Madras High Court
(Minor) Medai Dalavoi R. ... vs M.D.T. Kumaraswami, Mudaliar And ... on 24 September, 1958
Equivalent citations: AIR 1959 Mad 253
Author: P Ayyar
Bench: P Ayyar, B A Sayeed
JUDGMENT Panchapakesa Ayyar, J.

1. The appeal has been filed by minor Dalavoi Ranganatha Mudaliar, plaintiff in O. S. No. 31 of 19-34 on the file of the Subordinate Judge of Tirunel-veli against the decree and judgment in so far as they went against him. He had filed the suit for partition and separate possession, as the adopted son of Ranganatha Mudaliar who died on 11-1-1950. He had claimed a half share in the plaint properties comprised in Schedules 1-A to 1-11 on the ground that in those divided properties got by Tirumalaiappa Mudaliar, the father of Ranganatha Mudaliar, Kumaraswami Mudaliar and Shanmugakumaraswami Mudaliar, at a partition with his three sons on 18-6-1930 succession opened only on the death of his widow, the life-estate holder on 12-5-1954, when there were only two heirs.

Tirumalayappa died on 22-11-1980, after executing a will dated 14-9-1930, bequeathing his divided and undivided shares of the properties, got at the partition, to his wife, Ulagammal Anni, to be enjoyed by her for her life-time but without making any further provision. Ulagammal died on 12-5-1954. The plaintiff contended that Tirumalaiappa's one-fourth share (at partition) would be inherited only by his adoptive father Ranganatha Mudaliar, in whose place he stood, and Kumara-swami Mudaliar, the first defendant, alone were alive on that date.

Alternatively, he also contended that the one fourth share of Tirumalaiappa Mudaliar in the ancestral family properties, got by him at the 1930 partition, continued to be joint family properties with joint tenancy, and survivorship, and as Ulagammaj Anni died only in 1954 and till that date there was no partition of that one-fourth between the 3 sons and ho and Kumaraswami Mudaliar, were the only two persons then alive and were therefore entitled to that joint estate by survivorship. Regarding the undivided properties comprised in Schedule II he claimed a one-fourth share (1/2x1/4), just as he had claimed a half share in the divided properties comprised in Schedules . 1-A to 1-H.

2. The first defendant, Kumaraswami Mudaliar, was a son of Tirumalaiappa Mudaliar, and defendants 2 to 4 were the first defendant's sons. Defendant 5 was the widow of Shaumugakumara-swami Mudaliar, another son of Tirumalaiappa. Defendant 6 was a wife of Ranganatha Mudaliar, the adoptive father of the plaintiff. Defendant 7 was another wife of Ranganatha Mudaliar whose status as wife was disputed by some of the defendants though asserted by the plaintiff. Defendant 8 was the daughter of defendant 7.

3. The plaintiff by invoking the theory of joint tenancy of survivorship wanted to ignore the severance of the coparcenary effected by the partition of 1930, and also to deny the rights of the widows of Ranganatha Mudaliar to any share under the Hindu Women's Rights to Property Act, 1937. The lower court, after exhaustively discussing the evidence and the law, held that, as regards

the divided properties in Schedules 1-A to 1-H, the plaintiff would be entitled only to a one-sixth share, and only to one-twenty-fourth, share in the undivided second schedule properties (1/4x1/6).

It recognised the right of the widow, defendant 6. It directed partition on these lines, and directed all the parties to her their own costs since the parties could not amicably partition the properties, and the status of defendant 7 was in dispute, and it had been agreed by the parties to be left open for decision in O. S. No. 19 of 1950 on its file, which suit is still pending. The plaintiff has felt aggrieved at his not getting a half share in the properties in Schedules 1-A to 1-H, and a one-eighth share in the properties in Schedule II, and has filed the appeal.

4. The first respondent, Kumaraswami Mudaliar, filed a memorandum of cross-objections regarding the refusal of his suit costs amounting to Rs. 300, Ha died pending the appeal, and his legal representatives have been brought on record. Another memo-randum of cross-objections has been filed by the 5th respondent, Chellanimal Anni, the widow of Shanmugakumaraswami Mudaliar, regarding the refusal by the lower Court to decree her costs amounting to Rs. 2100.

5. We have perused the records, and heard the learned Counsel on all sides. Mr. K. Rajah Aiyar, learned Counsel for the appellant, and Mr. K. V. Ventatasubramania Aiyar, learned Counsel for the contesting respondents in the appeal and for the cross-objector in one memorandum of cross-objections, and Mr. R. Ramamurthi Aiyar, learned Counsel for the cross-objector in another memorandum of cross-objections, have- argued the case fully and fairly. Mr. Rajah Aiyar did not press before us the wholly unsustainable argument that the succession opened only "on 12-5-1954.

He, however, contended that the lower Court had gone grievously wrong in holding that Tirumalaiappa Mudaliar's one-fourth share in the ancestral properties, got by him at partition in 1930, would not be covered by the theories of joint tenancy and survivorship, and that his divided sons would take not as joiat tenants but as tenants-in-common, and further in holding that the widows of Ranganatha would get a share, under the Hindu Women's Rights to Property Act, 1937, and thereby reducing the plaintiff's share from one-half in the divided properties in Schedules 1-A to 1-H to one-sixth, and from one-eighth share in the second schedule undivided properties to one-twenty-fourth.

Mr. K. V. Venkatasubramania Aiyar strongly contested this. The question hero is whether the divided sons of a father, who has no undivided son living with him after the partition, take his share of the ancestral properties got at the partition, as joint tenants under the theory of right by birth and survivorship, or as heirs and tenants in common. There are three direct decisions, though not of this court, on this very point and all are directly against Mr. Rajah Aiyar's contention.

6. The first is that of a Bench of the Bombay High Court in Jadav Bai Lakhichand v. Mullan Chand Harakhchand, 27 Bom LR 426 : (AIR 1925 Bom 350), where Macleod, C. J. and Crump, J. have categorically held that the divided sons of a Hindu father succeed to the property as the father received at partition only as tenants in common, and not as joint tenants, as the coparcenary relationship has ceased and with it the joint tenancy and survivorship incidental to it.

The second decision is that of a Bench of the Punjab High Court in Harikishan Dass v. Rajeswar Prasad, AIR 1932 PUNJ 165, where it has been held categorically that where a father dies leaving separated sons, the property which had come to him on partition with his sons does not become coparcenary property in the hands of the sons, and that after his death the sons take the property as tenants in common and not as joint tenants. The learned Judges have discussed the various decisions relating to the point and have differed from the opinion given by Mulla in his Hindu law to the contrary.

The third is a decision of a single Judge of the Bombay High Court in Ragho Sambhaji v. Shantabai, , where too it was held that the separate property got by a Hindu father at partition of the joint family properties with his sons did not become coparcenary property in the hands of Ms divided sons, who had separated from him during his life-time, and that, therefore, after his death, each son takes the property as a tenant-in-common, with the other divided sons and not as a joint tenant.

7. As against the three definite rulings against him on this very point involved in this appeal. Mr. Rajah Aiyar could not show a single ruling of any High Court in favour of his contention. He contented himself with arguing on general principles of Hindu law enunciated in certain decisions relied on by him which, according to him, would lead to an inference that the property got by a father at partition with his sons would still be joint family property with the incidents of right by birth and joint tenancy and survivorship on his death as between his divided sons. We cannot agree with this by reposition, which, in our opinion, is not supported y anything in the rulings relied on by him.

8. He first relied on the ruling Ramappa Naickan v. Sithammal 2 Mad. 182 (F.B.). and on the observation therein (and in the cases in Rajaram. Narain Singn v. Pertum Singh, 20 Suth WR 189, Lakshminarasamma v. Ramabrahmam) that the son's right of inheritance under the Hindu law is distinguished from that of all other heirs in that it is apratiban-dha, i.e., not liable to obstruction, as opposed to sapratibandha (liable to obstruction) applied to the inheritance; by collaterals.

According to Mr. Rajah Aiyar, in coparcenary property or joint family properly there are four main rights, arising from the right to birth, namely, the right to claim partition; the right to interdict alienation except for necessity or benefit; the right to apratibandha succession; and the right of representation (that is, sons of a deceased son representing their deceased father, and taking along with the surviving sons, though some of these rights, like the right to claim partition, and the right to interdict alienation, may be given up for the time being at partition, by the partitioning members.

But the argument was the property got by the father and the sons, by division of the ancestral properties at the partition, does not lose the character of joint family property, as would be evident by the fact that if the father or sons got sons thereafter those sons would acquire a right by birth to the property got by their father, and that, therefore, the partition would only mean a temporary arrangement suspending the coparcenary which would revive on the death of the father, regarding his share in the ancestral properties got at the partition.

He said that the same result may not occur regarding the sons inter se regarding the properties got by them, as succession, under the Hindu law, is from father to son, and not the reverse way which is only rarely found. He urged therefore that the partition of 1930 must be practically ignored and the rights of joint tenancy and survivorship as between the divided sons recognised, at the father's death, in the portion of the ancestral properties got by him at the partition.

He even went further, and said that this would apply not only to the father's share of the ancestral properties got by him at partition, but also to his own self-acquired properties, where according to him there is a dormant coparcenary right in the sons, to be asserted at the father's death, subject to his right of alienation inter vivos or by will.

9. According to him, even succession by sons to self-acquired properties of the father would not be by way of inheritance but by right by brith and joint tenancy and survivorship and increased rights. But, hero, he was confronted by the Full Bench ruling of this court in Vairavan Chettiar v. Srini-vasachariar, ILR 44 Mad 499 : (AIR 1921 Mad 168), where it was held that even an undivided Hindu son has no joint tenancy in the self-acquired properties of his deceased father and acquires it at his death, by inheritance, and not by survivorship.

Ho wanted to challenge the correctness of this Full Bench decision on the basis of stray not-to-the-point observations in subsequent decisions and wanted us to refer the matter to a Full Bench. We see no reason to do so. This Full Bench decision was delivered in 1921 and has never been dissented from by any decision of this court or of any other High Court till now, much less overruled by the Supreme Court or the Privy Council.

It has stood the test of 37 years, and we are satisfied that it does not deserve to he referred to a Fuller Bench, especially as we have absolutely no doubt regarding its correctness. Indeed a Bench of this court has held in Narasimha Rao v. Nara-simham, ILR 55 Mad. 577: (AIR 1932 Mad. 361) that on the death of a Hindu leaving self-acquired property, his undivided sons succeed to such property to the exclusion of divided sons. Mr. Rajah Aiyar conceded that regarding ancestral properties left by a father who has divided from some of his sons and is living undivided from some others of his sons, the imdivided sons succeeded to these properties to the exclusion of the divided sons. But he explained it away on the theory of survivorship enuring to the undivided sons who still form part of the coparcenary whereas the undivided sons have ceased to be coparceners.

That very argument will show that in this case also the divided sons have ceased to be coparceners with their father and cannot claim joint tenancy and survivorship inter se Regarding self-acquired properties, the position is even stronger, as the self-acquired properties are strongly distinguished from the ancestral properties, as held by a Bench of this court in . The following observations in that ruling are significant :

"To ascertain the extent of the son's right in and to a particular property belonging to the father, it is absolutely necessary to determine whether that property is paithamaha or swayarjita. This dichotomous division is fundamental. According to Hindu law (and in this there is no difference between the Dayabhaga and the Mitakshara) property must be one or the other. This division is not

only mutually exclusive. It must also be exhaustive. You cannot leave out a property as not falling in either category, because how then will you determine the extent of the son's right in such property?"

As there is no coparcenary in modern law between the Hindu father and his undivided sons regarding his self-acquired properties, as held in Kattamanachiar v. Rajah of Sivaganga, 9 Moo Ind App 539 (PC), it is of importance to note that even regarding such self-acquired property the undivided son, even though he may not he the eldest or next son, will take the entire self-acquired property to the exclusion of his father.

10. Mr. Rajah Aiyar urged that a great deal of confusion has arisen regarding these matters by the mistranslation of the Sanskrit term daya by Colhrooke who translated it as "inheritance" whereas daya includes the taking of property during the lifetime of the father and not merely to taking of his property after his death as his heir, and by the importation of English legal conceptions and phraseology. These two factors conducing to confusion have been noticed by the learned Chief Jus-lice in ILR , but the learned Chief Justice has gone on to observe :

"However deplorable this may be, we are at a stage when we are not free to go back to the law as enunciated and discussed in ancient books on Hindu law untrammelled by judicial decisions. There can be no doubt that as between an original text and a decision of the Judicial Committee, we cannot choose to follow the former and refuse to be bound by the latter."

Mr. Rajah Aiyar urged that apratibandha succession (by sons, sons' sons, sons' sons' sons) and the right of representation would necessarily involve joint tenancy and survivorship even in the separate share of the father in the ancestral properties got by him at partition as the right by birth would otherwise be defeated. We do not see why the right by birth should be allowed to operate more than once. In our opinion, it exhausts itself by a complete partition of the ancestral and joint family properties.

It cannot again be asserted for setting up joint tenancy and survivorship in the father's share of the ancestral properties got at partition, when obviously no such joint tenancy and survivorship will attach to the shares got at partition by the brothers inter se. In our opinion, the apratibandha succession is put an end to at partition, and the saprati-badha succession takes its place even regarding the joint family properties got by the father at partition.

One incident of the obstructed inheritance is that no right in the properties can be affirmed by the successor during the lifetime of the owner (which is the main obstruction) whereas in the unobstructed inheritance the successor is already an owner in the property along with his father. No doubt, the translation of daya into "inheritance" by Colbrooke may not be quite correct, and may apply only to the Dayabhaga system prevailing in Bengal, where Colbrooke worked. But this will not affect the present point at issue.

11. Mr. Rajah Aiyar had to concede that if the father, long after the partition, got a son, that son alone would take the father's entire properties, ancestral and self-acquired, by right by birth, to the exclusion of the divided sons, whose "right by birth" will be of no avail. He said that this was due to a

special text of Hindu law. We are of opinion that it is due also to the general principles of Hindu law.

12. Mr. Venkatasubramania Aiyar rightly urged that joint tenancy and survivorship are unknown to Hindu law except in the case of the joint property of an undivided Hindu; family governed by the Mitakshara law. He relied on the rulings of the Privy Council in Jogeswar Narayandeo v. Ramachand Dutt, ILR 23 Cal. 670, and Mt. Bahurani v. Rajendra Baksh Singh, . This will take the bottom Out of the contention of Mr. Rajah Aiyar, who had to admit that the three sons were divided from Tirumalaiappa, and that the coparcenary between them and their father had ceased. This, of course, involves cessation of the inevitable concomitant incident of joint tenancy and survivorship contended for by Mr. Rajah Aiyar.

13. Mr. Venkatasubramania Aiyar urged that the widow is excluded from succession to her husband's right of co-ownership only when the co-ownership involves a joint tenancy governed by survivorship. He relied on the ruling in 9 Moo Ind App 539 (PC), and the observations at pages 611 to 615 for this proposition. Mr. Rajah Iyer was unable to meet this proposition and to deny the right of Ranganatha's widow under the Hindu Women's Right to Property Act, to share equally with the plaintiff. So, the lower court was undoubtedly right in rejecting the plaintiffs' contention that the widow had no rights in the properties. Three Benches of this court (to two of which both of us were parties and to the third of which one of us was a party) have upheld the widow's right.

14. The right of representation was the last thing on which Mr. Rajah Iyer relied. According to him, in other cases of inheritance it is the nearest heir who will succeed to the properties, excluding the remoter heirs, whereas with regard to the father's properties, the son, the son's son, and the son's son's son will take in a group and at the same time, and not one after another, and that, therefore, it must be apratibandha succession, and the incidents of joint tenancy and survivorship will remain in the father's share of the ancestral properties got by him at partition.

We cannot agree. Hindu law, like all other laws, is not always consistent or logical, and, sometimes, it is difficult to reconcile all the principles into one grand principle. Thus all the widows, as also daughters, take jointly, though none of them are coparceners. The line of succession even to the self-acquired properties of the father is, no doubt, in a group, by a son, son's son, and son's son's son, and the right of representation thus remains, the living sons not excluding their deceased brother's sons.

But that will not show that joint tenancy and survivorship exist in the father's share of the ancestral properties any more than in his self-acquired properties. There is no logic or reason in contending that divided sons of the father, owning their properties severally, should take the divided ancestral properties of their father jointly with eights of survivorship. There is also no ruling holding td that effect.

15. In the end, therefore, we reject Mr. Rajah Aiyar's contention. It follows from this that the lower court was right in giving the plaintiffs only 1/6th share in the properties in schedules 1 (a) to (h), and l/24th share in the properties in the second schedule.

16. The two memoranda of cross-objections do not deserve serious consideration. The lower court has passed its order regarding costs after carefully considering the point, and we cannot say that it has exercised its discretion wrongly. Besides the reasons given by it for not giving costs to the first and fifth defendants, who have filed the memoranda of cross-objections, we may add another reason. The law had not been clarified by that time in this State, and there was a great deal of doubt.

That is why the arguments in this ease have gone on for two days before us. In such a case, where the low is settled for the first time, it is only proper that all the parties should be directed to bear their own costs. In the end, therefore, we dismiss the appeal and both the memoranda of cross-objections, and confirm the lower court's decree and judgment. In this appeal and the memoranda of cross-objections we direct all the parties to bear their own costs.

Basheer Ahmed Sayeed, J.

17. I entirely agree with the reasoning & conclusions arrived at by my learned brother in the judgment which, he has just now delivered. I only wish to add a few words of my own on the point raised by Mr. Rajah Aiyar for decision in this appeal. The relevant facts have been set out exhaustively by my learned brother, and it is not for me to traverse them over again in any great detail. I shall only be brief in regard to them.

18. Thirumalaiappa entered into a partition with his three sons, Ranganatha, Kumaraswami and Shanmugakumaraswami, under Ex. A.1 on the 18th June, 1930. After executing a will, Ex. A.3. dated 14th September, 1930, in favour of his wife, he died on the 22nd November, 1930. At the time of his death all his three sons, amongst whom and himself there was a partition, were alive. The third son died earliest, that is, on the 4th January, 1936, and the first son on 11th January, 1950, whereas the donee under the will, in whose favour a life estate was created, died on the 12th May, 1954.

Ranganatha's widow, the 6th defendant, adopted the plaintiff-appellant to her deceased husband. The widow of the third son Shanmugakumara-swami figures as the 5th defendant. The 7th defendant is another wife of Ranganatha, whereas the 5th defendant is the daughter of Ranganatha. Defendants 1 to 4 are respectively surviving son of Thirumalaiappa namely, Kumaraswarni and the latter's three sons. That there was a partition between the father and the three sons on the 18th June 1930 if not in dispute. Nor is the will executed by the said Thirumalai in favour of his wife in controversy. The life estate created in her favour is also beyond dispute.

19. The suit was laid by the present plaintiff-appellant after the death of the widow of Thirumalai, claiming a half share in schedules 1-A to 1-H and also a 1/8th share in Schedule 2. It is also not in dispute that the properties described in Schedule 2 were kept in common without a division by metes and bounds. In a very cleverly drafted plaint, on behalf of the plaintiff-appellant, it was claimed that on the death of the widow of Tirumalaiappa the law returned the subjects of the bequest of the testator, and that there was and could be no anterior vesting.

Therefore, it was averred that in the case of a "return" or "reversion" which arose by operation of law, there was and could be no vesting in interest apart from possession. It was contended that the

reversion was to the persons who would on that date normally succeed as heirs to the testator, and in that case it is claimed that they were only his sons and son's sons. It was also contended in the plaint that the testator must be deemed to have died intestate on the 22nd November, 1930, and that, therefore, Sections 4 and 5 of the Madras Adaptation of the Hindu Women's Right to Property Act, 1937 did not have any operation on the estate.

In another paragraph of the plaint it was contended that even assuming but without admitting that the reversion to the separate estate of Thirumalaiappa on the death of his widow, Ulagammal, though an incorporeal right, vested on the 22nd November, 1930, itself, under the law it devolved on all the three sons together as joint undivided property, and consequently, there would be a coparcenary of the three brothers with rights of survivership inter se, and there had been no subsequent partition between them of that coparcenary right.

It was, therefore, further contended that on the death of Shanmugakumaraswami, the third son, without male issue and before the Hindu Women's Right to Property Act came into force with reference to agricultural lands in Madras, the said incorporeal right devolved on the second surviving brothers, Ranganatha and Kumaraswamishanmuga, and Chellammal Ammal, the 5th defendant, got nothing.

A further contention, was put forward in that neither the 6th defendant nor the 7th defendant would he entitled to any right in the schedule properties for the reason that nothing vested in Shanmugakumaraswami on the 22nd November, 1930. Therefore, the 5th defendant got no additional rights in the schedule properties in consequence of Ulagammal Anni's death. On these grounds the plaintiff claimed that he would be entitled to a half of Schedule I-A to 1-H and an 1/8th share in Schedule II leaving an equal portion in both to defendants 1 to 4.

20. Defendants 1 to 4 contested the suit on various grounds inter alia. Their contention in the main was that on the death of Thirumalaiappa, the remainder after what had been given to his wife, Ulagammal Anni, descended to his three sons who were all alive then, as on intestacy. They were co-heirs or co-sharers in respect of the same. The two sons, Shanmugakumaraswami and Ranganatha, having died on the dates mentioned above, one-third share of Shanmugakumaraswami descended to his widow, the 5th defendant, and the 1/3rd share of Ranganatha descended to his wife, the 6th defendant, and his adopted son, the plaintiff, as simultaneous heirs under Hindu Women's Properly. Act.

Therefore, it was pleaded that the plaintiff-appellant would he entitled to only 1/6th share and the 6th defendant to the other 1/6th share and the first defendant to a third share as the heir of his father. The defendants contended that the claim of the plaintiff to a half share was wholly untenable, though they admitted that the second schedule properties remained undivided between the shares and that the Evu Dittam Maniyam was owned in common.

They did not admit the legal position set out in the plaint as to the devolution of the property on the death of Thirumalaippa, the original ancestor, There was no question of reverter of any remainder as alleged by the plaintiff. As soon as the father died, it was their contention, succession to the

remainder opened and the sons as co-heirs got a vested remainder each being entitled to a third. They also contested the suit on the point that it was not correct to work out the heirs to Thirumalaianpa as on 12-5-1954 but that the estate should be taken to have opened on the death of Thirumalaiappa, namely, the 22nd of November 1930.

21. The learned trial judge, after framing the necessary issues, rejected the claim of the plaintiff to a half and 1/8th share in the concerned properties & upheld the claim of the defendants that the plaintiff would be entitled only to 1/6th share and 1/24th share in the properties 1-A to 1-H of Schedule 1 and Schedule 2 respectively. The lower court also held that the succession opened only on the death of Thirumalaiappa and not on the death of his widow.

22. In this appeal Mr. Rajah Iyer has been at great pains to uphold the contention of the plain-tiff, that on the death of Thirumalaiappa, which has been held to be the date on which succession opened, the three sons of Thirumalai would succeed, not as divided sons but as undivided sons, to the estate left by the said deceased, Thirumalai. His point was that whether the sons were divided or undivided, they would succeed to their father as joint tenants by right of birth and he also went further and argued that this would be the case whether the property was ancestral or otherwise.

In support of his contention, that on the death of the father who had taken his share of the joint family property at a partition between himself and his sons, the property taken by the father will remain joint family property, though for certain purposes it is termed as separate property, and that succession to that properly on his death would be only accordingly to what is known in Hindu law as the rule of "apratibandha", that is, unobstructed succession, and not according to the rule of obstructed succession, namely, "sapratibandha".

Mr. Rajah Iyer relied On many decisions of this court and other courts in support of his contention that whether it be joint family property or self acquired property the rule of succession by the sons on the death of their father was only by right of birth and that being so, it was only "apratibandha" succession and not "sapratibandha" succession. It will be seen presently that these decisions, which Mr. Rajah Iyer referred to at length and on which he laid great emphasis, did not directly deal with the point; and in fact, it is because of the absence of a direct decision of this Court on the point argued by Mr. Rajah Iyer that he had to labour hard in order to make us agree with his contention.

There can be little doubt that the property taken by the father in a partition by metes and bounds with his sons becomes the separate property of the father, and that it does not lose the character of being joint family or ancestral property as long its it is in his hands. It is also beyond dispute that in regard to this property, which has been taken by the father at partition between, himself and his sons, it is capable of being willed away or even gifted away; for, in respect of this property, a light to claim a partition has been lost once for all by reason of the partition which has already taken place.

Even so, in regard to this property it is beyond question that the right of the erstwhile coparceners, to interdict any alienation by the father had been taken away and put an end to once for all. But it is also a fact that for certain limited purposes, the property in the hands of the father, nevertheless remains joint, and ancestral, though it does not become his self acquired property. For instance, if a

son is born to the father when he holds the properly which he got at a partition, that son would be entitled to claim a right to partition in that property, though the remaining sons would not be so entitled.

He would become a coparcener with the-father and then he will have also right to interdict any alienation by the father except for legal necessity and any binding purpose. That is how the right by birth becomes operative in respect of the partitioned property in the hands of the father. Belying on the decisions in 20 Suth WR 189, ILH 2 Mad 182 (FB) and Marudayi v. Doraiswami, ILR 30 Mad 348, mainly, Mr. Rajah Iyer contended that it has been recognised that the property obtained, by the father at a partition among himself and his sons remains joint property, and therefore, whether the sons were divided or undivided at the time when the succession opened on the death of the father, the sons would take the property by right of birth, according to the rule of unobstructed heritage, that is to say, as joint tenants as if they wore members of a coparcenary and nut as it they were tenants-in-common in a divided family. In 20 Suth WR 189, the earliest decision which was brought to our notice, by the learned counsel for the appellant, Mr. Rajah Iyer, the following observations were relied on by the learned counsel :

"The distinction between a joint property and separate property under the Mitakshara law appears to me to be simply of a temporary, not of an abiding, character. Property is joint when it belongs to all the members, who may be many, of a joint family. Property is separate when it belongs only to one member of a joint family alone, and not to the others jointly with him. As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property -- the property of several persons united together as a joint family with regard to it -- the property of a new joint family springing from a new root. And it continues to go down by one rule of descent only."

Having carefully considered this dictum of Phear J. in the case cited, it is difficult to agree with Mr. Rajah Iyer that it supports him to any extent. Mr. Rajah Iyer misses the point that the case refers to the property "becoming joint family property the property of several persons united together as a joint family with regard to it, that is to say, the property becomes that of a new joint family springing from a new root."

This decision does not in any way lay down the rule that once there is a partition and when the sons become divided from the father, on the death of the father the sons would be entitled to claim the property as members or coparceners of a joint family according to the rule of "aprati-bandha" or as joint tenants, whether the sons are divided or undivided.

That is to say what in effect Mr. Rajah Iyer wants us to hold is that the partition which had taken place between the father and his sons should be completely ignored and that on his death the status quo ante should he restored us it there was no prior partition for the simple reason that by a partition the filial relation between the father and the sons was not in any way cut off I Act continued, notwithstanding the fact that a partition had taken place between the father and the sons at an earlier stage. In support of this aspect of his argument, Mr. Rajah Iyer invited our attention to

a decision in ILR 2 Mad 182 (FB).

In that decision a Full Bench of this court observed that under the Mitakshara law a divided son (no undivided sons surviving) is entitled to succeed to his father's share in preference to his father's widow. It was held that the son's right to inheritance under Hindu law is distinguished from that of all other heirs in that it is "aprati-bandha" not liable to obstruction, and the functions assigned to the son, and the character ascribed to him in the religious system of the Hindus, explain the preference in the succession accorded to him. Mr. Rajah Iyer, in particular, invited our attention to the passage that occurs at p. 184 which is to the following effect:

"The effect of partition is not to interfere with the right of inheritance, but to resolve joint rights into several rights. It frees so much of the estate as falls to the lot of his father from any present proprietary right on the part of the divided son, but it does not annul the filial relation nor the right of succession, which, in the absence of disqualification, is incidental to that relation."

The proposition laid down is certainly unexceptionable. It does not however state in least manner that when the inheritance opened, the divided sons and the undivided sons would take in the same right and according to the same rule of succession, as if there was no partition at all. In the case of the divided sons, it has been repeatedly held that the rule of succession is "sapratibandha," that is, obstructed heritage, because in respect of the property held by the father, the death of the father has the effect of removing the obstruction.

The dictum relied on by Mr. Rajah Iyer merely says that the fact of partition does not interfere with the right of inheritance by the sons. Certainly it does not. But the case did not decide as to what exactly was rule of inheritance, whether it would be obstructed or unobstructed heritage. Surely, when once a partition is effected between the father and his sons, the filial relation between the father and the sons is not affected, and particularly the duties which the sons are called upon to perform in respect of the funeral ceremonies of the father are not in any way taken away, but that does not mean that the rule of succession in respect of the property left by him, whether joint or self-acquired, remained the same despite the fact of the coparcenary interest between the father and the sons having come to an end by means of the partition already effected. It is, therefore, impossible to hold that this decision is of any great assistance to Mr. Rajah Iyer.

23. The next decision on which Mr. Rajah Iyer relied is one reported in ILR 30 Mad 348. This decision is on the same lines as the decision in ILR 2 Mad 182 (FB) and holds that the right of divided sons, grandsons, and great grandsons of the last male owner to succeed to his divided property, is the same as in the ease of undivided family property.

The right of representation exists equally in the former as in the latter case, and the divided sons will not, on the principle of the exclusion of remoter by nearer sapinda, exclude the divided grandson in the succession to divided property of the ancestor. A careful reading of this decision and the observations made therein would however show that this decision will not help Mr. Rajah Iyer even as the decision in ILR 2 Mad 182 (FB).

This is a case of succession to divided property between divided sons, grandsons and great grandsons and not as between divided sons and undivided sons. In further support of his contention Mr. Rajah Iyer relied upon Bliairab v. Bircadra, and Jatru Pahan v. Ambikajit Prasad, (S) . In , a Bench of that Court held that in the matter of succession to the grandfather's property the claim of the separated grandson and his sons in the Mithila school was governed by the Mitakshara.

As per Ramaswami J. in that decision the principle of the Mitakshara was that the sons and grandson got unobstructed right (apratibandha-daya) by mere birth to the separate property of the grandfather. He held that "partition merely adjusted or resolved joint right into several rights, and that it freed the father's share from any present proprietary right on the part of the divided son, but it could not annul the filial relation nor the right of succession incidental to that relation.

That being the position, partition cannot annul or destroy the right of the grand-son, or the great grandson to the grandfathers' properly. Once again it has to be noted that the observations of the learned Judges do not deal with the point we are called upon to decide in this case, namely, whether the succession is to be according to the rule of apratibandha or Sapratibandha,' There was no conflict in this case between divided and undivided sous, and the learned Judges were not called upon to decide any such issue.

The whole point pressed for by Mr. Rajah Iyer is to the effect that the distinction between the continuance of a coparcenary before partition and its non-existence after partition should be ignored, when succession opens in respect of the property that became the separate property of the father at the partition between himself and his sons. In doing so, he misses the distinction between the existence of the right of a son to claim a partition of the property by reason of birth to his father whereby he becomes a coparcener of the family and the right of the son to claim a share in the property of the father on his death.

In the former case it cannot be disputed that the rights of the father and son to the property of the family co-exist. The moment the son is born he becomes entitled to claim the property as a joint tenant and to have a partition thereof. His birth imposes a restriction on the power of the father to dispose of the property except in cases of legal necessity etc. In the latter case, the rights of the son arise and are sought to be enforced only after the death of the father.

It is this essential distinction between the two aspects of inheritance that the learned counsel for the appellants ignores and wants us to uphold that even though the sons became divided from the father when the father died leaving the properties which he got under the partition, the divided song should inherit as if they were co-parceners; that is, by virtue of the right which co-existed in them along with thel right of the father in the joint family properties. It is difficult for us to uphold such a contention in the light of the progress that the Hindu law has made by reason of the several "rulings of courts in regard to "obstructed" and "unobstructed" heritage.

24. In the case of (S) also, the point that is now at issue did not arise directly, and, it may be observed that this decision followed merely the decision in and it is difficult to see how exactly this decision helps Mr. Rajah Iyer on the point that he is urging before us.

25. In essence Mr. Rajah Iver's argument amounts to this: The rule of inheritance should be with reference to the nature of the property or its character and not with reference to the status of the parties or- the character of the recipients, who are to take the property on the death of the father, the last owner? It is true, as already stated, that the property retains for some limited purposes, the character of an ancestral property or joint family property but it does not become the self-acquired property of the father.

But the ancestral or joint family property which remains so, for certain limited purposes, does it continue to be the same when it has to be succeeded to by the persons who are not any more members of the joint family or coparceners with the deceased father but are already divided. This is the question to which Mr. Rajah Iyer would like us to give an answer in the affirmative. Bu we do not find it possible to do so.

We are unable to subscribe to this proposition of Mr. Rajah Iyer that in regard to this property which retains to some limited extent the character of a joint family property, the succession thereto on the death of the father should be decided upon the status of the parties or the character of the recipients who are entitled to succeed to the same, ignoring the fact that these recipients had already ceased to be members of the coparcenary, under which alone such members could nave claimed a right by birth in order to be entitled to claim succession under the rule of unobstructed heritage.

When once there has been a division, though there has beenstill a continuation official relationship between the father and the sons, the divided sons have ceased, beyond any doubt, to be members of the coparcenary and they do not have any more right to the property by birth. That right by birth has been settled by the partition and in respect of that property which has fallen to the share of the father it is beyond comprehension as to how exactly the divided sons could still lay a claim co-extensive with that of the father or any of Ins undivided sons.

In the property which has fallen to the share of the father the right by birth has been lost by reason of the partition and even the right to interdict any alienation in respect of the property which became the separate property of the father has already been lost by reason of the same partition and how it is possible for the divided son to exercise or enforce these very rights in respect of the very same property passes beyond comprehension. That means, according to Mr. Rajah Iyer, the right to claim by birth for a share jointly with the father as a coparcener in the property is never lost even though a partition might have taken place.

26. Then it remains to be seen as to what exactly is the effect of the partition, if the partition is to be ignored as being of no consequence. Is it also to be assumed that the coparcenary never ceased to exist even though a partition might take place between the coparceners of the joint family property? Or, is it to be postulated that at every stage the coparcener continues whenever the succession opens upon the death of the divided coparcener? All these points make the situation rather very anomalous if the argument of Mr. Rajah Iyer is to be accepted.

27. He would nevertheless assert that division between the father and the sons makes no difference, and, simply because the joint family property that fell to the share of the father continues to he joint

family property for some limited purposes the right by birth continues to exist in the sons to Succeed as if they were coparceners with the father, though he would concede that in respect of that property in the hands of the father the sons could not exercise the power of interdicting alienation or claiming a partition, again by right of birth.

28. Therefore, to argue that in respect of such separate property in the hands of the father the divided sons would succeed as if they were members of the coparcenary would lead to very strange results and would certainly nullify the effect of all partition between joint family members and also the meaning and weight to be attached to the existence of a coparcenary, or even the reunion of coparceners would come to nought.

29. Mr. Rajah Iyer, however, contended when faced with the decision in ILR 44 Mad 499; (AIR 1921 Mad 168) (FB) and the decision in so far as the self-acquired property was concerned, the undivided sons would take by inheritance as tenants-in-common and that under the Hindu law there were only two types of succession, the unobstructed and the obstructed, and a third type of succession was unknown. He would however try to canvass against the correctness of the decision in ILR 44 Mad 499: (AIR 1921 Mad 168) (FB), if the opportunity exists.

30. So far as the Full Bench decision is concerned, as my learned brother has pointed out, that decision is binding on this Bench, and in so tar as self-acquired property is concerned, the rule of succession would be "sapratibandha" and not 'apratibandha" and, by no means could the self-acquired property be equated to the separate pro perty held by the father on partition. For, Mr. Rajah Iyer himself conceded more than once in the course of his arguments that this property in the hands of the father on partition could only be a separate property with some characteristics of a joint family property, at lease for certain limited purposes.

31. The question that really has to be resolved then is as to whether on the death of the father holding property which fell to his share on partition the divided sons would succeed to it in the same manner as self-acquired property or in the manner pointed out by Mr. Rajah Iyer. In the case of such property, if there are undivided sons, the divided sons would not get any priority over them, and, if there are divided sons, they cannot certainly succeed to that property as if the property was joint family property available to be taken by the divided sons in their right as joint tenants.

They would, on the other hand, take it only as tenants-in-common. His sons on the death of the father, as has been pointed but by Mr. Venkatasubramania Iyer appearing on behalf of the respondents, have only a heirship right in the property left by the father. They have no right to the property during his lifetime by right of birth; nor would it be right to say that their succession to it could be by the "unobstructed" rule of heritage. Mr. Venkatasubramania Iyer has rightly pointed out that inheritance that is consequent upon the demise of one holder is always obstructed heritage under the Mitakshara law.

When there is a right of birth the property vests jointly in all the persons who are entitled to it, the father and the sons, and the sons' right by birth to such property held jointly and in common by all the sons cannot be "sapratibandha". It is certainly "apratibandha", unobstructed heritage. My

learned brother has pointed out how exactly the mistake has arisen with regard to the conception of the term "daya" in the Sanskrit books, and, I do not think I need repeat the same.

32. Mr. Venkatasubramania Iyer, in the course of his arguments, brought to our notice the decisions in, 9 Moo Ind. App. 539 (PC), ILR 23 Cal 670, ILR 8 Luck 121; (AIR 1933 PC 72), and , from which the following propositions are deducible, viz, that the widow is excluded from succession to her husband's right of co-ownership only when the co-ownership is joint tenancy governed by the rule of survivorship and that the principle of joint tenancy and survivorship are un-Known to Hindu law except in the case of joint family property of an undivided Hindu family governed by the Mitakshara law.

These propositions postulate the existence of a joint Hindu family in that the principle of joint tenancy and survivorship may come into operation, either it be in regard to succession by the sons or in regard to succession by the widow. These propositions are well-established from the decisions of the Privy Council and the decisions of this court.

33. A further proposition is also unexceptionable. As pointed out by Mr. Venkatasubramania Iyer, the co-ownership has the character of joint tenancy only when it is created by "apratibandha" by right of birth and that co-ownership never has the character of apratibandha when it is created by inheritance that is, on the death of the last owner. The decisions in Chalekani Venkataramana-yamma Garu v. Apparao Bahadur Garu, ILR 20 Mad 207 and Gossanii Sri Gridharji v. Rornanlalji Gossami, ILR 17 Cal 3 (PC), are ample authority for this position.

34. Mr. Rajah Aiyar however argued that the right of birth is always dormant even in the case or separate property in the hands of the father, and, therefore, a claim could be made on the basis of that dormant right by the divided sons after the death of the father. That again is, in other words, saying that the property remains joint for all purposes, notwithstanding the partition that has taken place and despite the fact that the sons had left the coparcenary and ceased to be members thereof.

We are unable to agree with this contention of Mr. Rajah lyer. He seemed to argue that the right by birth, could be liquidated by instalments as well, as when the properties come into the hands of the divided member and passes to the divided sons on the death of the divided member. Even this proposition seems to be rather too wide of the actual scope of the Hindu law which is administered in this country.

35. Mr. Rajah Iyer, laid emphasis on the rule of representation in support of his contention that the divided sons could take as joint tenants instead of as tenants-in-common. This aspect of the case has been dealt with by my learned brother in detail and I do not think I need take up the time ot this court in adding to what he has stated.

36. In the end, Mr. Rajah Iyer further relied upon a decision in Suryaprakasa Rao v. Govinda-rajulu, 69 Mad LW (Andhra) 46. A reading of this decision would clearly show that it is of no assistance on the point that is urged by Mr. Rajah Iyer.

37. In the result, as I have already observed, I have no hesitation in agreeing with my learned brother in the conclusions he has arrived at, and, this appeal and the memorandum of objections have to be dismissed in the terms already stated by my learned brother.