Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Sri Gajapathi Radhika Patta Maha Devi Garu v. *Sri Gajapathi Nilamani Patta Maha Devi Garu, and Sri Gajapathi Radika Patta Maha Devi Garu* v. *Sri Gajapathi Hari Khrishna Devi Garu, from Madras; delivered the 29th July*, 1870.

Present:

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL

THIS is an Appeal from a Decree of the High Court of Judicature at Madras.

The property which is the subject of litigation is called the Tekaly Talook. This property was acquired by purchase by one Pathmanaba, described hereafter as the common ancestor. A lady, described as his principal wife, by whom he had no issue, survived him. He left also two sons by different mothers. Between the elder of these sons, named Gopinada, and his father a quarrel of long-standing existed, which continued to the time of the death of the latter. Gopinada was at that time 36 years old; he did not live with his father and was absent at the time of his death.

The common ancestor left also a younger son named Khrishna who, at the death of his father, was a child about 7 years of age. This boy appears to have been treated by his father as legitimate. The legitimacy of both sons was doubted by the collector of the district, who, at the death of their father,

placed the above-described widow in possession of the Talook by way of a temporary arrangement for the management and protection of the family estate, and with a view to the interests of the Government, in the collection of the revenue.

The doubts about the legitimacy of these sons, which the collector entertained, may have had their origin in the nature of the marriages contracted by the common ancestor with their respective mothers, which were in the Gandharva form, and in the alleged difference of caste between the common ancestor and his wives the mothers of these sons. This irregularity was supposed by some persons to render the progeny of such marriages illegitimate.

Whatever was the origin, and whatever the weight of these doubts concerning the legitimacy of the sons, or of either of them, it is at least certain that they were grave enough to lead to the family arrangement about to be stated.

Supposing the sons, or either of them, to have been legitimate, the widow would have been entitled to maintenance only. Had both the sons been illegitimate, their claim, unless some special custom governed the case (which is not in proof), would have been to maintenance only. In this last-named case, the widow would have had the ordinary estate of a Hindoo widow.

As each son asserted his own legitimacy, and denied that of the other, the dispute, unless adjusted and settled amicably, would probably have led to litigation, and as the estate was already an embarrassed one, the collector, not without reason, represented such litigation as likely to involve the ruin of the family.

The management of the estate under the widow was not prosperous. The collector proposed to her to place the estate under the management of the elder son, of whom he appears to have entertained a favourable opinion. The widow is described as at enmity with the elder, and favourable to the younger son. The collectors advice, which was undoubtedly directed to the preservation of the family property, was adopted, and if reluctantly adopted, it was nevertheless acted on by the members of the family. The collector had advised a compromise, and in consequence of this advice and sugges-

tion, the lady addressed a petition to the collector dated the 26th November, 1838, which is set out in the third page of the case of the Appellant A, the sole Appellant before their Lordships.

In her petition she states that she has that day made a settlement, reconciled both her sons, and caused an interchange of agreement between them to the effect that they are equally entitled to the talook which belonged to her husband. Her petition then proceeds to state further terms of this arrangement, to the effect that the management should be held by Gopinada until Khrishna attained his majority; that on the younger attaining his majority, the elder should give up a moiety to the younger as his own, and retain a moiety for himself. It prays that the sale of the Zemindary may be stayed, and possession be given to Gopinada of the talook. The petition also contains a statement of the allowances to be made to herself and the sons, and of some minor matters not material to the decision of this Appeal.

This Agreement constituted the basis of the compromise suggested, it amounted to a family arrangement entered into for the preservation of the estate; and though the younger son was a minor at the time, he ratified it at full age, and became bound from its date by all its terms.

The construction and effect of this agreement will be afterwards considered.

The Agreement was acted upon until the younger son reached his majority. That was the period originally fixed for the actual division of the estate, and its separate possession in moieties. At that time, the actual division of the estate was judged by the sons to be inexpedient, and it was further postponed. Another document was at this time executed between the two sons, bearing date the 24th July, 1844. This document states that disputes existed between them respecting the ancestral property in cash, the division of the talook, and the accounts of receipts and disburse- of the talook. It states that they had addressed several Urzees (petitions) to the Collector, that he had explained to them the circumstances, and then it proceeds to state "the terms for our future guidance."

This document does not state any new compact or agreement to have been formed to vary the essential terms of the original compromise, but seems rather to have been designed as supplemental to it, and made with a view to carry out its provisions conformably to the Collector's explanations with such variations of detail as the convenience of the parties required. After stating certain inconveniences, which would result from an immediate division of the Talook, it provides "that the division should be postponed at present," but the reason assigned is to avoid the probability of loss from a present division. Consequent on that postponement it contains some provisions as to equality of rank and dignity between the sons, whilst the elder retained the ostensible headship, but it provides that the affairs of the talook or zemindary should be managed by both unanimously.

A document of this character between natives should not be construed narrowly, by a strict interpretation of the literal meaning of the words. Its object and general spirit are the best keys to the interpretation of language probably not very carefully studied.

The second clause of this document, if it were construed literally, would appear to give the talook, in the event of the death of the younger son, to such of the lawful widows as shall have male issue; but as such a disposition would at once contravene the ordinary rules of devolution of Hindoo property, and not be in accordance with the usages of Hindoos, and as there is no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers, is obviously inadmissible.

The document provides also that Khrishna after the death of his elder brother shall be recognized as the Zemindar of the whole talook.

This provision might take effect without any substantial alteration of the terms of the first agreement. It is consistent in its terms with a custom prevalent in some properties in this part of the country. The headship in such cases is constituted in one member of a family, whilst the beneficial enjoyment of the proceeds may be shared with the other members. It by no means follows, even from the

literal terms of that section, that either brother deliberately agreed to exclude his own male issue if he had any, as sharers, during the survivorship of the other brother. This clause contains a further provision, about which considerable doubt has been entertained, both as to the true translation of the words and its legal effect. This clause states an alternate contingent provision consequent on the failure of legitimate male issue by the widows of both sons; it provides that the talook shall be divided in equal shares, if there be sons born out of wedlock. This agreement further provides that 100 rupees a-month shall be paid out of the Zemindary to the family which shall have no title to the talook; but it contains no declaration of the cause of cesser of interest, so as to show in what event they thought such exclusion might arise. It is to be observed further that there is no express gift to illegitimate issue, and that the time of the division of the talook on that contingency is not defined.

The younger predeceased the elder son. The elder retained the headship and property of the family; there was no one entitled to dispute it with him, as Khrishna left no male issue, unless the family had been a divided one, in which case the widow of the latter would have been entitled to her husband's share. She does not appear to have preferred any claim to it during the elder son's lifetime; but no inference unfavourable to her subsequent claim should be drawn from that circumstance alone, as Hindu females are often ignorant of and unable to assert their rights.

On the death of the elder son, a dispute arose as to the possession. His widow was placed or preserved in possession of the estate. This step decided nothing as to her proprietary right. As the widow of the surviving brother, apparently the sole proprietor, she was rightly placed in possession.

Her title to retain and enjoy the sole possession and usufruct was disputed by the widow of Khrishna, who claimed a moiety as the widow of a deceased brother in a divided family. She preferred her suit numbered 72 of 1861, against the present Appellant, the widow of the elder son.

Another suit was brought about the same time by Hera Khrishna against the same Defendant, which suit is numbered 62 of 1861. The title was stated

to be as son of the last owner, the elder son. He claimed the whole property, stating his title either as a legitimate or as an illegitimate son, to be preferable to the alleged title of either widow.

In No. 72, the Plaintiff stated the property to be divided, and that allegation was one necessary to her reovery.

In No. 62, the Plaintiff declared the property to be joint, and to have become solely owned by his father by survivorship.

The Judge dismissed both suits.

Both Plaintiffs appealed to the High Court. The present Appellant, the original defendant in both suits, was Respondent in both Appeals.

The Appeals were allowed by the High Court, which reversed both Decrees below, and made a Decree declaring each widow and the son, Hera Khrishna, whom it found to be illegitimate, to be entitled in equal shares, together with any other illegitimate sons of either brother. It directed the suits to proceed as an administration suit, and directed inquiries as to the illegitimate issue. The result of this inquiry has been that, two other illegitimate sons having been reported to exist, the estate has been Decreed to be divided into five shares, to be enjoyed equally by the two widows and three illegitimate sons respectively.

From this Decree the widow of the elder son, the original Respondent in each suit, has alone appealed.

Much of the evidence which engaged the attenof both Courts below may be dismissed from the consideration of their Lordships.

The evidence as to the nature of the marriages, and the rules or laws of caste, together with the consideration of the effect on legitimacy of irregular marriages between persons of unequal caste, is in the view which their Lordships take of this case, unnecessary to be stated, or observed upon.

The litigation was confined to persons, all of whom claimed under the sons respectively. The estate was taken possession of, and enjoyed by these sons, under the compromise or family arrangement before stated. That compromise proceeded on the basis of legitimacy.

Whether both sons were legitimate, or only one legitimate, and to whichever of the two that status might really attach, was a question no longer

material to the consideration of the rights devolving to persons taking under that compromise and family settlement, by which the assumed was to be taken as the real state of the family.

The case of Abraham v. Abraham, shows that a family ceasing to be Hindus in religion, may still enjoy their property under the Hindu law; and the same principle is applicable, *inter se*, to the members of a Hindu family entering into possession of an estate under such a compromise as that which took place in this family.

The widow, though in one passage she terms the Zemindary her Zemindary, as in a certain sense it was, did not intend to convey, and did not in fact convey the property to the sons: she executed no deed nor instrument of gift whatever. Neither son admitted his illegitimacy, nor consented to take a gift on that admission. The widow accepted maintenance, and surrendered possession. Possession was taken by her sons, upon her abandonment of the estate; and this possession was taken also under their own agreement, which, as well as her petition which referred to it, proceeded on an acknowledgment common to all three of an antecedent right in both the sons whom she describes as "her sons." She had no estate entitling her to be an absolute donor, in any view of her position. Whatever effect this transaction might have as against heirs of the common ancestor, after the death of the widow, it bound her and the sons, and all claiming under them.

These instruments do not purport to give any new quality of descent to the talook, even if such quality were capable of being derived from the agreement of two or more owners. There is no evidence to show that the nature of the estate and its descendible character were meant to be affected by this transaction.

The case depends entirely on the construction of the petition and the agreements before referred to. The Talook itself is not the sole subject of the arrangement. A reference is made to one item—ancestral cash, as forming an element of dispute, and to other articles of property. The decision appealed against has given neither widow a preference over the other. In the opinion of their Lordships, the High Court erred in making the illegitimate sons sharers with the widows, and their Lordships

have now to consider the more difficult part of this case, whether the widow of the elder and surviving son has a title by survivorship to the whole Talook.

If this case could rightly be viewed as it was viewed in the Court of First Instance, as one governed by the ordinary presumption in Hindoo Law, that family property is joint, and by the ordinary law of the place where this Talook was situate, as to the devolution by survivorship under such failure of male issue as occurred in this case, the decision of it would be attended with no difficulty, and the Decree of the Court below dismissing the widow's suit would have to be restored; but, upon this subject, though not for the reasons assigned by the Judges of the High Court, their Lordships think such conclusion inadmissible.

The property was held under a family arrangement which silenced disputes, but contained no admission that such disputes were without foundation.

Neither son admitted that they were, *inter se*, antecedently heirs to each other in the then state of the family, nor admitted a right of succession of either to the other beyond that which this arrangement itself specifies.

It is not stipulated in terms that the property shall be enjoyed as that of a joint undivided Hindu family; nor is any succession by widows on the true construction of the instruments provided for. The documents in question contain terms some of which are consistent, and others inconsistent, with the rights to the possession, use, and enjoyment of undivided estate.

The first agreement contains in the first condition words that impart division and consequent management. This division is not in terms referred to a time subsequent to the commencement of the management spoken of. The next sentence clearly points, on the majority of the younger son, to an actual division and a possession in moieties. It provides for each son (the younger being a mere child) an equal present income by way of maintenance, and further, that each should pay out of his own income his own expenses of maintaining his own servants and relations; and by the last article it provides for an equal division from that time of such surplus as might exist after defraying all the out-

goings spoken of, which are to fall on the common money. These provisions are not such as would be applicable to a joint Hindu family property. On the other hand, it seems to have been supposed by both sons, that a survivorship by one would or might exclude the family of the other, and there are several other provisions which, though not absolutely inconsistent with mere managership, more resemble that of the constituted manager of a joint Hindu family.

The second agreement recites that disputes had arisen concerning the ancestral property in cash, the division of the talook, and the accounts of the receipts and disbursements of the talook: it proceeds to state that "the collector having sent for both of us to the nuzar, and communicated the circumstances to us, we understand the same; and the terms for our future guidance are hereunder specified." This language is certainly more consistent with disputes arising out of the existing arrangement than with a substitution for it by the sons alone, of their own authority, of some new terms of compromise. The disputes seem also to imply some precedent division of property constituting rights in a surplus after receipts and disbursements are accounted for. So far they are consistent with the provisions of the first agreement as to the division of any surplus. Again, the 5th Article, which relates to future debts; the 6th, which provides for the division of future surplus, profits of the Talook; and the 7th, which refers to a settlement in respect to the ancestral money and the money already acquired from the Talook, and implies a division of these funds, are all inconsistent with the hypothesis that the brothers were or considered themselves to be members of an undivided Hindu family.

Nothing is stated to show that the talook must be regulated by one law of succession and the rest of the property by another. It seems, therefore, to their Lordships, more proper to consider the provisions as to the talook as regulated by its peculiar nature, and influenced by the necessities of its proper management, and the maintenance of the dignity attached to it, rather than as furnishing alone the rule for the solution of the difficult question to be determined between the two widows.

The construction of these documents is beset with considerable doubt and difficulty, but their Lordships

are on the whole of opinion that although they postpone indefinitely the actual division of the talook by metes and bounds, and provide for its joint management, and, in certain events which have not happened, for its devolution otherwise than by the law which regulates the succession to separate property, they nevertheless contemplate its enjoyment in other respects by the two brothers as by members of a divided family, and the actual division of other family property. Their Lordships accordingly think that the finding of the High Court that the brothers were not members of a joint and undivided Hindu family must be taken to be correct. It follows that at least wherever the agreements have not specifically provided for the contrary—even assuming that they could so provide—the succession to this property must be governed by the law which governs the succession to separate estate. How, then, is the law which makes each widow succeed to her husband's share affected by the terms of the particular instruments?

Equality between the two widows is consonant to the expressed desire to maintain, as far as possible, equality between their respective husbands. The exclusion of widows by male legitimate issue, is an exclusion which would prevail equally in a divided, or undivided, family. The agreement provides, by language not apt nor correct, for the devolution on sons of lawful widows: in case one has male issue, and the others none, a preference is declared; but where each is childless, the agreements prefer neither. In such a case, then, the law alone can regulate the succession. The instruments do not support by any clear expression of intention, the claim of the widow of the elder son to exclude the other. There is no ground for confining the estates of the sons to life estates. The mortgage is inconsistent with that view. The provisions as to the possession of the talook alone, may refer merely to titular dignity, and ceremonial usage. The equal division between widows and illegitimate sons is not likely to have been conceived by the framers or advisers of this compromise.

Their Lordships will therefore recommend to Her Majesty that the Decree (or Decrees, if separate Decrees have been made in the two suits) of the High Court of the 22nd of April, 1865, be reversed,

and that in lieu thereof a Decree be made in Suit No. 62, of 1861, affirming the Decree of the Zillah Judge of the 13th of March, 1862, and dismissing the appeal therefrom to the High Court with costs; and that in Suit No. 72 of 1861 a Decree be made declaring that, according to the true construction of the agreements of the 26th November, 1838, and the 29th July, 1844, the widow of Gopinada, the Appellant, and the Respondent, the widow of Khrishna, upon the deaths of Gopinada and Khrishna without male issue, became entitled from and after the death of Gopinada, as Hindu widows, each to one moiety of the estate; and decreeing possession of the moiety claimed to the Respondent, Nilamani Patti, but without costs. The High Court, in executing Her Majesty's Order, must take all necessary steps to undo whatever may have been done under the Decree reversed inconsistent with the rights thus declared. Adverting to the difficulties occasioned by the instruments executed by the brothers, their Lordships think there should be no costs, as between the widows either in the Courts below, or here on appeal.

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