

*Judgment of the Lords of the Judicial  
Committee of the Privy Council upon the  
Appeal of Kattama Nauchear v. the Rajah of  
Shivagungah, from the Sudder Dewanny  
Adawlut at Madras; delivered 30th Novem-  
ber, 1863.*

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Present :

LORD JUSTICE KNIGHT BRUCE.

SIR EDWARD RYAN.

LORD JUSTICE TURNER.

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SIR LAWRENCE PEEL.

SIR JAMES W. COLVILE.

THE subject of this Appeal, and of the long litigation which has preceded it, is the Zemindary of Shivagungah, in the District of Madura and Presidency of Madras.

This Zemindary is said to have been created in the year 1730 by the then Nabob of the Carnatic, in favour of one Shasavarna, on the extinction of whose lineal descendants in 1801 it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the Nabobs of the Carnatic, and was granted by the Madras Government to a person whom we shall distinguish by one of his many names as Gaurivul-labha. He had an elder brother named Oya Taver, who predeceased him, dying in 1815. The Zemindar himself died on the 19th of July, 1829.

He had had seven wives, of whom three only survived him. Of the deceased wives the first had a daughter (since dead), who left a son named Vadooga Taver; the second had a daughter named Bootaka; the third had two daughters, Kota and Kauttama, the present Appellant; and the fourth was childless. The three surviving widows were

Unga Muttoo Nauchear, Purvata Nauchear, and Mootoo Veray Nauchear. Of these Purvata was enceinte at the time of her husband's death, and afterwards gave birth to a daughter named Sowmia. The two others were childless.

Oya Taver the brother left three sons, of whom the eldest was named Muttoo Vadooga.

The Zemindary is admitted to be in the nature of a Principality,—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject.

Hence if the Zemindar, at the time of his death, and his nephews were members of an undivided Hindu family, and the Zemindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the Zemindar, at the time of his death, was separate in estate from his brother's family, the Zemindary ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestable; but Gaurivullabha's widows and daughters have advanced a third, which is one of the principal matters in question in this Appeal. It is, that even if the late Zemindar continued to be generally undivided in estate with his brother's family, this Zemindary was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the Zemindary was to be treated as self-acquired separate property, or as part of the common family stock.

Whichever may have been the proper rule of succession, it is certain that, if not on the death of

Gaurivullabha, at least on the failure of his male issue, being demonstrated by the birth of his posthumous daughter, his nephew, Muttoo Vadooga Taver, obtained possession of the Zemindary. He seems to have set up an instrument which in the proceedings is called a will. On the Appellant's side this is treated as a forgery. The Respondent, denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title; and it may therefore be dismissed from consideration. Muttoo Vadooga obtained possession with the concurrence of various members of the family, and of Government and its officers, as is shown by the documents at pp. 62 and 63 of the Appendix. He afterwards obtained from the then three surviving widows the razeenamah, or agreement, set out at p. 64 of the Appendix. He continued in possession without litigation, if not without dispute, until his death, which took place on the 21st of July, 1831; and was then succeeded by his eldest son, Bodhaguru Sawmy Taver.

Soon after this event began the litigation concerning this property, which has now continued upwards of thirty years. Its history may be conveniently divided into three periods: the first beginning with the institution of Suit No. 4 of 1832, and ending with the Order of the Queen in Council in 1844; the second beginning from the date of that Order, and ending with the death of the widow, Unga Muttoo, on the 23rd of June, 1850; and the third being that which covers the proceedings which have been had since Unga Muttoo died.

The Suit No. 4 of 1832 was brought by Velli Nauchear, the daughter of Gaurivullabha by his first wife, on behalf of her infant son Muttoo Vadooga. It claimed the Zemindary for the infant by virtue of an Arzi said to have been sent to the Collector by Gaurivullabha in 1822, according to which the succession would be to the son of a daughter in preference to his widows, and *a fortiori* in preference to his brother's descendants. The defence to this suit insisted that the Zemindary had been granted to Gaurivullabha solely in consequence of his relationship to the former Zemindars, and was therefore to be treated as part of the undivided family estate, and, as such, descendible to the eldest of the male co-parceners in preference to any

descendant in the female line from Gaurivullabha. The reply did not raise any distinct issue as to the character of the family, whether divided or undivided, but insisted that the Zemindary was to be regarded as the self-acquired and separate property of Gaurivullabha, and ought to pass by virtue of the Arzi to the Plaintiff.

In 1833 two other suits were instituted against the Zemindar in possession. Of these that distinguished as No. 4 may be left out of consideration, inasmuch as the Plaintiff in it rested his title on an alleged adoption by Gaurivullabha, of which he failed to give satisfactory proof. Such a title, if established, would of course have been paramount to the claims of either the nephews or the widows.

No. 3 of 1833 is, however, the most important, with reference to this Appeal, of the three suits now under consideration. It was brought by Unga Mootoo, the fifth wife, and the elder of the three widows of Gaurivullabha. She set up an adoption, or *quasi* adoption, of Gaurivullabha, by the widow of the last Zemindar of the elder line, and treated this as the consideration, or a principal consideration, for the grant of the Zemindary made to him by the East India Company, and she insisted that Mootoo Vadooga Taver, on her husband's death, got possession of the Zemindary, of which she was the legal heiress, by means of the forged will. The defence to this suit, so far as it related to the title of the Zemindar in possession, was substantially the same as that made to the Suit No. 4 of 1832; but it also denied the alleged forgery of the will, and insisted on the razeenameh executed by Unga Mootoo and the other widows to Mootoo Vadooga Taver. In her reply Unga Mootoo did not raise any distinct issue as to the division or non-division of the family. She submitted, as an issue of fact, that the Zemindary had been acquired by the sole exertions and merits of her husband; and, as an issue of law, that what is acquired by a man, without employment of his patrimony, shall not be inherited by his brothers and co-heirs, but if he dies without male issue shall descend to his widows, his daughters, and parents, before going to his brothers or remoter collaterals.

These three suits were all dismissed by the Provincial Court. We have not the Decree or Decrees

of dismissal, but it seems probable that they were heard and disposed of together. It also appears that, although there was not in any of them a distinct issue, whether Gaurivullabha and his nephews were or were not an undivided Hindu family, some evidence was given in the Suit No. 4 of 1832 to show that he and his brother were separate in estate. There was an Appeal in each of the three suits, and these were heard together, and disposed of by the Decree of the Sudder Court, which is set out at p. 270 of the Appendix. That Decree dismissed No. 4 of 1833 on the ground that the Plaintiff had failed to prove his alleged adoption by Gaurivullabha, and it dismissed No. 4 of 1832 on the ground that the succession to the Zemindary was governed by the general Hindu law, and not by any particular or customary canon of descent; so that, if descendible as separate estate, it would go to the widows of Gaurivullabha in preference of a grandson by a daughter. In the Suit No. 3 of 1832 it decided, first, that as a matter of fact the Zemindary was the self-acquired and separate property of Gaurivullabha: secondly, that according to the opinion of the Pundits whom it had consulted, the rule of succession to the Zemindary, though self-acquired, would depend on the fact whether the brothers had or had not divided their ancestral estate; that in the former case it would belong to the widow, and in the latter to the nephew; thirdly, that upon the whole evidence the brothers must be taken to have divided their ancestral property; and lastly, that the Plaintiff Unga Mootoo was entitled to recover the Zemindary, not having forfeited her rights by the execution of the razeenameh.

Against this Decree the Zemindar then in possession appealed to Her Majesty in Council. The Order made on that Appeal on the 19th of June, 1844, was that the Decree of the Sudder Court should be reversed, with liberty to the Respondent, Unga Mootoo, to bring a fresh suit, notwithstanding the Decree of the Provincial Court, at any time within three years from the filing of that Order in the Sudder Dewanny Adawlut. The grounds on which their Lordships who recommended this Order proceeded were, as appears from the Judgment delivered by Dr. Lushington, that the Sudder Court had miscarried in deciding the question of division, which

was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the Respondent ought to be allowed to remedy the omission in a new suit. And their Lordships added, that though they could make no Order on the subject, it would be exceedingly desirable that it should be known to all those who were interested in the property that the question of division or non-division appeared to be the only point on which the main question of title to the property would ultimately depend.

On the 20th of August, 1845, Unga Mootoo commenced her second suit in *formá pauperis*. In the interim Bodhaguru Taver had died, and the Zemindary had passed to his brother Gaurivullabha, the father of the Respondent, and he with a younger brother were the Defendants to the new suit. In her plaint the widow, after stating the pedigree of the family, some of the former proceedings, and the desire of Velu Nachyar, the widow of the last Zemindar of the elder line, to make Gaurivullabha, the first of that name whom we have mentioned, her successor, proceeds to allege that with that object she had caused him and his elder brother Oya Taver to make a partition of their ancestral property as early as the year 1792. The Plaintiff then excuses her omission to plead this fact in the previous suit by saying that she had been advised it was only necessary for her to show that her husband had been adapted by Velu Nachyar, and that the Zemindary was his self-acquisition. She then proceeds to allege that on the death of Velu Nachyar he actually became Zemindar until he was dispossessed by the usurpers; on whose defeat and destruction by the East India Company he was again put into possession under their grant. She also in this suit makes the alternative case that even if no partition of their ancestral property took place between Gaurivullabha and his brother Oya, she, as the eldest widow, was entitled to the Zemindary, as a separate acquisition, in preference to that brother's descendants, and pleads the decision in what is called the Sandayar case, to prove that such is the Hindu law, and that the opinion given in the former case by the Pundits to the contrary was erroneous.

In his answer the first and principal Defendant recapitulated the several facts relied upon by Bod-

haguru in the former suit as constituting his title. He insisted that by the decision of the Privy Council the contest was narrowed to the issue whether the brothers were undivided in estate or not, and that the Plaintiff should have rested her claim on that issue. He contended that there had been no partition. The points recorded in the suit (Appendix, p. 24), are thus somewhat vaguely stated:—

“The Plaintiff to prove, by means of documents and witnesses, that division took place in 1792. As the defence is but a denial of this circumstance, the Defendant cannot be called upon to establish the negative side by direct proof. But the Defendant will have to prove the points mentioned in paragraphs 2 to 5 of the answer; and he is required to use, if possible, strong arguments against the points particularly spoken of by the Plaintiff.”

A large body of evidence is in fact given by each side on the question of division or non-division. The case was heard by the Zillah Judge, Mr. Baynes, whose Decree, dated the 27th of December, 1847, is at page 143 of the Appendix. The effect of it was that the only question really open between the parties was that of division or non-division; that the Plaintiff had failed to prove the partition between Gaurivullabha and his brother Oya; and that her suit must be dismissed with costs.

Against this Decree, and on the 6th of April, 1848, Unga Mootoo appealed to the Sudder Court. The Defendant Gaurivullabha then died, and his infant son, the present Respondent, came in, and on the 5th of November, 1849, filed an answer to the Appeal. Before the Appeal was heard, and on the 24th of June, 1850, Unga Mootoo also died, and with her death ended the second stage of this long litigation.

On the death of Unga Mootoo the Court seems to have issued a notice in the form ordinarily used on the abatement of an Appeal by the death of the Appellant, calling upon the heirs of the deceased to come forward and prosecute the suit. This form of notice, it is obvious, was not strictly applicable to a case like the present, where, upon the death of a Hindu widow, the right of action formerly vested in her devolves not upon *her* heirs, but upon the next heirs of her husband; and to this circumstance may be traced some of the confusion which is observable

in the subsequent proceedings. Such as it was, however, the notice brought into the field three sets of claimants. The first consisted of Boothaka Nauchear, the daughter of Gaurivullabha by his second wife, and Kota and the present Appellant, his daughters by his third wife. They claimed as the rightful heirs of the Zemindary, if it passed as separate property, next in succession to the widow Unga Mootoo; but considering its impartible nature, they expressed their willingness that it should be enjoyed first by Boothaka for her life, next by Kota for her life, and lastly by the Appellant. They treated Sowmia, the daughter by the sixth wife, as excluded from the succession by reason of her marriage with Bodhaguru, and of her being then a childless widow.

Sowmia, however, came forward by a separate petition, claiming to be heiress both to Unga Mootoo and the Zemindary, by virtue of an instrument alleged to have been executed by Unga Mootoo in her lifetime.

A third claimant was Mootoo Vadooga, the Plaintiff in the dismissed suit of 1832. His contention was that though the Decree in that suit may have been right in preferring to his claim that of Unga Mootoo, his title as grandson was nevertheless preferable to that of daughters, and that on the death of the widow he became entitled to the Zemindary.

Counter-petitions were filed on behalf of the Respondent, objecting to the revival of the Appeal by any of these claimants; and it is observable that he then insisted that they ought to be compelled to bring fresh suits for the trial of their alleged rights, in order to give him the means of alleging and proving certain special matters of defence against them, of which he would not have the benefit in the suit of Unga Mootoo.

The Sudder Court, in dealing with these claims to prosecute the Appeal, has made three different and inconsistent orders.

By the first, dated 21st October, 1850 (Appendix, p. 290), it held that none of the claimants could prosecute the Appeal, which it directed to be removed from the file, but left any of them at liberty to bring a new action to enforce their respective claims, provided it was commenced before the 30th of April, 1851.



They all petitioned for a review of this Order ; counter-petitions were filed on behalf of the Respondent ; and the Court, by its Order of the 1st of May, 1851, notwithstanding an adverse opinion given by its Pundits on the 7th of March preceding, reversed its former Order, and directed the Appeal to be replaced on the file, and the several claimants to be made supplemental Appellants ; resolving to hear the Appeal, and, if it should be sustained, to determine the mode in which their rights as against each other and the Defendant should be tried.

On the 19th of April, 1852, the Court, apparently of its own mere motion on taking up the record of the Appeal, reversed this Order of the 1st of May, 1851, and ruled that the several claimants could not be heard on the Appeal, but might prosecute their respective rights in the Court of First Instance, which Court was to be guided in the admission and hearing of their claims by the regulations in force, and the Appeal was again removed from the file.

Thereupon the Respondent shifted his ground, and by a petition dated the 30th of June, 1852, objected to the last Order and prayed for a review of it. His contention then was, that the heirs next in succession to Unga Mootoo, according to that course of succession, might have been admitted to carry on the Appeal, and that it was a hardship on him to have to litigate his title with them in a new suit. The Court, however, by its proceeding of the 16th of September, 1852, adhered to its Order, giving at the same time a not very intelligible explanation of it.

Of the three daughters of Gaurivullabha who joined in the first of the above-mentioned applications to the Sudder Court, the Appellant alone brought a fresh suit. The plaint was not filed until the 5th of December, 1856, but there seem to have been various intermediate proceedings before both the Zillah and Sudder Courts. These are referred to in the Appellant's Petition of Appeal at page 260 of the Appendix, line 51, but are nowhere stated in detail. Her plaint stated that her father and his brother Oya Taver were divided in estate prior to 1801, and were then living separately ; that the Zemindary was granted exclusively to the former, and was therefore his self-

acquisition, and enjoyed by him in exclusion of his brother.

The Appellant's title in succession to Unga Mootoo is thus stated:—"The Zemindary, which is the self-acquisition of the Plaintiff's father after his division with Oya Taver, belongs on the death of his widow Unga Mootoo to his second daughter the Plaintiff, who has male and female issue: whilst his first daughter Bootaka has no issue, and the third daughter Sowmia is a widow." In the seventh paragraph (Appendix, p. 251), (though the point is not taken so distinctly as in the suit of Unga Mootoo) she claims the Zemindary as her father's self-acquisition irrespectively of the alleged partition with his brother, and the question of division.

The answer took a formal objection to the suit, viz., that it was brought against the guardian of the infant Zemindar, and not, as it ought to have been, against the infant jointly with his guardian. It also insisted on the Regulation of Limitation and the Decree of the 17th of December, 1847, as bars to the Appellant's claim. It further impeached her title as the heir next in succession to Unga Mootoo in that line of succession, alleging that there were descendants of Gaurivullabha through his elder widows, and it again pleaded many of the facts put in issue in the suit of 1845 as constituting the title of the infant Zemindar. The estate being then in the custody of the Court of Wards, the Collector was made a Defendant, and put in a similar answer. Replies and rejoinders were filed; but without settling any issues or taking any evidence in the cause, the Zillah Judge (Mr. Cotton) on the 25th of August, 1859, dismissed the suit, together with the Suit No. 4 of 1857, which had been instituted by Sowmia, but with which we have no concern. His reasons for dismissing the Appellant's suit were:—first, that upon the question of division she was concluded by the Decree of 1847, which he treated as a Judgment *in rem*, made final by the removal of the Appeal from the file; and, secondly, that it was clear upon the opinions of the Pundits, that the Zemindary, whether self-acquired or not, could not descend to the widow, nor, *à fortiori*, to a daughter, except in the event of the Zemindar having been of a divided family.

The Appellant appealed from this decision to the

Sudder Court, praying that the suit might be remanded for adjudication on the merits. Her Appeal was dismissed by a Decree dated the 5th of November, 1859. The Sudder Court seems also to have considered that by the dropping of the Appeal on Unga Mootoo's death the Decree of 1847 had become final, and, as such, was an effectual bar to the Appellant's claim. On the 3rd of March, 1860, the Sudder Court refused to give the Appellant leave to appeal to Her Majesty in Council; but special leave was afterwards given on the recommendation of the Committee.

The present Appeal is against the Decree of the Sudder Court of the 5th of November, 1859, and its Order of the 3rd of March, 1860, and the Decree of the 25th of August, 1859. It is also against the Order of the Sudder Court of 1852, and the Decree of the Civil Court of Madura of the 27th December, 1847. If, therefore, the latter Decree is in truth a bar to the Appellant's obtaining effectual relief in her original suit, the Appeal seeks by re-opening that Decree to remove the bar.

And here, before going further, their Lordships deem it right to remark shortly upon the extraordinary doctrine touching this Decree which was propounded by the Zillah Judge when dismissing the suit of 1856; because if unnoticed here, as it seems to have been unnoticed by the Sudder Court, it may find acceptance with other unprofessional Judges, and embarrass the course of justice in India. Their Lordships would otherwise think it unnecessary to observe that a Judgment is not a Judgment *in rem*, because in a suit by A for the recovery of an estate from B it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular Judgment was nothing but a Judgment *inter partes*; and the only question which could properly arise concerning it in the suit of 1856 was to what extent, as such, it was binding on the Appellant.

Their Lordships also feel constrained to observe that the various proceedings which have taken place since Unga Mootoo's death have signally failed to do justice between the parties, or to dispose of the matters in dispute between them by anything approaching to a regular course of trial and adjudication. When Unga Mootoo died the Decree of

1847 was not a final Decree. An Appeal was pending against it. Either it was binding upon those who in the event of her title being a good one would succeed to the Zemindary, or it was not. Those persons were obviously not her heirs, but the next heirs of her husband according to the canon of Hindu law, which defines the succession to separate estate. It ought not, their Lordships conceive, to have been a difficult matter to ascertain the persons answering to this description. If the Decree were in its nature binding on them, they, when ascertained, ought to have been allowed to prosecute the Appeal. If the Decree were not binding upon them, it ought not to have been treated as an obstacle to the full trial and adjudication of their rights in an original suit. The Sudder Court, however, after making two other and inconsistent orders, referred the parties to an original suit; and yet a suit of that nature when brought by the Appellant has been since disposed of against her summarily, and without taking evidence, on the ground that the main and essential issue in it was concluded by the Decree of 1847. Therefore she has fallen, so to speak, between two stools. She has had neither the benefit of the Appeal against the Decree of 1847, nor a fair trial of her right in a new suit.

It has been ingeniously argued here that for this result the Appellant is herself solely responsible; that the suit which she ought to have brought, and which the Sudder Court intended her to bring, was one in the nature of a bill of revivor, or a bill of revivor and supplement, limited to the object of obtaining from the Zillah Court a declaration that she had established her title to stand in the place of Unga Mootoo, and carry on the former suit. Whether the procedure of the Courts of the East India Company admitted of such a suit (and no precedent of one has been produced), their Lordships are not prepared to say. But they have a very strong and clear opinion that such was not the nature of the suit which the Sudder Court had in its contemplation when it made its Order of 1852. The omission to reserve the hearing of this Appeal until the determination of the new suit; its removal from the file, which seems to be tantamount to its dismissal for want of prosecution, and has been so treated in these proceedings; the contention of the Respon-

dent himself in his counter-petitions filed in opposition to the first applications for leave to prosecute the Appeal,—all point to the conclusion that the new and original suit intended was one in which the whole title of the claimants should be again pleaded and litigated.

The subsequent and obscure Order of the 16th of September, 1852 (Appendix, p. 248) is hardly inconsistent with this, though it seems to contemplate that the Decree of 1847 might prove an effectual bar to the suit which the Court itself had directed. Yet if there was ground for this apprehension, in what a position had the Sudder Court placed the claimants? It had denied to them the power of prosecuting the Appeal; it had thereby made final that which was not in its nature final; and having thus tied their hands, it sent them to wage a contest in a new suit in which, so bound, they could not but fail. If, therefore, the Decree of 1847, when final, was binding on the claimants, the Sudder Court ought either to have dealt with the Appeal on the merits, or it ought to have declared the claimants at liberty to bring and prosecute the new suit, notwithstanding that Decree.

In either view of the case, therefore, there was a grave miscarriage of justice in the earliest Order of the Sudder Court which is appealed against, viz., that of the 19th of April, 1852.

It seems, however, to be necessary, in order to determine the mode in which this Appeal ought to be disposed of, to consider the question whether the Decree of 1847, if it had become final in Unga Mootoo's lifetime, would have bound those claiming the Zemindary in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that Decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Unga Mootoo. For assuming her to be entitled to the Zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in

the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a Decree fairly and properly obtained against the widow.

But, then, assuming that the succeeding heirs would be so bound, it was strongly insisted on the part of the Respondent that this Committee can do no more than remand the cause, with directions to the Sudder Court to hear and determine the Appeal against the Decree of 1847; that it cannot itself deal with the merits of a Decree of a Zillah Court, until they have been determined by the Appellate Court. Their Lordships, however, are not of that opinion. The Appeal was ripe for hearing by the Sudder Court. Their Lordships have before them all the materials for a decision upon the merits, which have been fully argued before them. They conceive, therefore, that they are not bound to yield to this technical objection. On the contrary, they think that it is competent to them to advise Her Majesty to make the Order which the Sudder Court ought to have made in 1852, and that it is their duty to do so.

The substantial contest between the Appellant and the Respondent is, as it was between Unga Mootoo and the Respondent's predecessors, whether the Zemindary ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions:—

1. Were Gaurivallabha and his brother undivided in estate, or had a partition taken place between them?

2. If they were undivided, was the Zemindary the self-acquired and separate property of Gaurivullabha? And if so—

3. What is the course of succession according to the Hindu law of the south of India of such an acquisition, where the family is in other respects an undivided family?

Upon the first question their Lordships are not prepared to disturb the finding of Mr. Baynes in the Decree of 1847. There are undoubtedly strong reasons for concluding that Gaurivullabha and his

brother, after the acquisition by the former of the Zemindary, lived very much as if they were separate. But this circumstance is not necessarily inconsistent with the theory of non-division, if, as was likely, the family and undivided property was very inconsiderable in comparison of the separately-enjoyed Zemindary. And Unga Mootoo, having admitted that the brothers had been joint in estate, and alleged a partition at a particular place and time, took upon herself the burthen of proving that partition; a burthen from which it must be admitted she has not satisfactorily relieved herself. Nor can their Lordships in considering this question be unmindful of the presumption which arises from the lateness of the period at which the allegation of division was first made: and from the silence of the parties in the suits of 1832 and 1833, as well as in the suit of 1823, which is mentioned in these proceedings, upon the subject of a partition which, if it had ever taken place, must have been in the knowledge of all the members of the family.

The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the Zemindary as the self-acquired property of Gaurivullabha. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the Zemindars of the former line does not, their Lordships apprehend, bring this case within the rule cited from Strange's "Hindu Law" by Sir Hugh Cairns.

The third question is one of nicety and of some difficulty. The conclusion which the Courts in India have arrived at upon it, is founded upon the opinion of the Pundits, and upon authorities referred to by them. We shall presently examine those opinions and authorities; but before doing so, it will be well to consider more fully the law of inheritance as it prevails at Madras and throughout the southern parts of India, and the principles on which it rests and by which it is governed. The law which governs questions of inheritance in these parts of India is to be found in the *Mitacshará*, and in chapter 2, section 1, of that work the right of widows to inherit in default of male issue is fully considered and discussed.

The Mitacshára purports to be a commentary upon the earlier institutes of Yaynawulkya; and the section in question begins by citing a text from that work, which affirms in general terms the right of the widow to inherit on the failure of male issue. But then the author of the Mitacshára refers to various authorities which are apparently in conflict with the doctrines of Yaynawulkya, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favour of widows; and, consequently, that in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that because widows take the whole estates of their husbands when they have been separated from, and not subsequently re-united with, their coheirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be observed, in the first place, that the general course



of descent of separate property according to the Hindu law is not disputed. It is admitted that, according to that law, such property descends to widows in default of male issue. It is upon the Respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of the law. The way in which this is attempted to be done, is by showing a general state of co-parcenaryship as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of co-parcenaryship, this proof, or absence of proof, cannot alter the case, unless it be also the law that there cannot be property belonging to a member of a united Hindu family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle. That two courses of descent may obtain on a part division of joint property, is apparent from a passage in Macnaghten's "Hindoo Law," title "Partition," vol. i, page 53, where it is said as follows: "According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property. In other words if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

Again, it is not pretended that on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequences; the sons taking their father's share in the ancestral property subject to all the rights of the co-parceners in that property, and his self-acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it

is clear, therefore, that according to the Hindu law there need not be unity of heirship.

But to look more closely into the Hindu law. When property belonging in common to a united Hindu family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the same rule apply to property which from its first acquisition has always been separate? We have seen from the passage already quoted from Macnaghten's "Hindu Law," that where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In other words the law of succession follows the nature of the property and of the interest in it.

Again, there are two principles on which the rule of succession according to the Hindu law appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands, dying separated from their kindred, on the first of these principles (1 Strange, 135). But some ancient authorities also invoke the other principle. Vrihaspati (3 Dig. 458, tit. ccxcix; see also Sir William Jones' paper cited 2 Strange, 250) says: "Of him whose wife is not deceased half the body survives; how should another take the property while half the body of the owner lives?" Now if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate. For it is upon this principle that she is preferred to his divided brothers in the succession to a separate estate. But it is perfectly intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should override the widow's right of succession, whether based upon the spiritual doctrine or upon the doctrine of survivorship. It is, therefore, on the principle of survivorship that the qualifica-

tion of the widow's right established by the Mitacshará, whatever be its extent, must be taken to depend. If this be so, we can hardly in a doubtful case, and in the absence of positive authority, extend the rule beyond the reasons for it. According to the principles of Hindu law there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to inherit it to any superior right of the coparceners in the undivided property.

Again, the theory which would restrict the preference of the co-parceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir Thomas Strange, are so intimately connected that they may almost be said to be blended together; and it is surely not consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. We may further observe that the view which we have thus indicated of the Hindu law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience.

A case may be put of a Hindu being a member of a united family having common property, and being himself possessed also of separate property. He may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But if the rule contended for were to prevail, he could not effect his first object without insisting on the partition, which, *ex hypothesi*, he is anxious to avoid.

The case standing thus upon principle, we proceed

to consider the opinions of the Pundits and the authorities referred to by them.

The case appears to have been referred to the Pundits on several occasions. The first of these references was made by the Zillah Court in 1833, in the suit No. 4 of 1832. The answer of the Pundits bears date the 28th of October in that year, and is at pages 311 and 312 of the Appendix. It is unnecessary, however, to examine this particularly, since whatever is there laid down is included in the fuller statements which will be next considered.

These fuller statements were made by the same Pundits in answer to references directed by the Sudder Court before making the Decree of the 17th of April, 1837. The answers are dated the 28th of December, 1836, and the 16th of January, 1837, and are at pages 141 and 272 of the Appendix.

On examining the reasons on which the Pundits rest their opinions, it is to be observed that they proceed upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from Vrihaspati and as to the text in the Mitacshará to which they refer; but they leave untouched the question which they ought to have considered, whether these authorities do or do not affect this particular case. What we have already said as to the text from the Mitacshará, and what we shall presently say as to the passages from Vrihaspati, is, we think, a sufficient answer to this part of the reasons on which the Pundits found their opinion. Then, again, they point to the distinction between obstructed and non-obstructed heritage; and because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled.

But the whole of this last argument seems to be founded on the passages in the Mitacshará contained in clauses 2 and 3 of section 1, chapter 1; and these passages, when examined, clearly appear to be mere definitions of "obstructed" and "non-obstructed heritage," and to have no bearing upon the relative rights of those who take in default of male issue. If, indeed, the argument which the Pundits have raised upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case.

It remains, then, to consider the authorities on which the Pundits rely in support of their opinions. They consist of the text from the *Mitacshára*, to which we have already so frequently referred, and of passages from *Vrihaspati* and several other commentators on the Hindu law. We have already intimated our opinion that the text from the *Mitacshára* does not apply to this case, and as to the passages from the commentators they are all of equivocal import. They may or may not have been intended to apply to a case like the present, and if there was nothing more to be found upon the subject they might or might not be thought sufficient to warrant the opinion which the Pundits have founded upon them; but these passages seem to be the same passages, or passages similar to those, which were brought forward before the time of the *Mitacshára*, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from *Nareda*. These authorities failed when contrasted with conflicting passages in the works of other commentators, of which the Pundits in this case have taken no notice, to negative the right of the widow where the property was wholly separate; and as they have failed to this extent, we cannot but think that the Pundits in this case have gone much too far in bringing them forward as uncontradicted authorities in favour of the opinion which they have formed that the widows are not, in this case, entitled to the separately acquired property. It seems to us, too, that the decision in the *Sandayar* case—a decision also founded on the opinion of the Pundits of the *Sudder Court*—is wholly at variance with the opinion of the Pundits in the present case. Whether the Pundits in that case were or were not right in the opinion that the *Zemindary* became the separate property of the uncle by the transaction between him and his nephew, it is quite unnecessary to consider. All that is important to be considered is, that holding the *Zemindary* to have become the separate property of the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that opinion. The Pundits, in the present case, attempt to reconcile the conclusions at which they have arrived with the opinion given by the Pundits in the *Sandayar* case, by assuming that the

Pundits in that case proceeded upon an idea that the descendants of the common ancestor had been separated, but we see no foundation whatever for that assumption. On the contrary, the facts of the case seem to us to negative it. If, indeed, there had been any such separation, we do not see how there could have been any question as to the rights of the widows.

The case therefore stands thus upon the authorities. On the one hand, we have the opinions of the Pundits in this case, which seem never to have been acted upon by any *final* Decree. On the other hand, we have the decision in the Sandayar case, and the other authorities cited for the Appellants at the Bar, particularly the passage from Menu, in Sir William Jones' paper, given at 2 Strange, page 250, and the opinion of the Pundit Kistnamachary (2 Strange, p. 231), the latter and material portion of which is not open to the objection taken to the passage which precedes it by Messrs. Colebrooke and Dorin.

In this state of things their Lordships cannot but come to the conclusion that the balance of authority, as well as the weight of principle, is in favour of the Appellant's contention.

We proceed, then, to consider how the Sudder Court ought to have dealt with this case after Unga Mootoo's death, and we are of opinion that that Court ought, upon the applications made by the different parties claiming to prosecute the Appeal, to have determined which of the parties was so entitled. We are of opinion that Sowmia and the grandson were not so entitled, and that their claims therefore ought at once to have been dismissed. The claims of the Appellant and her two sisters were founded on a right common to them as against the Respondent; and we think that the Court ought to have held them entitled to prosecute the Appeal without prejudice to their rights *inter se*, founded upon the agreement which appears to have been entered into between them. It would then have been open to the Court to decide the case upon the merits; and upon the merits we are of opinion, for the reasons above given, that the Appellant and her sisters were well entitled to the Zemindary as against the Respondent. We have, of course, not failed to consider the Judgment

of this Committee in 1844. Nor have we failed to observe that, in a recent edition of his Treatise on the Hindu Law of Inheritance, Mr. Strange, one of the Judges of the Sudder Court of Madras, has expressed an opinion adverse to the conclusion at which we have arrived. But we think it probable that the case was not so fully discussed and examined in 1844 as it has been on the present hearing; and, at all events, we do not feel ourselves justified in holding the Appellant bound by the opinion which was then expressed; which, though of course entitled to the greatest possible respect, was not necessary to the decision then arrived at. And as to the opinion expressed by Mr. Strange, it seems to rest upon the opinions of the Pundits, and the proceedings of the Courts which we have now been called upon to review. If that opinion had been supported by a uniform course of decisions, we should perhaps have felt some difficulty in contravening it; but as the case stands upon the authorities, we feel bound to give effect to the conclusion at which we have arrived.

We shall therefore humbly recommend Her Majesty to reverse the Decrees and Orders complained of by this Appeal; to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the Sudder Court, ought to have been and ought to be dismissed; and in the suit of 1845 to declare that Sowmia and Mootoo Vadooga were not, nor was either of them, but that the Appellant and her sisters were, as against the Respondent, entitled to prosecute the Appeal, and to recover the Zemindary—this declaration to be without prejudice to the rights of the Appellant and her sisters *inter se*; and, further, to declare that an account ought to have been and ought to be directed of the rents and profits of the Zemindary received by the Respondents, or by his order, or for his use, since the death of Unga Mootoo, with directions for payment to the parties entitled of what should be found due upon the account; and also to declare that the Zemindary ought at once to be put into the hands of the Collector, or of a Receiver to be appointed by the Court, with liberty to the Appellant and her sisters, or any of them, to apply to the Court as they may be advised. We shall further recommend that the

case be remitted to the Sudder Court, with directions to carry these declarations into effect ; but we shall not recommend that any costs be given of the suit of 1856, or of this Appeal, or of any of the proceedings below. But any costs to which the Appellant has been subjected must be refunded.

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