*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Periasami alias Kottai Tevar and others* v. *The Representatives of Salugai Tevar* (*Consolidated Appeals, Nos.* 82, 83 *and* 84 *of* 1875), *from the High Court of Judicature at Madras; delivered* 12*th February* 1878.

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Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE question common to the three suits which have been consolidated in the appeal before their Lordships is whether the Plaintiff, one Salugai Tevar, was entitled to recover from the Defendants in possession, all of whom claimed to be purchasers for value from the late proprietor Dhorai Pandian under different titles, seven villages being in fact all that remained of the ancient Palayapat of Padamattur, which seems to have consisted originally of ten villages.

The various questions which were raised and determined in the three causes, in all of which there was judgment for the Plaintiff, were substantially the same. Of these some are no longer contested, and of those that are contested the only one that has been argued before their Lordships is whether Salugai Tevar had established a sufficient title to maintain the suits. It is upon this question alone that their Lordships have now to express their opinion.

Before doing so, however, they wish to make some observations upon the manner in which the Courts in India dealt with this question, as

appears from the following passage in the judgment of the High Court. The learned Judges say, " The Defendants not only denied the " legitimacy of the Plaintiff, but also asserted " that Dhorai Pandian, the last proprietor, " having left a widow, Vellai Nachiar, who " is still alive, the right of suit is with her " and not with the Plaintiff. The subordinate " Judge, regarding the suit not as raising any " question between contending heirs, but as a " suit brought to recover from strangers family " property unlawfully alienated by a member, " held that the Plaintiff might sue, subject to " any question between himself and others con- " cerning the right to the inheritance. It appears " to us that the right of Dhorai Pandian's widow, " which was the only right urged in the Court " below as prior to the Plaintiff's cannot be " maintained, for the estate of Dhorai Pandian's " was not a separate acquisition by him, following " the course of succession prescribed for separate " estate, but an ancestral estate of the character " already mentioned, the right to which would " vest on his death without issue in the next " collateral male heir of the undivided family " in preference to the widow. In this Court the " Defendants have urged a new ground of objec- " tion to the Plaintiff's competency to sue, which " is said to arise on the Plaintiff's deposition " given in the suit. It is urged here that ' there " ' are preferential heirs to the estate, who are " ' descendants of an elder branch of the family.' " We find that the Plaintiff, in his cross-exami- " nation, after mention of Muttu Ramalinga " Shervai, the son of the Istimirar Zemindar, " whose legitimacy was questioned in the suit " of 1823, says that his, the deponent's, elder " brother had two sons (by a kept mistress), " and that there are three grandsons of his " still living. The enquiry was not, so far as

" is shown, fully pursued, nor was the Court " asked to decide upon the matter, and the issue " already noticed respecting the prior title of " Dhorai Pandian's widow was alone tried and " disposed of. A decision unfavourable to the " Defendants having been given, they now seek " in appeal to bring forward for the first time " an objection to the Plaintiff's right to sue, " which they declined to urge in the Court below " We think they cannot fairly be permitted in " this stage of the case to defeat the suit by " such an objection. If there are other and " nearer heirs, their rights will remain unaffected, " and any decree to be now given may make " reservation of such rights. The Plaintiff for " the purposes of the present suit may be re- " garded as entitled to the succession, and it is " unnecessary to consider the arguments which " were addressed to us on the subject of the " course of descent of this property on the " assumption that there were in existence de- " scendants of his elder brother."

Their Lordships are of opinion that there is nothing to take these cases out of the general rule relating to actions in the nature of actions of ejectment, namely, the well-known rule that the Plaintiff must recover by force of his own title. They think that it would be in the highest degree unjust to allow the Defendants, who had been for nearly the whole time of prescription in possession of villages of which they claimed to be purchasers for value, to be turned out of possession by any person other than one who had established a clear title to present possession. To allow this on the ground that if there should turn out to be other persons with a higher title than the Plaintiff those persons might recover over against him, is obviously to deprive the Defendants of their undoubted right to defend their

possession by setting up the *jus tertii*, and it is further to be remarked that those persons might possibly have been unable themselves to recover from the Defendants by reason of having by lapse of time or acts of confirmation or acquiescence lost the right to question their title.

With these observations their Lordships will pass to the consideration of the question before them, with reference to which it will be sufficient to confine their observations to the proceedings in the first and principal suit.

The particulars of the claim, as stated in the plaint, are that the Palayapat of Padamattur was an impartible and ancient zemindary descendible by inheritance, according to the custom governing other similar zemindaries and to the Hindu law; that it was last ruled by a person with many aliases, being the Dhorai Pandian mentioned in the pedigree; and that he held the right of ruling it till the 7th November 1861, when he died at Padamattur without issue. The title of the Plaintiff to succeed to him is thus stated: "The "Plaintiff being the son of the deceased Muttu "Vaduganadha Tevar, who was the undivided "brother of the said Gouri Vallabha Tevar, *alias* "Muttusami, and of the deceased Bodhaguru "Tevar, is the only son's son now surviving of "Oiya Tevar," who was the common ancestor. The plaint therefore asserts a title in the Plaintiff to succeed to the Palayapat on the death of Dhoria Pandian, and consequently the right to impeach the alienation of the villages made by him. The nature and impartibility of the estate have been found by the High Court confirming the decision of the Lower Court in these words: "We "conclude that Padamattur is shown to be (appa- "rently like other similar groups of villages in the "Shivagunga zemindari) a Palayapat impartible, "and therefore held by one member of the

"family and descending on a single heir." The question remains whether, on the death of Dhorai Pandian in 1861, the Plaintiff of right became the Polygar. The facts stated in the plaint relating to his descent from the common ancestor are consistent with the pedigree set out in the Appellant's case, and may be taken as proved. And it may be true that upon those facts he would have been, according to the ordinary course of the Hindu law of succession, the next heir to Dhorai Pandian in the collateral line of succession if that person had left no widow, or if the widow were from the nature of her husband's estate incapable of inheriting it. It may however be a question whether, putting the widow's possible right out of question, he would be entitled to succeed to the Palayaput. Nothing has been found by either Court in India as to the rule which governed the abnormal descent of Padamattur to a single heir. There is some evidence that up to the date of the transactions to be next considered it was governed in the course of direct descent from father to son, by the rule of primogeniture; but as to the rule in the case of collateral succession there is no evidence.

It may be desirable, before their Lordships approach the direct question to be decided, briefly to recapitulate some of the facts relating to this estate. Oiya Tevar, the then zemindar of Padamattur, died in 1815. He was succeeded by his eldest son, Muttu Vaduga. That person had two brothers, and therefore, whether Oiya Tevar were previously joint with his brother Gouri Vallabha, the Istimirar zemindar of Shivagunga, in respect of Padamattur or not, the latter estate must be taken to have descended to Muttu Vaduga, as ancestral estate. He would therefore necessarily be joint in that estate, so far as was consistent with its

impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindoo family in the case of a raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was, up to the year 1829, in a sense the joint property of the joint family of the three brothers. In 1829, however, the uncle of the three brothers, who was zemindar of the great impartible zemindary of Shivagunga, died. Padamattur appears to have been a sub-tenure of that estate, paying rent to the zemindar, and it was supposed that if Gouri Vallabha, the deceased zemindar, left no male issue, that large estate would go, according to the Mitacshara law of succession in the case of joint family property, to his eldest nephew, Muttu Vaduga, the then Polygar of Padamattur. In consequence of this the family arrangement embodied in the document No. 77, set out at page 138 of the Record, took place. The true construction and effect of that document will be afterwards considered. At present it is sufficient to say that the effect of it was to transfer the Palayaput of Padamattur to the next brother, Muttu Sami, on whose death it descended to his only son Dhorai Pandian, who enjoyed it till his death in 1861. In the meantime the great estate of Shivagunga was enjoyed, first by Muttu Vaduga, next by his eldest son and second son in succession, and lastly, by his eldest grandson by that second son. During all that time, however, the litigation concerning the title to Shivagunga, of which the history will be found in the 9th volume of Moore's Indian Appeals, at page 539, was going on. That was finally determined in 1863, by the judgment of this Committee, which ruled that, though the

zemindar of Shivagunga, who died in 1829, had continued to be generally undivided in estate with the family of his brother Oiya Tevar, the former Polygar of Padamattur, the zemindary of Shivagunga was his self-acquired property, and, therefore, descendible to his widows, and failing his widows, his daughter in preference to his nephew. The result of that decision was that Shivagunga passed from the line of Muttu Vaduga, who in 1829 had transferred the Polygarship of Padamattur to his next younger brother Muttusami.

In the present case the Defendants, relying in some degree upon the final decision in the Shivagunga case, by their written statement insisted that the title of the widow of Dhorai Pandian to succeed to Padamattur on the death of her husband was preferable to that of the Plaintiff. They founded this contention upon the transaction of 1829, whereby, as they alleged, Muttu Vaduga absolutely abandoned and renounced all his right to Padamattur in favour of Muttusami. They also alleged that for some time prior to 1829 and since the three brothers were divided in estate and interest, and were living as divided members of a Hindoo family. This part of the defence led to the settlement of the 2nd, 3rd, 8th, and 9th issues in the suit. The 2nd and 3rd are, "Whether Muttu Vaduga "relinquished his interest in the estate sued for; "and if so, what is the effect of such relinquish- "ment upon the Plaintiff's title?"

The 8th issue is, "If the Plaintiff be found "son of Muttu Vaduga, whether Muttu "Vaduga and the last owner of Padamattur "were divided or undivided." The 9th issue is, "Whether the plaintiff was entitled to "bring this suit during the lifetime of the "last owner's widow." Those issues of course involved two distinct questions, namely,

first, whether Muttu Vaduga was for all purposes separated from his brothers ; and secondly, whether he had not at least so parted with all interest in Padamattur as to make that particular property as between his descendants and Dhorai Pandian the separate estate of the latter and so subject to the rule of succession affirmed by the decision of this Committee in the Shivagunga case. In the course of the trial a further objection was raised to the Plaintiff's case on facts which came out in the course of his cross-examination. That objection was briefly to this effect, that though he was the only surviving son of Muttu Sami, there were sons and grandsons of one of his elder brothers who, as the Plaintiffs contended, would have a preferential title to Padamattur even on the assumption that Padamattur was to pass as joint property. That question, although no issue in the suit had been settled with respect to it, was distinctly raised by the grounds of appeal. The High Court nevertheless declined to adjudicate upon it, for the reasons stated in the passage of their judgment, which has been already read. Their Lordships think that if there were not sufficient materials before the Court to enable the learned Judges to decide the question thus raised, they ought to have directed an issue in order that the facts essential to such determination should be ascertained.

Their Lordships will consider in the first instance the first of the two objections which have been thus taken to the Plaintiff's title, viz., the preferential title of the widow. In doing this they will assume that the Indian Courts have correctly found that after 1829 the status of the family, consisting of Muttu Vaduga, his two brothers, and their children, continued to be joint and undivided; and, consequently, that the only question is whether by reason of the

transaction in 1829 the particular property of Padamattur ceased to be the joint property of the three brothers, and so upon the death of Dhorai Pandian became subject to the rule of succession already referred, as affirmed by this committee in the Shivagunga case. That question, of course, depends on the construction to be put on the instrument at page 138 of the Record.

Now, various constructions have been put upon it. The first was that of the subordinate Judge. He says, at page 296, "Although the "relinquishment (taking it to be true) was thus "rendered absolute,"—he is referring to the birth of the daughter of the deceased zemindar of Shivagunga,—"and kept Muttu Vaduganadha "and his offspring out of the Padamattur "estate for a time, yet, as they were judi- "cially pronounced to come into the Shiva- "gunga estate as usurpers, and were ousted "from it, Muttu Vaduganadha's heir or heirs "are entitled to revert to the Padamattur es- "tate." This construction, their Lordships think, cannot be maintained. There are no words which import a right of reversion. The true construction of the document cannot be affected by what happened subsequently. The grant, whatever its effect, was not necessarily avoided, because subsequent events disappointed the expectation in which it was made, namely, that the estate of Shivagunga would remain in the line of Muttu Vaduga. One consequence of that construction and of the adoption of the doctrine of reverter might be to give force to the Defendant's second objection, because it would assume —if indeed such an assumption could be made consistently with what was ruled here in the Tagore case—that a certain reversion remained in Muttu Vaduga; in which case it would be a grave question whether that reversion did not

descend to his descendants in the direct line according to the law of primogeniture. Another construction was put upon the instrument by the High Court at page 329. Dealing with this part of the defence the learned Judges say: "The Appellants contention on this part of "the case we understand to be that the instru- "ment of relinquishment precludes all claims "on the part of Muttu Vaduganadha's de- "scendants that the family can no longer be "regarded, as they admittedly were originally, "as a joint and undivided Hindu family, and "that under the terms of the Limitation Act "XIV. of 1859, the Plaintiff's claim is barred, "because Muttu Vaduganadha and his descend- "ants are not shown to have participated in the "income or profits of Padamattur since the year "1829. Although the fact of the division of the "family in or before the year 1829 was alleged "by the Defendants in their written statement, "no evidence of this was adduced, and it is only "from the mode of enjoyment of the property "and from the effect attributed to the instru- "ment of relinquishment that this is inferred. "We think it clear that the family must "still be regarded as a joint Hindu family, "and that Muttu Vaduganadha's renunciation "of his right in 1829, whatever its operation "on himself and his descendants in possession "of the zemindari of Shivagunga, cannot operate "further, and that, upon the death of Dhorai "Pandia without issue, the right of succession, "which then opened to the members of this "joint family, was not affected by such "renunciation. The words 'We and our offspring "'shall have no interest in the said Palayapat, but "'you alone shall be the zemindar, and rule and "'enjoy the same' must be construed with due "regard to the person using them, and the "occasion when they were used. They refer to

" the estate and rights of the new so-called " zemindar of Padamattur, and amount to a " declaration that the Palayapat shall be enjoyed " by him exclusively, the Shivagunga zemindar " disclaiming any joint interest. They are not " a release by the latter for himself and his heirs " of all future rights of succession, which might " accrue to them as members of an undivided " family." The last two sentences do not appear to their Lordships to be quite consistent. If the Shivagunga zemindar had disclaimed any joint interest, his words of renunciation taken alone would seem to imply that he had given up whatever interest he had, as a member of the joint family in that estate. Their Lordships agree that such a renunciation would not deprive the descendants of Muttu Vaduga of such future rights of succession as they might afterwards have to that property, treating it as separate property *quoad* them,—such a right of succession, for instance, as might accrue to them in the present case upon the death of the widow. But it does seem to be inconsistent with the retention by them, " of all future rights of suc- " cession which might accrue to them as " members of an undivided family." The construction of the instrument for which Mr. Cowie argued at the bar does not substantially differ from that of the High Court. He contended, as their Lordships understood, that the only effect of the transaction was to transfer the ostensible headship of the family, as regarded Padamattur, to the second brother and his direct descendants, and so virtually to reduce the position of Muttu Vaduga and his heirs to that of a junior line. This, however, is not the construction which, after some doubt, their Lordships think must be put upon the document. The heading of it is in these words: " Agreement " passed on " such a day " by me Oiya Tevar's

" son Muttu Vaduganadha Tevar of Padamattur " in favour of my brother Gouri Vallabha " Tevar." It proceeds thus: " My junior paternal " uncle Muttu Vijaya Raghunadha Gouri " Vellabha Peria Udaya Tevar, zemindar of " Shivagunga, having departed this life, leaving " no male issue, I have become entitled to the " said zemindary, and you, as my next younger " brother, are appointed zemindar of the " Palayapat of the said Padamattur." It then refers to the pregnancy of one of his uncle's wives, and says, "I shall act as usual in the " matter in the event of her giving birth to a " son." Those words show that where the grantor meant to make a gift on a condition he knew very well how to express what the condition was to be; and this affords an additional argument against the construction put upon the document by the subordinate Judge. Then follows this clause:— " But should she be delivered of a daughter "— an event which happened—" I and my offspring " shall have no interest in the said Palayapat, " but you alone shall be the zemindar, and rule " and enjoy the same, allowing at the same time, " as per former agreement, to the younger " brother, P. Bodhagarusami Tevar,"—who in the pedigree is called Chinna Sami,—" the village " that has been assigned to him before." Now the plain meaning of those words seems to their Lordships to be that Muttu Vaduga renounces for himself and each of his descendants all interest in the Palayapat either as the head or as a junior member of the joint family, whilst at the same time he reserved expressly the rights of the youngest brother, Chinna Sami. The effect, therefore, of the transaction, in their Lordships' opinion, was to make this particular estate the property of the two instead of the three brothers with, of course, all its incidents of impartibility and peculiar course

of descent, and to do so as effectually as if in the case of an ordinary partition between the brother, on the one hand, and the two younger brothers on the other, a particular property had fallen to the lot of the two.

This construction seems to their Lordships to be strengthened rather than weakened by the subsequent clause as to the debts. He says, "As "regards any debt contracted by me during the "time that I was zemindar of the said Palayapat "you shall have no concern at all therewith, but "I shall myself be responsible for the same." That clause reads as if he wished to transmit the Palayapat, in which he had abandoned all interest, to his brothers, cleared of the debts incurred by himself as Polygar, whatever might have been their nature, and whether they were a charge upon the estate or not. Their Lordships see no great improbability in such a transaction. Muttu Vaduga believed himself to be, by a title not then disputed, the proprietor of the large and valuable estate of Shivagunga. He might therefore well be content to abandon in favour of his brothers all his interest in the comparatively inconsiderable sub-tenure of which, as zemindar of Shivagunga, he had become the superior landlord. That he should have done so and have afterwards lost Shivagunga was, no doubt, a misfortune for his family, and would be the greater subject of regret if the Polygarship of Padamattur now carried with it anything more than the right of disputing transactions which were very possibly entered into by the parties in the bonâ fide belief that Dhorai Pandian had become sole owner of the estate; as, if their Lordships' construction of the document is right, would have become upon the death of Chinna Sami without issue. But this unfortunate consequence cannot, in their Lordships' view, affect the construction of the

document, which must be considered by the light of the circumstances as they existed at the time of its execution.

Again, their Lordships may observe, their construction of the instrument is somewhat corroborated by what seems to have been the understanding of the family. It appears at page 71 of the Record that in the suit in which Muttu Vaduga's eldest son, Muttu Sami, and Chinna Sami were sued together for debts alleged to be a charge upon the Palayapat, both the first and the second Defendants invoked the transaction of 1829, the first contending that as his father had transferred the estate to his brothers, the second and third Defendants, he was no longer responsible for the debt; Muttu Sami, on the other hand, relying on the clause in the deed of 1829 by which Muttu Vaduga had agreed to take such debts upon himself.

Then again, in the cases that are found at pages 195 and 197 of the Record, in which Chinna Sami first, and afterwards his widow, were so illadvised as to raise the question of the partibility of Padamattur, the suits seem to have been brought against the representatives only of Muttu Sami, and the representatives of Muttu Vaduga are treated as having no interest in the matter. And, lastly, their Lordships' construction is in some degree further confirmed by the acquiescence of the Plaintiff himself for nearly twelve years in the conveyances and transactions which he now seeks to impeach.

Their Lordships then have come to the conclusion that, as between the descendants of Muttu Vaduga and Dhorai Pandian, the Palayapat was the separate property of the latter; that on the death of Dhorai Pandian, his right, if he had any left undisposed of in the property, passed to his widow, notwithstanding

the undivided status of the family; and that therefore the case was one to which the rule of succession affirmed in the Shivagunga case applies.

It follows therefore that their Lordships dissent from the finding of the two Indian Courts on the 9th issue, and hold that the Plaintiff had no title to sue in the life of the widow of Dhorai Pandian. This being so, it is unnecessary to consider the other objection taken to the Plaintiff's title. That objection involves considerations of some difficulty which perhaps could hardly be satisfactorily determined without further evidence as to the customary rule of succession to Paddamuttur.

Their Lordships will humbly advise Her Majesty to reverse the decrees of both the High Court and the subordinate Court, and to dismiss the three suits, with costs, in both Courts. The Appellants must also have their costs of the appeals; but in taxing those costs the Registrar must set off against the amount of costs payable by the Respondents the taxed costs of the application to bring in fresh evidence, which were in any case to be borne by the Appellants.