1874. *July* 15. *R. A. No.* 57 *of* 1873.

plaintiff has been advised has prevented him from obtaining more relief than we have given by our decree. That relief is probably very incommensurate with the wrong which he has sustained.

Appeal allowed.

DECREE :—"This Court doth order and decree that the decree of the Lower Court be, and the same hereby is, reversed, and this Court doth direct that the defendants do pay to plaintiff Rs. 31,050 being Rs. 23,000 with interest at 12 per cent. from the 15th August 1871 the date of the sale, to the date of this Court's decree, together with further interest at 6 per cent. from the date of this decree to the date of its execution on the judgment debt and costs"—with costs of both hearings.

Appellate Jurisdiction.(a)

Special Appeal No. 481 *of* 1871.

VITLA BUTTEN.....*(Plaintiff) Special Appellant.*

YAMENAMMA.....*(3rd Defendant) Special Respondent.*

A long course of decisions in this Presidency recognise the right of a co-parcener to dispose of his interest in the joint family property before partition: a co-parcener cannot, however, before partition, convey away as his interest any specific portion of the joint property.

In a suit by an adopted son to set aside a Will made by his adoptive father disposing of immovable ancestral property; *Held*, that the Will was of no effect as a valid devise of property. At the moment of death the right of survivorship was in conflict with the right by devise. Then the title by survivorship, being the prior title, took precedence to the exclusion of that by devise.

1874. *October* 16. *S. A. No.* 481 *of* 1871.

THIS was a Special Appeal against the decision of V. Jayaram Row, the Principal Sadr Amin of Mangalore, in Regular Appeal No. 725 of 1869, modifying the decree of the Court of the District Munsif of Mulki, in Original Suit No. 23 of 1868.

Plaintiff sued as the adopted son of the 1st defendant, to set aside a Will made by his adoptive father on the 4th January 1868, whereby he bequeathed his immovable property to his daughter, the 3rd defendant, and another daughter, a minor named Kistnamah. The plaintiff further sought to obtain immediate possession of the property in dispute on the ground of the imbecility of his adoptive father.

(a) Present :—Sir W. Morgan, C.J., Innes and Kernan, JJ.

1874.
October 16.
S. A. No. 481 *of* 1871.

The 1st defendant died after the institution of the suit.

The 2nd defendant, admitted plaintiff's right as adopted son of her husband, the 1st defendant, but set up a life-interest in herself in the property in dispute.

The 3rd defendant denied the adoption of the plaintiff by the 1st defendant, and maintained that the Will of the 1st defendant was valid.

The Munsif dismissed the suit on the ground that the adoption set up by the plaintiff, was not proved. The Principal Sadr Amin found that the alleged adoption had been satisfactorily proved, and as to the Will made by the 1st defendant, he remarked as follows :—

" The Will I. shows that some part of the property in dispute was purchased by the 1st defendant. Plaintiff says that the said purchase was made by the said defendant from ancestral funds. While the said allegation of plaintiff is supported by the presumption of law, the 3rd defendant's vakil was not prepared to deny its truth ; but on the contrary made a general admission that all the property in dispute was 1st defendant's ancestral property. There appears, therefore, no objection to hold that the said property is ancestral property. It being so, and the bequest thereof made by the 1st defendant in favor of 3rd defendant, &c., being apparently after the date of plaintiff's adoption, the said bequest can, by no means, affect plaintiff's share of it, which is a moiety, under the Hindu Law, which is applicable to this case.

" As to the remaining portion, that is, a half of the property in question, the Will I. in question must, I consider, be upheld. For, plaintiff has utterly failed to prove that 1st defendant was incompetent to deal with property at all by reason of unsoundness of mind. He had consequently a right to alienate the said portion of the property in question as forming his undeniable share, by gift, &c., and of consequence to bequeath it by Will, the power of a Hindu to devise being co-extensive with his power of alienation, as ruled in the Judgment of the Madras High Court in

1874. October 16. S. A. No. 481 of 1871.

Special Appeal No. 34 of 1862 at page 326 of the Reports, Volume I. I therefore uphold the said Will to the extent of the 1st defendant's aforesaid share in the disputed property.

"I therefore, in modification of the decree of the Lower Court, cancel the bequest made by the 1st defendant under the Will I. as regards plaintiff's moiety in the property in question, and award possession of the same to plaintiff, regard being had to the quality of the soil, &c. I also direct that plaintiff and the 3rd defendant should bear the costs of original and appeal suits with reference to the amount allowed and disallowed, and that plaintiff shall recover the mesne profits of the property awarded to him, as will be determined at the execution of the decree, from date of plaint till delivery of possession to him."

From this decision the 3rd defendant appealed on the ground that, Nos. 2 and 3 were the self-acquired property of the 1st defendant, and that the 3rd defendant was therefore entitled to the whole of them instead of a moiety only.

And the plaintiff appealed on the following grounds:—

1. The 1st defendant could not have alienated any part of the property in question without the consent of his son.

2. The document No. 1 is not an alienation but a Will, and is, as such, invalid,—

a. As being without consideration.

b. For want of possession given.

These appeals were heard on the 29th January 1872.

Mr. Shephard for *Mr. Mayne*, for the special appellant, plaintiff, contended 1st, that a father having a son cannot alienate ancestral immovable property to third persons *inter vivos;* 2ndly, that if such alienation is good, it does not follow that he can dispose of such property by Will. The sole foundation for the affirmative proposition is the decision in *Virasvámi Grámini* v. *A'yyasvámi Grámini*. (1) It is admitted that the judicial authorities were decided upon the *Dáya Bhága*. Here there is really nothing but the vague expres-

(1) 1 Madras H. C. Rep., p. 471.

1874. *October* 16. *S. A. No.* 481 *of* 1871.

sion of Sir T. Strange, (Vol. I. p. 201) and the opinion of Mr. Colebrooke. The real grounds, as appears from other cases, were, that a co-parcener who had contracted ought not to be allowed to escape from his liability; and that a co-parcener might sever the joint tenancy. The doctrine that the contract ought to be good to the extent of the contractor's share, is an attempt to reconcile archaic anomalous property with modern ideas of individual responsibility. As to the difference between the Hindu undivided family and the English joint tenancy, see *Sadabart Prasad Sahu* v. *Foolbash Koer.* (1) The rule adopted here is opposed to the authorities in the other Presidencies:—

Sadabart Prasad Sahu v. *Foolbash Koer.* (1)

Nathu Lal Chowdhry v. *Chadi Sahi.* (2)

Haunman Dutt Roy v. *Baboo Kishen Kishor Narayan Sing.* (3)

Gangubáikom Sidhápá v. *Bámannábin Bhimanná.*(4)

Even if the alienation be good by act *inter vivos*, it does not follow that it is good if made by Will. Though the general proposition has been laid down in *Vallináyagam Pillai* v. *Pachché* (5) the Privy Council in *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (6) and Holloway, J., in *Tara Chand* v. *Reeb Ram* (7) were more guarded. Wills have proceeded on the analogy of gifts.

1 Sir T. Strange's H. L. p. 258.

Náráyanasáwmi Chetty v. *Arunachella Chetty* (8).

N. Visalatchmi Ammál v. *N. Subbu Pillai* (9).

No fiction can establish delivery here, for the son takes by survivorship but the property vests in him on his birth, therefore there is nothing for a Will to operate upon. A son is not merely an heir; he has two rights vested in him, 1st, the right to partition, and 2ndly, the right of survivorship. In point of equity there are no reasons in favor of a

(1) 3 Bengal L. R., (F. B.) p. 31.
(2) 4 Ib., (A. C. J.) p. 15.
(3) 8 Ib., p. 358.
(4) 3 Bombay H. C. Rep., (A.C.J.) p. 66.
(5) 1 Madras H. C. Rep., p. 326, (at p. 332).
(6) 6 Moore's I. A., p. 309, (at p. 345).
(7) 3 Madras H. C. Rep., p. 50, (at p. 55).
(8) 1 Ib., Appendix p. 437 (at p. 491).
(9) 6 Ib., p. 270, (at p. 274).

1874. October 16. S. A. No. 481 of 1871.

claimant under a Will, as there are in favor of a purchaser. The cases hitherto have been either of purchasers, or, where there have been no issue or co-parceners.

2 Sir T. Strange's H. L., 433.

Vallinayágam Pillai v. *Pachché.* (1)

Nagalutchmee Ummal v. *Gopoo Nadaraja Chetty.* (2)

Baboo Beer Pertab Sahee v. *Maharajah Rajendar Pertab Sahee.* (3)

Bissonauth Chunder v. *Sreemutty Bamasoondery Dossee.* (4)

Sunjiva Row, for the special respondent, 3rd defendant, contended that the power of a Hindu to make a Will is indisputable at the present day. The power of testamentary disposition is co-extensive with the power to alienate *inter vivos.* The right of survivorship made no difference. The current of authorities is too strong to be over-ruled now.

Virasvámy Grámini v. *A'yyasvámi Grámini.* (5)

Cur. adv. vult.

On the 16th October 1874, the Court delivered the following

JUDGMENT:—We consider it necessary to determine only the first and third of the three questions referred to us, as this will be sufficient for the decision of this special appeal.

In regard to the first question, we are of opinion that the long course of decisions in this Presidency, recognizing the right of a co-parcener to dispose of his interest in the joint family property before partition, has not been in conflict with the law of the Mitakshara. Our view, we are aware, is not in accord with that of the High Court of Calcutta, and we have, therefore, given the question all the more careful consideration. The reasons upon which the High Court of Calcutta have based their opinion will be

(1) 1 Madras H. C. Rep., p. 326.
(2) 6 Moore's I. A., p. 309.
(3) 12 Moore's I. A., p. 1, (at p. 38).
(4) Ib., p. 41, (at p. 61).
(5) 1 Madras H. C. Rep., p. 471.

1874. *October* 16. *S. A. No.* 481 *of* 1871.

Found at page 44, Vol. III. Bengal Law Reports (Full Bench Rulings) (1) also 12 W. R. (Full Bench.)

The Court say "so long as the family remains joint, "and separation has not been effected, either by partition "or by agreement, such as that recognized in the case above "cited by the Privy Council (2) every son who is born "becomes, upon his birth, entitled to an interest in the "undivided ancestral property. In such a case neither the "father nor any of the sons can, at any particular moment, "say what share he will be entitled to when partition takes "place. The shares to which the members of a joint family "would be entitled on partition are constantly varying by "births, deaths, marriages, &c., and the principle of the "Mitakshara law seems to be that no sharer, before parti-"tion, can, without the assent of all the co-sharers, deter-"mine the joint character of the property by conveying "away his share." If by the word 'share' is intended specific share, the argument is of course valid that a co-parcener cannot, before partition, convey his share to another, because, before partition it cannot be ascertained what it is. It is equally the law in Madras that a co-parcener cannot, before partition, convey away, as his interest, any specific portion of the joint property. See *Venkatachella Pillai* and another v. *Chinnaiya Mudaliar*, (3) in which it is said (4); "By the sale in the present case, "therefore, the vendor, Subbaroya, could not, in our judg-"ment, transfer to the 1st defendant's father a valid title to "any specific portion of the joint family property, but only "to his beneficial estate as an undivided co-parcener, with "the incidental right of partition." Considered in this light, the difficulties which have influenced the Calcutta High Court disappear. The person in whose favor a conveyance is

(1) *Sadabart Prasad Sahu* v. *Foolbash Koer.*

(2) *Appovier* v. *Rama Subba Aiyan*, XI Moore's I. A., p. 75; approved of and followed in *Ram Chunder Dutt* v. *Chunder Coomar Mundul*, 13 Moore's I. A., p. 182; *Runjeet Singh* v. *Kooer Gujraj Singh*, L. R., 1 Indian Appeals, p. 9; and *Baboo Doorga Pershad* v. *Mussamut Hundun Koomar*, Ib., p. 55.

(3) 5 Madras H. C. Rep., p. 166.

(4) At p. 171.

Sir

1874. *October* 16. *S. A. No.* 481 *of* 1871.

made of a co-parcener's interest takes what may, on a partition, be found to be the interest of the co-parcener. What he so takes is, at the moment of taking, and, until ascertained and severed, subject to the same fluctuations as it would be subject to, if it continued to subsist as the interest of the co-parcener.

But it can at the proper period be ascertained without difficulty, and there appears to us no reason, either derived from the Hindu Law current in this Presidency, or founded upon general principles, for saying that such an interest is inalienable.

With regard to the third question, we are of opinion that the Will in the case referred to cannot take effect. At the moment of death the right of survivorship is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise. We must, therefore, reverse the decree in special appeal, and declare the Will of no effect as a valid devise of property in favor of defendant.

KERNAN, J. subsequently, on the 12th February 1875, recorded the following

JUDGMENT:—The 3rd question is whether a co-parcener, of an ancestral property had, before the late Hindu Wills Act, a right to dispose of his share by Will so as to defeat the right of survivorship.

Although I see some difficulty in arriving at a conclusion in the negative, I am not prepared to dissent from the above judgment of the Court on this point. On the first question I agree in the above judgment fully.

Special Appeal No. 481 *of* 1871, *allowed.*

NOTE—As the following case, heard and decided on the 18th March 1874 but not hitherto reported, has been frequently referred to with regard to the question whether the powers of disposition by will, and of gift *inter vivos* are co-extensive, the Acting Reporter, who appeared for the plaintiffs, has copied from his brief his note of the judgment delivered therein after comparing it with the note made by Mr. Johnstone, counsel for the defendants.