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except the recognition of the right of the grand-mother as guardian to dispose of a minor daughter with the consent of her male paternal relative, expressed in the Judgment of the Court in *Maharanee Ram Causi Koeri* v. *Maharanee Soobh Koeri, Wyman's Civ. and Rev. Reports*, p. 244 Vol. III, which certainly favors our view of the plaintiff's claim. For these reasons the decree appealed from must be affirmed and the appeal dismissed with costs.

Appellate Jurisdiction (*a*)

Special Appeal No. 500 *of* 1868.

K. VENKATRAMANNA..... { *Special Appellant.* (*1st Defendant.*)

K. BRAMMANNA SASTRULU and another..... { *Special Respondents.* (*Plaintiffs.*)

Upon a division of family property, the parties to the division entered into an agreement that the property of any one of the parties to the agreement or their heirs dying leaving no issue should not be sold or transferred as a gift, but should on his death be divided by the other shareholders.

In a suit by one of the shareholders to recover the share to which the plaintiff was entitled under the agreement from the defendant a purchaser from the son of the person to whom the property was allotted upon the division,

Held, that an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents and that the power of disposition, being a legal incident of the estate which passed to the vendor, could not be taken away by the agreement.

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THIS was a Special Appeal against the decision of H. Morris, the Civil Judge of Rajahmundry, in Regular Appeal No. 392 of 1867, reversing the decree of the Court of the District Munsif of Rajahmundry in Original Suit No. 120 of 1866.

Sloan, for the special appellant, the first defendant.

Snell, for the special respondents, the plaintiffs.

The plaintiffs sued to recover their shares of family property.

The plaintiffs alleged that the 1st plaintiff's undivided brother Bhadrayza died issueless on the 5th March 1863, and that the defendants took possession of the whole pro-

(*a*) Present: Scotland, C. J. and Innes, J.

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perty of the said Bhadrayza inclusive of that which ought to be divided, according to the deed marked A executed by both parties' ancestors on 16th June 1817, into three shares, one to the 1st plaintiff, another to the 2nd plaintiff, and the third share to the 1st defendant and his brothers.

The 1st defendant in his written statement asserted that the deed was a fabricated one and that it was invalid according to Hindu Law; that the disputed property was, under the deed of sale, dated 22nd August 1862, delivered into his possession by Bhadrayza, the proprietor, and had since been in his own enjoyment.

The District Munsif found that the deed marked A was duly executed, and in favor of the sale set up by the 1st defendant, and he dismissed the suit. With reference to the contention of the 1st defendant that the deed marked A was not valid, the Court made the following obsevations in the Judgment:—

The condition that the property of the deceased must be divided between the survivors is not against law.

The condition that any of the executors of this document who should be without any issue, natural or adopted, should have no power to dispose of the property by sale or gift, is binding only on the parties who executed the document, but is not binding on their heirs. Hindu Law has no power to restrain a person from disposing as he likes by sale or gift of his real property which ought to descend to his sons and other heirs who have an equal right with him thereto.

The plaintiffs appealed against this decision for the following reasons:—

Because the bill of sale had not been fully proved.

Because exhibits IV and V had not been proved.

Because the kararnamah A is valid, Bhadrayza not having objected to it.

The Civil Judge observed as follows:—

The family is indisputably divided, all parties allowing that such is the case. I see no reason to doubt the genuineness either of the kararnamah A or of the bill of

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sale No. I. The only point for determination, therefore, is, whether the conditions mentioned in A are valid, the property of Kommu Bhadrayza who died without issue, being subject thereby to be divided into three shares between the plaintiffs and the 1st defendant; or whether he was at liberty to transfer it all by sale to the 1st defendant. I am of opinion that the terms of the kararnamah are binding on the heirs of those who executed it as well as on themselves.

The kararnamah was executed in June 1817, at the time of division by Kommu Peru Bhotlu and the widow of deceased brother on behalf of her infant son, the present 2nd plaintiff, in favor of two other brothers Pedda Viriah, adoptive father of the 1st plaintiff, and Chellamiah, father of the 1st plaintiff and the deceased Bhadrayza, who are said to have executed a similar counter-kararnamah. The clause now under consideration runs thus.—"If any one of us or of our heirs be without any manner of issue, either natural or adopted, it is agreed that the surviving sharers, after his death, shall divided his (real) property without his having the power to give it away or to sell it." In violation of these terms, Bhadrayza, a son of one of the parties, who had no issue, before his death sold the share which he had inherited from his father to the 1st defendant, who, as the son of another of the parties to the above agreement, was entitled to a share in it without purchase. I do not see anything illegal in the conditions. Relations at a division are not debarred by law from making whatever stipulations they please in order to keep the property in the family, provided that no absent member of the family be defrauded.

The Civil Judge reversed the decision of the District Munsif and gave judgment in favor of the plaintiff. The decree directed that the real property left by Kommu Bhadrayza be divided into three equal portions between the 1st plaintiff, the 2nd plaintiff, and the 1st defendant and his brother, according to the terms of the kararnamah.

The defendant presented a Special Appeal to the High Court of Judicature at Madras upon the ground the kararnamah was not valid in law.

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The Court delivered the following

JUDGMENT:—This suit is founded upon a kararnamah under which the plaintiffs claim to share with their paternal cousins, the 1st defendant and his brother, the property which was allotted on a family division to one of the co-parceners, and was after his death enjoyed by his son Bhadrayza who died without issue, and shortly before his death made a *bonâ-fide* sale of the property to the 1st defendant. The kararnamah was entered into between the co-parceners contemporaneously with the division, and the single question to be determined is whether the provision made therein against a disposition of the allotted shares invalidated the sale by Bhadrayza to the 1st defendant, as the Civil Court has decided in reversal of the decree of the Court of First Instance.

The kararnamah, after reciting that each co-parcener had taken possession of his share according to the list prepared upon the division and that the arrangements therein had been determined upon for the conduct of affairs in future, contains a stipulation that if by an act of Providence or Government loss should occur at any time to the lands divided, the parties or their heirs should again divide equally, and then follows the provision in question:—"We have "also resolved that the property of any one of us or our "heirs who has no natural or adopted son or any other "issue should not be sold or transferred as a gift but should "on his death be divided by the other shareholders." The obvious purpose of these stipulations was to frustrate indefinitely the right of alienation which was a legal incident of the absolute estate in severalty created by the partition; in effect to convert the estate in the case of each sonless or issueless possessor into a mere life enjoyment. But this we are of opinion they were inoperative to do. Although the parties might by mutual contract impose on themselves an obligation restrictive of their proprietary rights, they could not, we think, by a collateral agreement, annex hereditarily to each separate absolute estate acquired by the division a condition which was incompatible with the beneficial rights incident thereto. It is a sound principle and one from its very nature of general application that an estate cannot be made subject to a condition

which is repugnant to any of its ordinary legal incidents, and we are not aware of anything in the Hindu Law which would permit of a departure from that principle. But we learn from *Sir F. Macnaghten's Considerations on Hindu Law, p.* 327, that it has been decided in accordance therewith by the Supreme Court at Calcutta that the possessor of property could not put a restraint upon the exercise by his descendants of the right of partition given by the Hindu Law. Here the power of disposition was unquestionably a legal incident of the separate estate which passed to Bhadraiyza partly on his birth and partly by inheritance on the death of his father, and to hold that it could be indefinitely taken away by a condition of this kind would be abrogating the law by the agreement.

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We are therefore of opinion that the stipulation against alienation in the kararnamah was not binding upon Bhadraiyza, and, as the sale by him to the 1st defendant is found to have been made *bonâ fide*, the plaintiffs' claim fails. Consequently the decree of the Civil Court must be reversed and that of the Court of First Instance dismissing the suit affirmed. The defendant's costs in this Court and the Civil Court must be paid by the plaintiffs.

Appellate Jurisdiction (*a*)

Special Appeal No. 619 *of* 1868.

ARCHAKAM SRINIVASA DIKSHATULU... *Special Appellant.*
UDAYAGIRY ANANTHA CHARLU.....*Special Respondent.*

Plaintiff sued to establish his right to receive certain honors in a Temple as appertaining to his office of Officiating Priest of the Temple, and to recover damages for the invasion of his right. In a former suit between the predecessor of the plaintiff and the 1st defendant, the claim to sit at the right side of the idol at festivals was admitted, but the right to receive a cake on the same occasion was disallowed.

Held, that the claim of the plaintiff, so far as it sought to establish the plaintiff's right, was *res judicata*.

Held, also that the suit of the plaintiff to recover damages for the invasion of the right of the plaintiff appertaining to an office in the Temple was one which it was competent to the Civil Courts to entertain.

THIS was a Special Appeal against the decision of E. F. Eliott, the Acting Civil Judge of Chittoor, in Regular Appeal No. 12 of 1867, reversing the decree of the Court

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(*a*) Present : Innes and Carmichael, J. J.