Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sri Gajapathi Nilamani Patta Maha Devi Garu v. *Sri Gajapathi Radhamani Patta Maha Devi Garu, from the High Court of Judicature at Madras; delivered 3rd July* 1877.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.

THIS is an unfortunate case, inasmuch as, though reduced to a question of the interest of two Hindoo widows in that which seems to be an inconsiderable estate, it now comes for the third time before this tribunal.

It is not necessary to go at any length into the earlier history of the case. It is sufficient to say that the litigation arose out of the construction to be given to the document constituting a certain family arrangement by which Gopinadha and Krishna, the two sons of one Padmanabha, had held the talook Tekkali. Each of these sons appears to have questioned at one time the legitimacy of the other, but ultimately their disputes were settled by this family arrangement, and after the death of the surviving brother, Gopinadha, his widow took exclusive possession of the whole talook. The question then arose whether she was entitled to hold that possession, one of the widows of Krishna claiming his share, and certain illegitimate sons of the two brothers also claiming to share in the estate. The construction of the document came before the courts in India,

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and the High Court of Madras, dealing chiefly with this clause of it: "If the legal widows "of both of them should have no male issue, "and if there be any sons born out of wed- "lock, the talook shall be divided in equal "shares," declared that on the true construction of the agreement the estate was to be equally divided between the wives and the sons born in concubinage, and remanded the suit to be treated as a suit for the administration of an estate, directing the Civil Judge to inquire who were the parties "entitled on the construction "aforesaid, and to make the parties to the "present suit and to Regular Appeal 26 of "1862, and all other claimants, parties to that "inquiry."

The case went down upon that remand, and the present Respondent having come in and claimed to be a widow of the younger son, Krishna, the Civil Court found that the estate was to be divided into five equal portions, one of which was to be given to the possession of each claimant, those claimants being the two illegitimate sons, the two widows who had been parties to the previous litigation, and the widow Radhamani, who had come in in order to establish her title upon the inquiry.

Immediately after the passing of that order the Appeal to Her Majesty in Council appears to have been allowed, and it came on in due course in the year 1870, and this Committee, putting a different construction upon the family arrangement, and in particular on the clause which has been read, ordered that the decree of the High Court should be reversed and "a "decree made declaring that, according to the "true construction of the agreements of the "26th November 1838 and 29th July 1844, "the widow of Gopinadha, the Appellant, "and the Respondent, the widow of Krishna,

" upon the deaths of Gopinadha and Krishna
" without male issue, became entitled from
" and after the death of Gopinadha as Hindoo
" widows, each to one moiety of the estate;
" and decreeing possession of the moiety
" claimed to the Respondent, Nilamani Patti,
" but without costs." In the course of that judgment, which was delivered by Lord Cairns, it was observed, "The result of this inquiry," that is, the inquiry directed by the High Court, "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." The inaccuracy in this statement may be accounted for by the fact that the order of the Civil Judge, which was all that appeared on one of the records, does not specify who the five claimants were. It is true that in another of the records, there being altogether three, it appeared more distinctly from the judgment of the Civil Judge, upon which his order was made, that he had found there were not three illegitimate sons and two widows, but three widows and two illegitimate sons. The Committee, however, was not set right at the time by the counsel on the appeal, who were probably equally deceived, and thought that the effect of the Judge's order was correctly stated.

In that state of things the first order of Her Majesty went out to India to be executed. Difficulties then arose, and the execution of part of the order was suspended until the widow Radhamani, who may be called the junior widow of Krishna, should have applied to this Board in order to have any misapprehension concerning the effect of the first order of Her Majesty corrected. That application was opposed by the other widow, Nilamani. The rights of the widow of

Gopinadha had been finally determined, and she had disappeared from the litigation. Their Lordships report to Her Majesty on this application was in these terms: "Their Lordships being of opinion "that the Respondent Nilamani Maha Devi "represented in these Appeals not only her own "interest but also the interest of all the lawful "Hindoo widows (if more than one) of Krishna, "and that the order of Your Majesty of the "9th August 1870, declaring the title of "Nilamani as Hindoo widow to the moiety of "the estate, was an order enuring to the benefit "of any other (if there should be found to be "any other) such lawful widow, and that the "High Court, executing the said order, ought "to have taken and ought now to take all "necessary steps to give to the petitioner (if "one of such lawful widows of Krishna) such "share, interest, or other benefit as under the "law applicable to the case she would have "been entitled to as such widow, along with "Nilamani, of, in, or out of the one moiety of "the said estate and the profits thereof, do "not think fit to advise Your Majesty to make "any further order in the present petition." This report was confirmed by an Order in Council of the 3rd of March 1873; and the case then went back, and the High Court having to execute the original order of Her Majesty, as explained by this subsequent order, made the order of the 11th March 1874, which is the subject of the present Appeal.

Before consideing the particular terms of that order it may be desirable to see what are the objections that were taken to it in India, and at their Lordships' bar. It was contended that the High Court was in error in treating as an ascertained fact that Radhamani was a widow, in the proper sense of the term, of Krishna, and that it ought to have directed an issue in order to

ascertain whether she was the lawful widow of Krishna or whether her connexion with him was only by means of a Gandharva marriage, which would not be a valid marriage according to Hindoo law. The other point was, that assuming her to be a widow she was only a junior widow, and therefore, under the Hindoo law, was only entitled to maintenance. Hence the two points raised in the Court below, and the two principal points now raised before their Lordships, concern, first, the status of Radhamani as a widow, and secondly, her rights, if a lawful widow of Krishna.

Their Lordships are of opinion that as far as the status of Radhamani is concerned, the finding of the Court below is correct, and that it was not bound to direct any further inquiry upon that point. It appears to their Lordships that there was a sufficient *contestatio litis* between the two parties upon the inquiry which was directed to the Civil Court, to make the finding of that Court binding on both widows. It follows that there having been no appeal, it would have been conclusively found between those two persons, but for the effect of any order of the Crown that has since been made, that Radhamani was a joint widow with Nilamani. It is contended, however, that the effect of that finding has been swept away by the first order of Her Majesty in Council. That argument appears to their Lordships to be erroneous. The judgment on which the Order in Council was founded, although it recognised the proceedings which had taken place before the Civil Judge, did not in terms recommend the reversal of his finding. The order reversed no doubt the decree of the Court which made the remand, and substituted a new decree for it, but by that new decree it directed the High Court to "take all necessary steps to "undo what may have been done under the

" decree reversed inconsistent with the rights " thus declared." It therefore by implication assumed that things might have been done under the decree which were not inconsistent with the rights declared, and that what had been so done was to remain; and if the decision ascertaining the *status* of the *widow* was to remain, it would have been a very idle proceeding on the part of the High Court to institute a new inquiry in order to retry that question. It is however contended that at least the second order of Her Majesty in Council has made it imperative upon the High Court to take the course which the Appellants argue ought to have been taken. That order simply confirmed the report, which is more in the nature of an expression of opinion than of an order; is very cautiously expressed; and seems to avoid the decision of any question in the cause. It certainly did not order the High Court to institute any inquiry which would otherwise be unnecessary. It declared that the former order was to enure for the benefit of all the widows if more than one of Krishna, "and that the " High Court executing the said order ought " to have taken and ought now to take all " necessary steps to give to the petitioner (if " one of such lawful widows of Krishna), " such share, interest, or other benefit as " under the law applicable to the case she " would have been entitled to." This assumes that the Court ought to have taken proceedings in order to ascertain the number of Krishna's widows; and if it had in fact done so by means of the inquiry directed by the original decree, it can hardly be said to have been afterwards in error in treating as conclusive evidence of the status of Radhamani the finding of the Civil Court which stood unreversed. Their Lordships desire to add that they would have been

extremely sorry to find themselves compelled to give way to any technical objection founded upon the mere words of the Order in Council, since from the other earlier proceedings which have been put in by the Appellant, for another purpose, it appears clearly that as early as the year 1856 or 1857 there were disputes between these ladies about a certificate and other matters; that in the proceedings arising out of those disputes there was no serious contest as to the status of Radhamani as the junior widow of Krishna; and that the suggestion that she was not lawfully married to her husband seems to have been an afterthought.

Having disposed of this first objection, it now becomes necessary to consider what are the legal rights of Radhamani; whether she has a right to share, as one of the widows, jointly and upon the same footing with the other widow in the enjoyment of her husband's estate; or whether, as she is junior widow, her right is limited to maintenance. Their Lordships have already, in the course of the argument, intimated that this question was perfectly open to the Appellant; and was in no degree concluded by the order of Mr. Morris, the Civil Judge, which has been already alluded to, because his finding that the estate was to be divided into fifths, though consistent with the construction put upon the family arrangement by the High Court, which divided the estate among the members of a certain class *per capita*, was inconsistent with the order of Her Majesty in Council which divided the estate into moieties, giving the share of each brother to the widow or widows of that brother. This point of law has now been ably and fully argued before their Lordships, and in their opinion the law of Madras must be taken to be in accordance with the decision in the 3rd Madras High Court Reports,

in what may be called the *Tanjore case.* That there had been a notion that the law of Southern India on this point differed from the law of Hindostan, it is impossible to deny; but that notion seems to have been mainly founded upon the passages which have been cited from the work, —a work of very high authority—of Sir Thomas Strange. Those passages are open to the observations that have been made upon them, namely, that even Sir Thomas Strange seems by his note on the first passage to have thought that the proposition was in some degree questionable; and that although the doctrine is repeated in the subsequent passage without qualification, it is not consistent with one of the cases, which are set forth in the 2nd volume, viz., the *Salem case,* at page 91, or with the opinion of the pundits and the opinion of Mr. Colebrooke there stated.

There are, however, two decisions which are relied upon as having been made consistently with the doctrine laid down by Sir Thomas Strange, and which it is argued settled up to a certain time the law of Madras. It appears, however, to their Lordships, that although the learned Chief Justice in his elaborate judgment in the *Tanjore case* accepts those cases as decisions in point, and as confirmatory of the doctrine laid down by Sir Thomas Strange, they really are not authorities of that character. The first of them is clearly a case in which the question was which of several widows was to succeed to an impartible zemindary which could only be held by one. It appears upon the face of the Report that that zemindary had been held by two brothers in succession, and therefore there can be no doubt that the subject of the litigation was an impartible zemindary. That was the last of the decisions in and was passed 1835. In the other decision, which is of as early date as 1824, the subject of litigation

would seem to have been also a zemindary; but the contest there was not between several widows, and did not relate to their rights *inter se*. A person claiming as nearest male heir had obtained possession of the zemindary, and had been ejected by the eldest widow of the zemindar. At her death this male claimant appears to have regained possession, and the question was whether the right of the elder widow had not survived to the second widow. It was held that it had so survived, and therefore the decisions merely affirmed the proposition of law, that where there are two or more widows, there is a right of survivorship between them. On the other hand, their Lordships find that in that portion of India which is emphatically governed by the Mitakshara, namely, Benares, it is settled law that the widows take jointly. This view of the law is also consistent with Mr. Colebrooke's own opinion as expressed in the *Salem case*. In order to support the appellants' contention it ought, in their Lordships' opinion, to be shown either by a course of decision, by custom, or by reason of some treatise which is of authority in Madras and not in the north of India, the law of Madras is different from what it is in the north of India. Their Lordships have dealt with the only two decisions cited; so far as treatises go, the Smriti Chandrika, which is of authority in Madras, seems to show the contrary; and although the authority of the translation of that treatise has been impugned by Mr. Leith, his argument at most would show that the Smriti Chandrika is not a conclusive authority against him; it certainly would not show that that treatise is an authority in his favour. It seems to their Lordships by no means impossible that, as has been argued by Mr. Mayne, the dictum of Sir Thomas Strange was founded upon a misapprehension of the law that

prevails in Bengal as laid down by Jimúta Váhána. The proposition is not confirmed by the Mitakshara or by any treatise of paramount authority in the presidency of Madras, and it is to be observed that in Mr. Strange's Manual, published as early as 1856, and in other works, the accuracy of the law as laid down by Sir Thomas Strange appears to have been questioned. It is, therefore, incorrect to say that the settled law of Madras was first changed by the decision of the *Tanjore case* in 1867.

Their Lordships think, that in this state of the authorities they would not be justified in treating the *Tanjore case* as improperly decided, or in dissenting from the proposition which the learned Chief Justice finally expressed in these words: —"On this review of the authorities we come " satisfactorily to the conclusion that the sound " rule of inheritance is that two or more law- " fully married wives (patnis) take a joint estate " for life in their husband's property, with rights " of survivorship and equal beneficial enjoy- ment." As to the mode of enjoyment, it has no doubt been decided both in the *Tanjore case* and in the case reported of *Bhugwandeen Doobej* v. *Myna Baee*, 11 *Moore*, *I.A.*, *p.* 487, that widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between them. But in the *Tanjore case*, after affirming this proposition, the learned Chief Justice said : "But " we are at the same time of opinion that a case " may be made out entitling one of several " widows to the relief of separate possession " of a portion of the inheritance. We have no " doubt that such relief can and ought to be " granted when from the nature or situation " of the property and the conduct of the co- " widows or co-widow it appears to be the only " proper and effectual mode of securing the en-

"joyment of her distinct right to an equal share "of the benefits of the estate." It also appears that in the case in the 11th Moore, the widows had made what was called a partition; that they had separately enjoyed their respective shares of the estate during their joint lives; and that it was not until the death of one of them that the question arose whether she had a right to dis-dispose of her share, and whether if she had no right to dispose of it, it did not pass by survivorship to the other widow. It was held there that there was no objection to a transaction which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected; although the widows nevertheless remained co-parceners, with a right of survivorship with them, and there could be no alienation by one without the consent of the other. Their Lordships make these observations in order to meet the objection which, though not raised by the petition of appeal, and apparently never raised in the Court below, has been taken to the form of the decree. They think it sufficiently appears that in this case the state of things contemplated by the *Tanjore case* exists; that these widows could not go on peaceably in the joint enjoyment of the property; and that they have acted as if they had agreed that they are separately to enjoy, in the manner above indicated, their respective shares. Therefore, their Lordships guarding themselves against being supposed to affirm by this order that either widow has power to dispose of the one fourth of the estate allotted to her, or that they have any right to a partition in the proper sense of the term, are not disposed to vary the form of the order under which one fourth of the profits of the estate will go to each widow during their joint lives, their respective

rights by survivorship and otherwise remaining unaffected.

The only other point that was taken is that which relates to the costs of the former litigation, and their Lordships upon that are of opinion that whatever equity the widow who conducted the litigation might originally have had to recover a portion of the costs from the younger widow, that equity cannot be said any longer to exist in this case, in which the elder widow, who if considered to have sued as a trustee for the younger widow, has long and persistently repudiated any such trust; and by resisting the claim of the younger widow has occasioned all the costs of the litigation that has since taken place.

Upon the whole, then, their Lordships are of opinion that it will be their duty to advise Her Majesty to affirm the order under appeal, and to dismiss the Appeal, with costs.