Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chidambaram Chettiar and others v. *Gouri Nachiar and another, from the High Court of Judicature at Madras; delivered 27th May* 1879.

Present:

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

THIS Appeal arises out of a suit brought by the younger son of one Gouri Vallabha Tevar, the late Zemindar of a dependent Zemindary carved out of the great Sivaganga estate, against his elder brother and against a number of persons who claimed to be either incumbrancers upon or absolute owners of different villages comprised in the Zemindary under titles derived from either the father or the elder brother of the Plaintiff. The general nature of the suit was for a partition between the brothers, and for the recovery of the Plaintiff's share freed from the interests claimed by the other Defendants, except to the extent to which the alienations were valid against him under Hindoo law. The litigation has now been reduced to the question whether and upon what terms the Plaintiff's representatives are entitled to recover his moiety of the village Pattanam from the 3rd Defendant Ramasami Chetti, and his moiety of the village Minnittangudi from the 4th Defendant Ramanadhan Chetti. These two Defendants are the present Appellants.

The facts were very clearly and candidly stated by Mr. Cowie in his opening, and it is

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unnecessary to recapitulate them, because it is admitted that the decree impeached must stand, unless the Appellants can succeed upon one ground. That ground is, that the Plaintiff having died on the 28th of March 1872 without issue, the suit which was then pending ought to have been dismissed, inasmuch as the proceedings for a partition had not then gone so far as to effect that severance of interest between the brothers which would prevent the share of the younger from going over to the elder by right of survivorship. The following is the history of the proceedings in the suit, so far as they relate to this question: In August 1871 the first of the issues settled in the cause, viz., "whether the property sued for consti-" tuted a Zemindary, and if so, whether it is " partible or impartible, and whether it is liable " to all the incidents of private property," was tried separately, and was determined by the Civil Judge in a judgment of the 24th of that month, which will be hereafter considered. He afterwards tried the other issues in the cause and disposed of them by his judgment and decree of the 2nd of April 1872. On that occasion the point now relied upon was first raised by a petition which bore date the day before, but was not filed in Court until the 2nd of April of that year. On that petition the Judge made the following order: "The case has been heard; oral " judgment pronounced at the close of the hearing " except in regard to details; and this day the " Court delivered its written judgment; petition " dismissed." The present Appellants appealed against the decree of the 2nd April 1872, and the second of their grounds of appeal is the following: "The Plaintiff died after the suit was " brought, but before the decree was written or " signed or judgment delivered," and that " under these circumstances the suit ought to

" have been dismissed, as no partition could be " made."

On the 6th of January 1873 the High Court, before disposing of the Appeal, remanded the cause to the Civil Judge, with directions to try whether the partition was complete when the Plaintiff died, and when it became so; and also another issue. In his finding upon the first issue dated the 14th April 1873, the Judge said, " I am of opinion " that the partition was complete, *i. e.*, that the " brothers became divided in interest, at least on " the 24th of August 1871 if not before. I regard " that order as equivalent to a decree for dissolu- " tion of partnership and for an account. The " shares were ascertained, and all that remained to " be done was to see what charges, if any, on any " particular properties, were good as against " Plaintiff. This was a question between the " Plaintiff and the alienees alone, and first " Defendant had nothing to do with it." The present Appellants appealed against that finding, but the High Court in its judgment of the 5th of January 1874 expressed its concurrence in it.

Their Lordships have to determine whether that finding was not substantially right. In doing this they dismiss from consideration, as of no weight, the suggestion that in the month of February 1872, and before the written judgment of the 2nd of April of that year was delivered, there had been an oral judgment which would have effected a partition, or at least a severance of interest between the brothers, had there been no such severance previously. They proceed to consider the effect of the proceedings of the 24th of August 1871 on the separate trial of the first issue. The Judge then found that upon the evidence it was quite clear that the estate was in its nature partible, that the facts were incontestible, and stated that the Defendants' vakils had given in their adhesion to the finding

of the Court upon that issue. The judgment then proceeded as follows: "That being so, it "is also not disputed that Plaintiff is entitled "to a moiety of the property left by his father "at his death, whatever that moiety may be, "subject to all charges then subsisting, and "to such charges as have been incurred subse- "quently, as are of such a character as are "recognized under Hindu law to be valid "charges upon the estate, but to enable the "Court to arrive at a correct conclusion it is "necessary to appoint a Commissioner with "power to investigate the accounts, and the "result will be submitted for this Court's con- "sideration." It then states the points which are to be referred to the Commissioners, all of which had reference to the different mortgages or alienations relied upon by the Defendants, other than the Plaintiff's brother, and to the question of how far the mortgages had been discharged by the usufruct of the mortgage property. It then adds, "In accordance with "these observations an order will be prepared." No formal order or decree drawn up upon that judgment is to be found in the Record, but their Lordships are by no means satisfied that there may not have been one. At all events they are of opinion that by this judgment there was a clear adjudication that the property was partible, and that the rights of the two brothers were that each should have a moiety, and that the only object of the subsequent proceedings in the suit was to ascertain how far the share of the second brother, which had thus been declared to be a moiety of each village, was affected by the incumbrances and alienations of his father and his elder brother. That this was the clear understanding and intention of the Judge, their Lordships think, appears from the 11th and 19th paragraphs of the judgment of the 2nd of April

1872. In the former he says, "The Court in its "proceedings of the 24th August 1871 held that "the estate in question was partible and "subject to all the incidents annexed to property "among Hindus, and that the Plaintiff was "entitled to a moiety of the property left by "his father at his death, whatever that moiety "might be, subject to all charges then sub-"sisting and to such charges as have been "incurred subsequently as are of such a character "as are recognised under Hindu law to be "valid charges upon the estate." In paragraph 19 he says, "This suit has now come before me "in another form, and the points I have to deter-"mine are the conditions under which Plaintiff "is entitled to recover a moiety of his ancestral "property." He does not in any part of this judgment deal with the question whether the brothers are to be declared separate or whether the property is partible. He treats all that as decided by the former proceedings, and deals only with the question of the Plaintiff's right to recover his moiety of each village freed from the incumbrances thereon, or some part of them. It is to be observed that there was no appeal against the judgment of the 24th of August 1871 or its finding on the first issue; and that the first Defendant, the elder brother, seems to have thenceforward acquiesced in the decision. For these reasons their Lordships are of opinion that the judgment of the 24th of August 1871 must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from that date, if they had not previously become so. If that be so, the case, though the actual division of the property was not complete, falls within the principle of *Appovier* v. *Rama Subba Aiyan*, 11 Moore, I. A. 75, and there is no ground for

the contention that upon the death of the Plaintiff his interest passed to his elder brother, and not to his own representatives in the course of succession to separate estate as ascertained in the suit.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree under appeal and to dismiss this Appeal with costs.