PETITIONER:
JALAJA SHEDTHI & ORS.

Vs.

RESPONDENT:
LAKSHMI SHEDTHI & ORS.

DATE OF JUDGMENT20/09/1973

BENCH:
REDDY, P. JAGANMOHAN
BENCH:
REDDY, P. JAGANMOHAN
DWIVEDI, S.N.

CITATION:
1973 AIR 2658 1974 SCR (1) 707
1973 SCC (2) 773
CITATOR INFO :
E 1980 SC 198 (19,21,23)

ACT:
Aliyasantana Act (Madras Act IX of 1949), Sections 3(b), (i), (ii), 3(c), 3(f), 3(h), 35, 36 and 39-Hindu Secession Act, XXX of 1956, sections 3(a), 4(1), 6, 7(2), 8, 10, 15, 17, 23 and 30-Meaning of 'Kavaru', 'Kutumba', nissanthathi kavaru', and 'Santhathi kavaru' under Madras Act-Conceit of inheritance is through female Partition-Share of a kavaru is ascertained on date of claim-Kavaru in relation to its undivided interest is kavaru undercus-tomary Allyasantana law or Madras Act-Succession Act does not enlarge life interest of male under Aliyasantana law into absolute interest.

HEADNOTE:
Prior to the Hindu Seccession Act, 1956, the parties were governed by the Aliyasantana law. The customary Aliyasantana law was known by two different names, namely marumakattayam and aliyasantana which literally connotes inheritance in the line of nephews' or sisters' sons respectively. The basic principle underlying the joint family composition, otherwise known as kutumba or tarwad, is the matriarchal system, in which devolution is through females. A kutumba under the customary Aliyasantana law was a family corporation; every member, male or female, born in it has equal rights in the property owned by it. On the death of any member of the kutumba, his or her interest in the kutumba property devolved on the remaining members by survivorship. Partition could be effected only at the instance of all the adult members. The children of the female members alone were the coparceners in the kutumba, but not the wife and children of the male members. The Madras Aliyasantana Act, 1949, defined and amended in certain respects the customary Aliyasantana laws relating to, inter alia, intestate succession and partition and in other respects saved the prevailing laws. Thereafter, the Hindu Secession Act, 1956, came into operation whereby the antecedent Hindu Law ceased to have effect to the extent that it was either provided for or was inconsistent with the Act.
The first appellant and the other appellants are the widow

and sons respectively of C, while the first respondent and the other respondents are C's sister and her sons respectively. C executed a will on January 15, 1957 bequeathing his interest in favour of the appellants. On January 25, 1957, the respondents issued a notice to C stating that he was the manager of the undivided family, that he was a missanthathi kavaru while the respondents were santhathi kavaurs, as such there were only two kavarus and that they had decided to divide the properties between C and themselves. They, therefore, demanded under the Madras Act a share belonging to their kavaru from out of the entire movable and immovable properties of the family. C replied on January 24, 1957, stating that the respondents' family was not a santhathi kavaru but a nissanthathi kavaru as the first respondent was mere than fifty years old on the date of the said notice and had no female issue. He admitted, however, that there are only two kavarus in the family, and as both the kavarus were nissanthathi kavarus, each kavaru was entitled to a absolute share in the kutumba properties. He also stated that he bad no objection to the claim for partition made by the respondents and was prepared to effect it provided the respondents cooperated. C subsequently died on February 13, 1957, after the coming into force of the Succession Act. On March 23 1957, the appellants gave a notice to the respondents claiming a separate share under C's will. The respondents replied to the notice on the same day denying that the appellants had any share because according to them C was entitled only to a life interest under the Aliyasantana law.

The appellants-plaintitfs then filed a suit against the respondents-defendants for partition, separate possession of their 7/20th share of the suit Properties and for mesne profits. The trial court decreed the suit but the High Court dismissed. In appeal by special leave to this Court, the questions that arose for consideration were : (i) whether the rights of the parties, are to be determined in accordance with the Aliyasantana law or under the Succession Act; (ii) what interest C had,

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under the Madras Act, in the joint family properties on the date of his death; (iii) whether a partition had been effected; (iv) whether C's will is effective in respect of his share; (v) whether he had a life interest in the properties; and (vi) whether, under the Succession Act. that interest had been enlarged into an absolute interest which could be bequeathed by a will.

Dismissing the appeal,

HELD : (i) From the definitions of 'kavaru' [S. 3 (b) (i) & (ii)], 'Kutumba' S. 3(c), 'Nissanthathi kavaru' S. 3(f) and 'Santhathi Kavaru S. 3(h), under the Madras Act, it is apparent that the, basic concept of inheritance through a female has been maintained. The presence of even one female in the kavaru will have the effect of continuing the kavaru, while the absence of a female would amount to the absence of progeny. [712D]

(ii) Under the provisions of Sections 35 and 36 of the Madras Act, any kavaru represented by the majority of its major members can claim its share of all the properties of the kutumba over which the kutumba has power of disposal. It may thereafter take its share and separate from the kutumba provided that where a kavaru consists of only two persons, such a claim can be made by either of them. But no kavaru can make such a claim during the life time of any common ancestress who is common to such kavaru and to any other kavaru or kavarus of the kutumba who has not completed

50 years unless she has signified her consent in writing or 2/3 of the major members of the kavaru have joined in making the claim for partition. The common ancestress can however on her own volition claim a partition. The share obtained by the kavaru on partition is with all the incidents of a kavaru property which is divisible into certain proportion for a period of 15 years from the commencement of that Act, and thereafter, is divisible per stirpes and each kavaru gets a share on the basis. The same position applies to every kavaru possessing separate property as if it were a kutumba. However, u/s 36(3), if at the time of the partition any kavaru taking a share is a nissanthathi kavaru it would have only a life interest in the property allotted to it, if the kutumba from which it separated has at least one family member who has not completed the age of 50 years or where the kutumba broke up into a number of kavarus at partition, if at least one such kavaru is the santhathi kavaru. But if there is no such female member or santhathi kavaru, the nissanthathi kavaru would have an absolute interest in the properties allotted to it. The properties allotted to a nissanthithi kavaru at a partition and in which it had only a life interest at the time of the death of the last of its members, devolves upon the kutumba or where the kutumba is broken up at the same or at a sub-sequent partition into a number of kavarus, upon the nearest santhathi kavaru or kavarus. [713H]

Gupte, Hindu Law of Succession, 2nd edition, at page 484, referred to.

(iii) The provisions of the Madras Act, particularly section 36(2)(h) with its explanation without doubt indicates the time when a share of a kavaru is ascertained on a partition in the family and whether the property is divided by metes and bounds or not the share in the property has to be determined as on the date when the claim is made. In the present case, the claim was made on January 22, 1957, and therefore, the share of the parties has to be determined as on that date even though the physical partition of the properties by metes and bounds may take place some time later. [715B]

(iv) Under the provisions of the Succession Act, on the demand for partition, there is a division in status, and though partition by metes and bounds may not have taken place, that family can thereafter never be considered as an undivided family nor can the interest of a coparcener be considered to be an undivided interest. It is a well established principle in the Hindu Law that a member of a joint Hindu family has a right to intimate his definite and unambiguous intention to the other members of the joint family that he will separate himself from the family and enjoy his share in severally. Such an unequivocal intention communicated to the other will amount, to a division in status and on such division, he will have a right to get the division of his specific share of the joint family property in which till then all of them had an undivided coparcenary interest, and in which none of them could claim that he had any right

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to any specific part thereof. Once the decision to divide has been unequivocally expressed and clearly intimated to his co-sharers, whether or not the other co-sharers agree, an immediate severance of the joint status is effected and his right to obtain and possess the share to which he is admittedly entitled becomes specified. This principle enunciated in Girja Bai v. Sadashiv Dhundiraj and others L.R. 43 I.A. 151 and Appovier v. Ramasubbier [1866] 11

M.I.A. 75 has been enacted in section 36(2) (h) of the Madras Act which specifies the point of time for ascertaining the share when a division in status is effected. The term "partition" in sub-section (3) of s. 36 therefore, must be given the same meaning as in Sec. 36(2)(h) of the Madras Act. If so on a demand for partition, a severance of status takes place and the share to which each is entitled in the undivided properties is ascertained. In the case of an Aliyasantana kutumba, this Court, in Panduraja and others v. Dhanawanti and others, held that if the jointness of the kutumba had been disrupted, there is no question on claiming any partition as there is no kutumba in existence as in the present case. Similarly, on the same parity of reasoning, when there are two kavarus, demand for partition would disrupt them within the meaning of S. 7(2) of the Succession Act. If he had no undivided interest in the property, his interest cannot be enlarged into an absolute estate nor can his interest devolve upon his heirs by intestate succession. Prior to the Succession Act, neither under the customary law nor under the Madras Act, nor under the Indian Succession Act, the interest of a coparcener in an Aliyanasantana kutumba could have been disposed of by testamentary disposition. But s. 30 of the Succession Act made a definite change in the law by enabling a member of an undivided Aliyanasanta kutumba or of a kavaru to dispose of his interest in the kutumba or kavaru properties by a will. [717H]

Karthiyayini Kunehi v. Minakshi Ammal [1935] M.L.F. 114 and Mahalinga Sherty v. Jataja Shedthi and others [1956] 2 M.L.F. 446, approved.

Padmaraja and others v. Dhanavanthi and Ors. [1972] 2 S.C.C. 100, 104, applied.

Girja Bai v. Sadashiv Dhundiraj and others L.R. 43 I.A. 151 and Appovier v. Ramasubbier [1866] 11 M.I.A. 75, referred to.

(v) In the present case, there is neither a kutumba nor can C be a kavaru. The two kavarus after the division in status, became only one kavaru, viz. that of respondent no. 1 (C's sister). C will not be a kavaru within the meaning of S. 3(b) of the Madras Act because u/s 3(b)(ii), there being no female line, it is only C's mother who can be a kavaru but not C. In fact, a male can never be a kavaru either under the customary law or under the Madras Act. When Sec. 7(2) of the Succession Act refers to kavaru in relation to its "undivided interest', it is the kavaru under the customary law or the Madras Act and not a deemed kavaru for the purpose of partition. If C is not a kavaru, there is no property of a kavaru, which can be disposed of under sec. 30 of the Succession Act. Even under the explanation to that section, the life interest which C had on severance of status is not property capable of being disposed of by a will nor could it devolve by survivorship. He is no longer a kavaru and had, therefore, no interest in the property of the kavaru. C's live interest is also not enlarged u/s 7(2) of the Succession Act into an absolute interest, because a male with a life interest under the Aliyasantana law being in the same position as a female limited owner under the Hindu law, the Succession Act while enlarging the right of the latter under sec. 14 into an absolute interest did not specifically provide for the enalrging of the right of the former. In the absence of any such specific provisions, it must be held that C's interest enured till his life time only. [721]

Dundara Adapa and others v. Girija & Ors. I.L.R. [1962] Mysore 225, applied.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1258 of 1967.
Appeal by Special Leave from the Judgment and Order dated the 10th July 1963 of the Mysore High Court at Bangalore in Second Appeal No. 345 of 1961.
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S. S. Javali, B. P. Singh and B. R. Agrawala for the appellants.
K. N. Bhatt and Saroja Gopalakrishnan, for respondents Nos. 1-3.
The Judgment of the Court was delivered by
JAGANMOHAN REDDY, J. The appellants who were the plaintiffs filed a suit against the respondents the defendants for partition, separate possession of their 7/20th share of suit properties and for mesne profits. The Trial Court decreed the suit, but the High Court dismissed it. This appeal is by special leave against that judgment.
Prior to the Hindu Succession Act, XXX of 1956 (hereinafter referred to as 'the Succession Act) the parties were governed by the Aliyasantana Law and the question before us is whether their rights are to be determined in accordance with that Law or under the Succession Act. It is not disputed that Chandayya Shetty, who died on February 13, 1957 after coming into force of the Succession Act, and the first respondent are brother and sister respectively. The first appellant is the widow and appellants 2 to 6 are the sons- of Chandayya Shetty, while respondents 2 to 4 are the sons of the first respondent. In order to appreciate the contentions, urged before us, it would be necessary to first set out certain underlying concepts of the Aliyasantana customary law, the changes made by the Aliyasantana Act (Madras Act IX of 1949)-hereinafter referred to as "the Madras Act" and the relevant provisions of the Succession Act. The Aliyasantana Law is a part of the customary law which governed certain communities on the West Coast of South India. The basic principle underlying the joint family composition, otherwise known as kutmba or tarwad, under the customary law known by two different names, namely, marumakkattayvam and aliyasantana, is the matriarchal system, in which the devolution is through females. The meaning of the two words by which the systems are known literally connotes 'inheritance in the line of nephews' or sisters', sons. Apart from a few differences in these two systems. it may be noticed that while the marumakkattayam system was applicable to all castes, the aliyasantana system is' not followed by the Brahmins (See P. R. Sundra Iyer's Malabar and Aliyasantana Law, 1922 Edn. 247). It is chiefly followed by the Bunts, the Bilwa caste and the non-priestly class among the Jains (See Myne's Hindu Law, 1950), 11th Edn. 971). A kutumba under the Aliyasantana customary law was a family corporation: every member born in it has equal rights in the property owned by it. On the death of any member of the kutumba his or her interest in the kutumba property devolved on the other members of the kutumba by survivorship. The limited estate of Hindu female familiar to the Mitakshara Law was unknown to this ,system, for under it every male and female member had equal rights in the kutumba property. Under this law, though partition could not be enforced at the instance of on(-, or more members and the members of the kutumba would be entitled to maintenance. it could be effected at the instance of all the adult members thereof. It may, however,

be noticed that 'since the basis of the system was matriarchal, the children
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of the female members alone were the coparceners in the kutumba, but not the wife and the children of the mate members. This customary law as applicable in certain areas of the Madras Province and in the erstwhile princely State of Travancore and Cochin was modified by the laws enacted by the respective legislatures. In this case we are concerned with the Madras Ast which defined and amended in certain respects the laws relating. to marriage, guardianship, maintenance, intestate succession and partition applicable to persons governed by that customary law. In respect of matters which this Act did not affect, the prevailing customary law was saved by s. 39 of the Madras Act which provided :

> "Nothing contained in this Act shall be deemed to affect any rule of Aliyasantana Law, custom or usage, except to the extent expressly laid down in this Act. "

The Madras Act conferred a right to partition properties and the mode of ascertainment of shares on partition. These provisions are dealt with in Ch. VI of that- Act.

Before examining the provisions of the Madras Act and the Succession Act it may be mentioned that Chandayya Shetty had executed a Will on January 15, 1958 bequeathing his interest in favour of the appellants ie. his wife and children. A week thereafter on January 22, 1957, the first respondent and her children issued a notice to Chandayya Shetty stating that he Chandayya Shetty) was the manager of the undivided family, that he was a nissanthathi kavaru (branch) while the respondents were santhathi kavarus, as such there were only two kavarus and that they had decided to divide the properties between Chandayya Shetty and themselves. They, therefore, demanded under the Madras Act a share belonging to their kavaru from out of the entire movable and immovable properties of the family. Chandiyya Shetty replied on January 24, 1957, denying that the respondents' family was a santhathi kavaru, but was a nissanthethi kavaru as the first respondent was more than 50 years old on the date of the said notice and had no female issue. He, however, admitted that there are only two kavarus in the family, and as both the kavarus were nissanthathi kavarus, each kavaru was therefore entitled to an absolute share in the kutumba properties. He also stated that he had no objection to the claim for partition made by the respondents and was prepared to effect it provided the respondents cooperated. After this reply notice, Chandayya Shetty died, as already stated, on February 13, 1957. On March 23, 1957, the appellants i.e. Chadayya Shetty's widow and her children gave a notice to the respondents claiming a separate share under the Will of Chandayya Shetty. A reply was given on the same day by the respondents denying that the appellants had any share because according to them Chandayya Shetty was entitled only to a life interest under the Aliyasantana Law.

On these facts it may be necessary to ascertain under the provisions of the Madras Act the interest which Chandayya Shetty had in the joint family properties on the date of his death, whether a partition had
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been effected,..whether his will is effective in respect of his share, whether he had a life interest in the properties, and whether under the provisions of the Succession Act that interest had been enlarged into an absolute interest which could be bequeathed by a Will.

Before examining the provisions of Ch. VI of the Madras Act which deal with partition, it will be useful to ascertain, what under that Act is a 'kutumba' and a 'kavaru', and what is meant by a 'santliathi kavaru' and a 'nissanthathi kavaru'? A 'kavaru' has been defined in S. 3 (b) (i) in relation to a female as meaning "the group of persons consisting of that female, her children and all her descendants in the female line", and under S. 3 (b) (ii) when used in relation to a male as meaning "the kavaru of the mother of that male". Under s. 3(c) 'kutuniba' means "the group of persons forming a joint family with community of property governed by the Aliyasantana Law of inheritance". Under s. 3 (f) 'nissanthathi kavaru' has been defined as meaning "a kavaru which is not a santhathi kavaru", and 'santhathi kavaru' under S. 3 (h) means "a kavaru of which at least one member is a female who has not completed the age of fifty years". It is apparent from these definitions that the basic concept of inheritance through a female has been maintained under this Act in that the presence of even one female in the kavaru will have the effect of continuing the kavaru, and the absence of a female would amount to the absence of progeny a nissanthathi liable to the extinction of the branch. Keeping in view these definitions, s. 35, which provides for partition may now be read

> "35. (1) Any, kavaru represented by the majority of its major members may claim to take its share of all the properties of the kutumba over which the kutumba has power of disposal and separate from the kutumba:
> "Provided that- .
> (i) where a kavaru consists of only two persons, such a claim may be made by either of them;
> (ii) no kavaru shall make such a claim during the lifetime of any ancestress common to such kavaru and to any other kavaru or kavarus of the kutumba, who has not completed fifty years of age, unless-
> (a) she has signified her consent in writing, or
> (b) two-thirds of the major members of the kavaru join in making the claim for partition;
> (iii) the common ancestress may on her own volition claim a partition.
> (2) The share obtained by the kavaru shall be taken by it with all the incidents of kutumba property.
> Explanation.-For the purposes of this Chapter-
> (a) a male member of a kutumba, or a female member thereof who has no living descendant in the female line, shall be deemed to be a kavaru if he or she has no living female ascendant who is a member of the kutumba;
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> (b) such male member, or such female member if she has completed the age of fifty Years, shall be deemed to be a nissanthathi kavaru."

Under s. 36(1) any kavaru entitled to partition under s. 35 shall be allotted a share of, the kutumba properties in accordance with the provisions of sub-s. (2), and the share of a kavaru at a partition under sub-s. (2) (h) shall be ascertained as on the date on which it make a claim for partition. Explanation to that sub-section provides that :

> "For the purposes of this sub-section, the

date on which a partition is claimed shall be-
(a) where the claim is made by a suit for partition, the date of the institution of the suit (whether the suit is prosecuted or not); and
(b) where the claim is made otherwise than by a suit the date on which such claim is made."

The following sub-sections (3) to (5) on which reliance has been placed are also given below :

"(3) If, at the time of the partition, any kavaru taking a share is a nissanthathi kavaru, it shall have only a life interest in the properties allotted to it, if the kutumba from which it separates has at least one female member who has not completed the, age of fifty years, or where the kutumba breaks up into a number of kavarus at the partition, if at least one of such kavarus is a santhathi kavaru and if there is no such female member or santhathi kavaru, the kavaru shall have an absolute interest in the properties allotted to it.
(4) In the case referred to in sub-section (3), the life interest of the nissanthathi kavaru in the properties allotted to it at the partition shall become absolute, if the kutumba concerned ceases to have among its members a female who has not completed the age of fifty years or if all the kavarus into which the kutumba broke up, whether at the same or at a subsequent partition, become nissanthathi kavarus.
(5) The properties allotted to a nissanthathi kavaru at a partition and in which it had only a life interest at the time of the death of the last of its members, shall devolve upon the kutumba, or where the kutumba has broken up, at the same or at a subsequent partition, into a number of kavarus, upon the nearest santhathi kavaru or kavarus."

The position that emerges on a consideration of these provisions is that, any kavaru represented by the majority of its major members can claim its share of all the properties of the kutumba over which the kutumba has power of disposal. It may thereafter take its share and separate from the kutumba, provided that where a kavaru consists of only two persons, such a claim can be. made by either of them

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but no kavaru can make such a claim during the life-time of any common ancestress who is common to such kavaru and to any other kavaru or kavarus of the kutumba, who has not completed fifty years unless she has signified her consent in writing or two-thirds of the major members of the kavaru have joined in making the claim for partition. The common ancestress can however on her own volition claim a partition. The share obtained by the kavaru on partition is taken with all the incidents of a kutumba property. Under s. 36 of that Act the property of a kutumba is on partition divisible in a certain proportion for a period of fifteen years from the commencement of that Act and thereafter all the property, is to be divided per stripes and each kavaru gets a share on that basis. The provision is also applicable to every kavaru possessing separate property as

if it were a kutumba. However, under sub-s. (3) of S. 36 of that Act if at the time of the partition any kavaru taking a share is a nissanthathi kavaru it would have only a life-interest in the property allotted to it if the; kutumba from which it separated has at least one female member who has not completed the age of fifty years or where the kutumba broke up into a number of kavarus at partition if at least one such kavaru is a santhathi kavaru. But if there is no such female member or santhathi kavaru the nissanthathi kavaru would have an absolute interest in the properties allotted to it. Sub-section (4) of that section provides for circumstances under which the life-estate in a ,divided share above referred to becomes absolute property' and sub-s. (5) of that section provides that the properties allotted to a nissanthathi kavaru at a partition and in which it had only a life-interest at the time of the death of the last of its members devolves upon the kutumba or where the kutumba is broken up at the same or at a subsequent partition into a number of kavarus, upon the nearest santhathi kavaru or kavarus. See Gupte's Hindu Law of Succession, 2nd Edn., (p. 484).

It is apparent from a reading of these provisions that in this case there were only two kavarus and that one of them was santliathi kavaru and the other a nissanthathi kavaru. The kavaru of Chandayya Shetty was a branch which was liable to extinction as he had no female progeny. The appellants however sought to characterise the kavaru of the respondents as a nissanthathi kavaru because though there was a female, namely, the first respondent, she was said to be not under fifty years, for if this was so, then since both the kavarus would be nissanthathi kavarus, at a partition each of the two kavarus would take an absolute interest. But when there are two kavarus if one is sintbathi kavaru and the other a nissanthathi kavaru, at a partition the nissantbathi kavaru would take only a life-interest. The attempt to establish that the respondents' kavaru was a nissanthathi kavaru having failed, as, both the Courts held that the first respondent was below 50 years. the learned Advocate for the appellants made strenuous attempts to persuade us, that in fact the giving of a notice by the first respondent does not effect a partition of the kutumba or between the two kavarug, and that even if this be not established, s. 7(2) of the Succession Act read with its Explanation has the effect of enlarging a

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life-interest into an absolute interest. If so, the learned Advocate submits that Chandayya Shetty had an interest in the properties which he could bequeath by Will.

It appears to us that the provisions of the Madras Act particularly s. 36(2)(h) with its Explanation without doubt indicates the time when a share of kavaru is ascertained or a partition in the family and "whether property,is divided by metes and, bounds or not the share in property has to be determined as on the date when the claim is made. In this case, the claim was made on January 22, 1957 and, therefore, the share of the parties has to be determined as on that date even though the physical partition of the properties by metes and bounds may take place some time later. The argument that though a claim may be made, no partition may. ever take place, and consequently there is no partition of the kavarus, is a speculation which cannot affect the principle applicable for determining, whether or not a partition takes place and if so when. it may be that even though a notice bad been given for partition of the properties, the parties may later choose to

live together and the notice withdrawn. But that is neither her nor there. What we have to ascertain is whether there, has been a partition in the family or whether the family is still undivided for the purposes of s. 7(2) of the Succession Act.

The learned Advocate for the appellants has made a great play on the words "undivided interest in the property" in s. 7(2) of the Succession Act, as in his submission when Chandayya Shetty died, he had undivided interest in the kutumba properties and hence the provisions of the Succession Act applied and the appellants were entitled to their shares. This contention of the appellants no doubt finds support from the District Judge who observed that s. 7 (2) does not speak about a division in status, but only speaks about a division in property and that it would be wrong to import the provisions of the Aliyasantana Act in interpreting the Hindu Succession Act which prevails in spite of any provisions under the Aliyasantana Law. There was, according to the District Judge, nothing in s. 7(2) of the Act which states that the person who dies after the commencement of the Act should not only have an undivided interest but he should also have been an undivided member of the kutumba, and it would be wrong to introduce words which are not in the Act. According to him under s. 7(2) of the Act if the kutumba properties had not been divided and the deceased had not been allotted any portion of the kutumba properties, then he continued to have an undivided interest in the properties at the time of his death,_ and on his death his share is inherited by his legal heirs under the Act. The, learned Advocate again drew support from the ,observations made by the District Judge that even if the provisions of the Madras Act could be taken into consideration in interpreting the provisions of the Succession Act, then sub-s. (3) of s. 36 could not be invoked to say that even where an allotment could have been made, but was not made, there would have been an allottee who was only entitled to life estate. According to the District Judge, s. 36(3) of the Madras Act comes into operation only when there has been a partition and allotment of a definite share, the share to be ascertained

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as at the time the partition was claimed. But, when there has been no partition and no allotment of a share, then S. 36(3) has no operation and the person who formed a nissanthathi kavaru, if he dies without getting allotted his share in the kutumba properties, dies with an undivided interest in the kutumba properties, and, therefore, S. 7(2) of the Succession Act comes into play. This view of the District Judge has been held to be erroneous by the High Court. To ascertain which view is correct, we will have to examine, the relevant provisions of the Succession Act and ascertain whether on Chandayya Shetty's death, he had an undivided interest which he could dispose of by will and if he had a life interest whether. it had been enlarged into an absolute interest. The Succession Act defines "aliyansantana law" by S. 3 (a) as meaning "the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Aliyasantana Act, 1949, or by, the customary aliyasantana law with respect to the matters for which provision is made in this Act." Section 4(1) on which reliance has been placed for contending that the Aliyasantana Law as in force prior to the Succession Act has no application provides thus :

> "4. (1) Save as otherwise expressly provided in this Act.-

(a) any text rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply- to Hindus in so far as it is inconsistent with any of the provisions of this Act."

Sections 8and 10 of the Succession Act make provisions for the devolution and succession of the property of a male , Hindu dying intestate,S. 15 deals with the general rules of succession in the case of female Hindus dying intestate, and s. 23 makes special provision in respect of dwelling-houses where a Hindu dies intestate leaving him or her both male and female heirs specified in class I of the Schedule.

Sections 7, 17 and 30 of the Act on which reliance has been placed will now be read insofar as they are relevant:

"7. (2) When a Hindu to whom the aliyasantana law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a kutumba or kavaru, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the aliyasantana law.

Explanation.-For the purposes of this sub-section, the interest of a Hindu in the property of a kutumba or

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kavaru shall be deemed to be the share in the property of the kutumba or kavaru, as the case may be, that would have fallen to him or her in a partition of that property per capita had been made immediately before his or her death among all the members of the kutumba or kavaru, as the case may be, then living, whether he or she was entitled to claim such partition or not under the aliyasantana law, and such share shall be deemed to have been allotted to him or her absolutely.'

"17. The provisions of sections 8, 10, 15 and 23 shall have effect in relation to persons who would have been governed by the marumakkattayam law or aliyasantana law if this Act had not been passed as if- ,

(i) for sub-cluses (c) and (d) of section 8, the following had been substituted, namely :-

" (c) x x

x

(ii) for clauses (a) to (e) of sub-section (1) of section 15, the following had been substituted, namely

(a) x x x x

(b) x x x x

(c) x x x x

(d) x x x x

(e) x x x x

(iii) clause (a) to subsection (2) of section 15 had been omitted;

(iv) section 23 had been omitted."

> "30. Any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.
>
> Explanation.-The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a forward, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhifi illom, kutumba or' kavaru shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section."

The first thing to be noticed is that on the demand for partition there is a division in status, and though partition by metes and bounds may not have taken place, that family can thereafter never be considered as an undivided family, nor can the interest of a copareener be considered to be an undivided interest. It is a well-established principle in, the Hindu Law that a member of a joint Hindu family has a right to, intimate his definite and unambiguous intention to the other members of the joint family that he will separate himself from

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family and enjoy his share in severalty. Such an unequivocal intention communicated to the, others will amount to a division-in status and on ,such division he will have a right to get a de facto division of his specific share of the joint family property, in which till then all of them had an undivided coparcenary interest, and in which none of them could claim that he had any right to any specific part thereof. Once the decision to divide has been unequivocally expressed and clearly intimated to his co-sharers, whether or not the other co-sharers agree, an immediate severance of the joint status is effected arid his right to obtain and possess the share to which be is admittedly entitled be-Comes specified: Girja Bai v. Sadayhiv Dhundiraj & Others.(1) Lord Westbury in Appovier v. Ramasubbier,(2) had earlier observed

> "If there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to, the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may,-at any time, be claimed by virtue of the separate right."

This principle has been incorporated in s. 36(2) (h) of the Madras .Act which, as already stated, specifies the point of time for ascertaining the share when a division in status is effected. The term 'partition' in sub-s. (3) of s. 36 therefore must be given the same meaning ,as in s. 36 (2) (h) of the Madras Act.

In Mahalinga Shetty v. Jalaia Shedthi and others(3) Govinda Menon, J., as he then was, speaking for the Bench of the Madras High Court came to a similar conclusion on a consideration of ss. 36(2) (h) and 36(3) of the Madras Act.

It was held in that case +.hat the phrase 'at the time of partition should be understood as 'at the time when the parties effect a severance in status' the partition being only a disruption of status. It does not mean the point of time when the actual division by metes and bounds takes place, which might take a long time after the division in status takes place, either by the institution of a suit or by a notice of ($aim for 'partition'. It was pointed ,out in that case that clause (h) in sub-s. (2) of S. 36 was obviously inserted as a result of the decision in Karthiyayini Kunchi v. Minakshi Ammal(4) in which a Bench of that Court held that the theory of division in status by a unilateral declaration of intention is applicable to persons following the Marumakkattayam Law just as it applies to Mitakshara joint family. Burn, J., who delivered the judgment stated that the principle is not restricted to the case of joint Hindu families following the Mtakshara or any other system of law but is one of universal application. It is to remove any doubts about this that clause (h) has been inserted in S. 36(2). In our view also, the word partition' in sub-s. (3) of S. 36 should be given the same meaning, as.in s. 36(2) (h) of the Madras Act, if so on a demand for partition

(1) L. R. 43 I. A. 151.
(2) (1866) It M. T. A. 75.
(3) (1956) 2 M. L. J. 446.
(4) (1935) 70 M. L. J. 114.

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a severance of status takes place and the share to which each is entitled in the, undivided properties is ascertained.

Even in the case of an aliyasantana kutumba this Court had held per Hegde and Grover, JJ. in Padmaraja and others v. Dhanavanthi and others(1) that if the jointness of the kutumba had been disrupted, there is no question of planning any partition as there is no kutumba in existence as in the instant case before us. Similarly, on the same parity of reasoning, when there are two kavarus, a demand for partition would disrupt them and Chandayya Shetty could no longer claim that he had an undivided interest within the meaning of s. 7(2) of the Succession Act, and if he has no undivided interest in the property, his interest cannot be enlarged into an absolute estate, nor can his interest in the property devolve, upon his heirs by intestate succession. What s. 7 is dealing with is a situation similar to that dealt with in s. 6, namely, that when a member of joint Hindu family dies undivided, instead of his undivided interest devolving upon the other members of the family by survivorship, it is provided that on the death of an undivided member of the joint Hindu family his share in the joint family properties shall devolve on his heirs as if there had been partition in the family. The Explanation to s. 7(2) makes this position clear. Prior to the Succession Act neither under the customary law, nor under the Madras Act, nor under the Indian Succession Act the interest of a coparcener in an aliyasantana kutumba could have been disposed of by testamentary disposition. But s. 30 of the Succession Act made a definite change in the law, by enabling a member of an undivided aliyasantana kutumba or of a kavaru to dispose of his interest in the kutumba or kavaru properties by a will.

The learned Advocate for the appellants submits. that merely because a person has asked for a partition and that also not by Chandayya Shetty but by the first respondent, it should not deprive him of his right to dispose of that property by

a will, or deprive his legal heirs of inheriting his property by intestate succession. This argument ignores the basic concepts of the aliyasantano law. As pointed out earlier there is neither a kutumba, nor can Chandayya Shetty be a kavaru. The two kavarus after the division in status, become only one kavaru, namely that of respondent 1. Chandayya Shetty will not be 'a kavaru within the meaning of s. 3(b) of the Madras Act, because under s. 3(b) (ii) there being no female line, it is only the mother of Chandayya Shetty who- can be a kavaru but not Chandayya Shetty. In fact a male can never be a kavaru either under the customary law or under the Madras Act. When the Succession Act refers to kavaru in relation to its undivided interest, it is the kavaru under the custom or the Madras Act and not a deemed kavaru for the purposes of partition. If Chandayya Shetty is not a kavaru, there is no property of a kavaru which can be disposed of under s. 30 of the Succession Act. Even under the Explanation to that section, the life interest which Chandayya Shetty had no severance of status is not property capable of being disposed of by a will. As we said he is no longer a kavaru and had, therefore, no interest in the property of the, kavaru.

(1) [1972] 2 S. C. C. 100, 104.

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A Full Bench of the Mysore High Court in Sundara Adapa and others v. Girija and Others(1) has given a similar answer on facts analogous to the one raised before us. In that case the first defendant who was a nissanthathi kavaru had claimed in his written statement a partition of his own share and was granted 751360th share in the preliminary decree. By a will he left to his wife and children all his rights in the properties due to him on account of his share. There was also likewise a santhathi kavaru, Under the Aliyasantana Act on the cessation of the first defendant's life interest the property would devolve upon the nearest santhathi kavaru according to sub-s. (5) of s. 36. But it was contended as is contended in this case. that by virtue of Explanation to sub s. (1) of s. 30 of the Succession Act, the rights of the first defendant in his 75/360th share of his properties became capable of being disposed of by wi ll and, therefore, the children of the first defendant could be entitled to the share in accordance with the terms thereof. Hegde, J., as he then was, delivering the judgment of that Court observed at pp. 238-239 ;

> "The object of section 30 is clear. That section neither directly nor by necessary implication deals with the devolution of divided interest. As mentioned earlier, its purpose is limited. The language employed is plain and therefore no question of interpretation arises. It is not correct to contend, as done by Sri Bhat, that if the Explanation to s. 30(1) is understood in the manner the respondents want us to understand, a coparcener who dies undivided would leave a more valuable estate to his heirs than one who dies divided. In most cases, the share taken by a nissanthathi kavaru though limited to the duration of the life of the kavaru would be larger in extent than one as provided under sec. 7 (2) of the "Act". In the case of a share under the Aliyasanthana Act the kavaru takes his share on the basis of half-per capita, half per stirpes. Under sec. 7(2) the

share is determined on per capita basis. Quite clearly the object of bounty under section 7 (2) read with sec. 30 is the donee under the will of a deceased coparcener. The fact that divided members also do not get corresponding benefits under the "Act" is no relevant test. If Parliament wanted to enlarge the interest of divided male members nothing would have been easier than to enact a provision on the lines of sec. 14(1) of the "Act", provided Parliament had competence to do so. Further, the Explanation to section 30(1) speaks of "The interest of a Male Hindu" in his "kutumba" or "kavaru" propert
y. The

definite article 'the' evidently refers to the interest specified or quantified in some other provision of the "Act"; it could not refer to the unascertained interest of a coparcener in a kutumba. Obviously "the interest" referred to is the interest quantified under section 7 of the "Act" to which reference will be made in greater detail at a later stage.

(1) T. L. R. [1962] Mysore 225.

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Quite clearly, on the date of his death the first defendant was not a member of his kutumba or kavaru. As noticed earlier, he was already divided from the family. Further, his will did not relate to his interest in the kutumba or kavaru property. The will purported to bequeath the property obtained by him as his share as per the preliminary decree. Therefore, the contention that interest obtained by the first defendant under the preliminary, decree stood enlarged as a result of section 30(1) of the "Act" must fail."

The above statement of the law which meets the several contentions raised before us is in consonance with our own reading of the provision of the Madras Act and the Succession Act. The learned Advocate for the appellants, however, has tried to distinguish this case on the ground that the effect of s. 17 of the Succession Act was not considered in that case. In our view, that question was not relevant either in that case or in this case, because s. 17 of the Succession Act applies the provisions of ss. 8, 10, 15 and 23 which deal with intestacy, to Persons who would have been governed by the Marumakkattayam Law or Aliyasantana Law if the Succession Act had not been passed with the modifications provided therein. in this case also, as already stated, there is no kavaru of Chandayya Shetty and on separation he Succession Act while enlarging the right of an absolute interest did not specifically the right of the former. In the absence had only a life interest which is not a heritable property and cannot be disposed of by a will, nor could it devolve as on intestacy. Even the argument that under s. 7(2) Chandayya Shett's life interest has been enlarged into an absolute interest is equally untenable, because a male with a life interest under the Aliyasantana Law being in the same position as a female limited owner under the Hindu Law, the latter under s. 14 into provide for the enlarging of any such specific provision we can only hold that Chandayya Shetty's interest enured till his life time only.

In the result the judgment of the High Court is sustained, and the appeal dismissed but without,costs.

3.B.W. Appeal dismissed.

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