case of 3 sisters succeeding jointly to their father's estate, and all dying childless or having daughters only ; and he says that upon the death of one, the two others would succeed to her share in equal proportions and upon the death of one of these, the whole estate would vest in the survivor for her life.(See also

(*a*) S. A., No. 404 of 1866, III. M. H. C. Reps. 268.

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I. Borrodaile's Reps. 91.) The exceptions mentioned by Mr. Strange in Section 237 of his Manual, viz., that the male issue of a man, *i. e.*, his sons, son's sons, and son's grandsons, must have been exhausted before his lapsed share falls to those in paralled grade to himself, and that daughter's sons must have been exhausted before the lapsed share of the daughter falls to other daughters," are to be explained on the ground that "as the word 'son' intends male issue down to the great grandson since he is equally a giver of funeral oblations, so does the term 'daughter' comprehend the daughter's son, for he also is the giver of a funeral offering." as is expressed in the Dáya Bhága, Chap. XI, Sec. 2, para. 27. No such explanation is applicable to the case which we have to consider; and we do not see any ground for not applying the general rule.

It seems to us, therefore, that the plaintiff derived no title from the 1st defendant, and that the judgment of the Principal Sadr Amin must be reversed and that of the District Munsif confirmed. The plaintiff must pay the costs in both the Lower Courts—but in this Court we think that each party should bear his own costs.

Appeal allowed.

APPELLATE JURISDICTION (*a*)

Referred Trial No. 8 *of* 1867.

CHODA ATCHENAH.....*1st Prisoner.*

To make the confession of a prisoner, not uttered in presence of a Magistrate, admissible in evidence, the fact discovered must be one, which, of its own force, independently of the confession, would be admissible in evidence.

Sections 149 and 150 of the Criminal Procedure Code considered.

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TRIAL referred for the confirmation of the High Court by C. R. Pelly, Session Judge of Nellore.

No Counsel were instructed.

The Court made the following

ORDER :—In this case we have confirmed the sentence of death passed by the Session Judge without taking into

(*a*) Present :—Holloway and Ellis, J. J.