to mortgage it to the plaintiff: (see *Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube*(1), and *Jagan Nath Das* v. *Birbhadra Das*(2); also *Karimshah* v. *Nattan Bivi*(3), and *Sankaran* v. *Krishna*(4). In this view it is unnecessary for us to consider the contention urged on behalf of the second and third defendants that the debt for which exhibit A is said to have been executed was incurred for purposes binding upon the institution.

The appeal is dismissed with costs.

PRIVY COUNCIL.

GURUSAMI PILLAI AND OTHERS (PLAINTIFF'S REPRESENTATIVES),

v.

SIVAKAMI AMMAL (DEFENDANT'S REPRESENTATIVE).

P.C.* 1895. February 27. March 30.

[On appeal from the High Court at Madras.]

Hindu Law—Construction of will—Condition—Bequest to daughters—Meaning of the words 'have issue.'

The testator, after providing that his two daughters should, after their marriage, remain in his family taking the income of his property without dividing it, and that, if they should disagree, the income only should be shared between them, added the following:—"If both the said daughters shall have issue, they shall "divide the said properties equally. Those who have no issue shall, as aforesaid, "enjoy the income for their lives, and those who have issue shall enjoy the whole "property:"

Held, to be the applicable principle, that, where the language of a will is clear and consistent, it shall receive its literal construction, unless there is something in the will itself to suggest a departure from it. Accordingly, the true construction was that the birth of issue was the event on which the absolute gift of a half share to either daughter was to take effect; and that there was no reason for construing the words 'have issue' to mean 'leave issue.' Therefore, under the will, one of the daughters, whose only issue died before her, took a heritable share, and that share did not go over, on her death, to her surviving sister, who had children.

APPEAL from a decree (21st December 1888) of the High Court reversing a decree (28th March 1887) of the Subordinate Judge of Tanjore.

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(1) L.R., 10 I.A., 90. (2) I.L.R., 19 Calc., 776.
(3) I.L.R., 7 Mad., 417. (4) I.L.R., 16 Mad., 456.

* *Present:* Lord HOBHOUSE, LORD MACNAGHTEN, and Sir R. COUCH.

GURUSAMI PILLAI v. SIVAKAMI AMMAL.

The testator, Gurunadha Pillai, made his will on the 19th October 1864 and died on the 29th. He left no son, but left two daughters, the elder Pichayi Ammal, aged seven years, and the younger Sinnattal Ammal, aged three. To them he bequeathed his property, providing also for their mother Sivagangai Ammal. He directed that the daughters should jointly take the income and that, after their marriage, the share of either one of them dying without issue should go over to her sister, the latter having issue. The elder was married in 1868, the younger in 1869. In 1885 the younger died. The elder brought this suit on the 29th September 1885 against Subbaraya, her late sister's husband, joining with him Sivagangai Ammal, claiming her sister's moiety as having devolved upon herself.

The principal questions now raised were: whether the will required that a daughter, unless her share on her death was to pass to her surviving sister, if the latter had a child, should not only have had, but should have left issue; and whether Sinnattal Ammal had, in fact, ever had issue. Subbaraya having died in 1889, Sivakami, his widow, was brought on to the record; and, on the death of Pichayi Ammal in 1892, the suit was revived by her representatives. The material parts of the will, as well as all the facts of the case, are stated in their Lordships' judgment.

In 1877 an arrangement for a partition was entered into by Sivagangai, her daughters and their husbands. The land forming the estate was divided, the portions to be assigned to each daughter were ascertained, and agreements were drawn up. Separate documents, embodying this arrangement, were executed by Sivagangai and the sisters. Each daughter, with her husband, was aware that her mother had executed an agreement to the other, but was not a party to it.

It was asserted, on behalf of the respondent, that, at the time of this arrangement, Sinattal Ammal had a son who was then a few months old, and who died soon after. Also, that she had previously had a child, which lived only a few days, and that she gave birth to a third child, which died in a few days, its mother also dying.

The issues in effect were:—whether Sinnattal Ammal, who admittedly died childless, was entitled, by reason of her having had issue, which predeceased her, to an absolute interest in her moiety, so that this would pass to her husband on her death. Had she at any time a living child? Did the plaintiff, by the agreement

executed by her to her mother on the 13th June 1877, abandon any right she had under her father's will?

The first Court held that Gurunadha's will was entitled to full operation, and was not affected by the agreements in June, 1877; that Sinnattal had not a living child at the time of the execution of the agreements in June 1877; and that the defendants' witnesses, who had alleged that she then had living issue, were not credible. The Subordinate Judge specially adverted to the fact that neither of those agreements stated that she then had a son, although the existence of such issue was a fact most material as a cause of their coming to an agreement in the matter in hand, and was the cause of the partition being effected by those agreements. He decreed the claim.

The High Court (KERNAN and WILKINSON, JJ.) were of opinion that the principal fact to be decided was whether Subbaraya's wife Sinnattal ever bore a living child.

The evidence of the mother of the wife was clear that her deceased daughter had not only one child, but certainly two, and perhaps three. This was supported by witnesses who had opportunities of knowing the facts. Contrasting the evidence for the plaintiff with that for the defendant, the Judges arrived at the conclusion that the wife had, at all events, two children born alive. The plaintiff had admitted that, after the execution of the agreement in June 1877, Sivagangai Ammal, her mother, gave over to her her moiety of lands in that month; and, after this partition, the sisters were in possession of their shares. This vested an absolute estate in each of the sisters in no way contrary to what was contemplated by the will of their father. The testator had intended that there should be no partition so long as one, or both, of the daughters had no issue, but that, in case of both daughters having issue, they should take his property in equal shares.

This was what had taken place. Up to 1877 the parties lived in harmony; then, having children, and being unable to agree, both daughters applied to their mother, who, since the death of the testator in 1864, had been in possession of the property, to give them their shares. She did so, retaining with their consent, for her own life time, three and odd velis of land for her maintenance. It could not be argued that the plaintiff, as her sister had died without making any disposition of her property, succeeded as the heir of her father. There was no authority to show that a gift to

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an unmarried daughter, undisposed of, went back to her father's heirs. It was to be regarded as her stridhanam and descended as stridhanam. That being so, the plaintiff was not the heir, but the husband of her sister, Sinnattal Ammal, was the heir. The judgment of the first Court was reversed, and the suit was dismissed.

The representatives of Pichayi Ammal having appealed:

Mr. *R. V. Doyne* for the appellant.—The true construction was that the testator intended that, in the event of a daughter dying leaving no issue, her surviving sister having issue should take the whole estate. The conditions in the will remained in force notwithstanding the agreement of 13th June 1877; no agreement having effect to get rid of the condition. The will should have been construed with regard to those rights, according to Hindu law, which a testator must be understood to have in contemplation. He referred to *Moulvie Mahomed Shumsool Hooda* v. *Shewukram*(1) and to *Hirabhai* v. *Lakshmibai*(2). The father apparently hoped that the sisters would remain joint until the death of one; he intended that, on the death of either leaving issue, her issue should succeed to their mother's interest in his property; and that, if either should die without leaving issue, the survivor, if she had issue, should take the whole estate. Till the death of either, the estate was to continue in the testator's name. The argument came to this that by the expression 'have issue,' the testator meant 'leave issue.' If, however, the Appellate Court below had been right in its construction of the testator's language, and had rightly held that the birth of a child conferred on the mother an absolute interest in one-half of the estate, the first Court had still been right in finding that it had not been established that Sinnattal Ammal ever had a living child. The High Court had been wrong in finding this fact in favour of the defendant, and the judgment should be reversed.

Mr. *J. D. Mayne* for the respondent.—The evidence established that Sinnattal, wife of Gurusami Pillai, at the time when the agreement and the partition were made in 1877, had already then had issue. The contingency had happened under which she was taken absolutely, and she and her sister were in a position, in regard to their father's will, which enabled them to act upon what had

(1) L.R., 2 I.A., 7.

(2) I.L.R., 11 Bom., 69; on appeal, *ib.*, p. 573.

taken place. To proceed as they did was in accordance with the testator's provisions; and when the partition had been acted upon, the clause in the will had no effective operation to make the share of either daughter, both of them having had issue, and the estates in both having become absolute, go over upon the decease of either. Doubtless, this depended on the fact that there had been issue born alive; the decision, however, of the High Court was fully borne out by the evidence that Sinnattal had one, or more, living children, who lived but a short time. The words in the will relating to the daughters' interests were to be taken in their literal sense. According to the will, survivorship between the sisters was to result from the state of things referred to therein, viz., where the one sister might have had issue and the other not. That state of things had not arisen when the death of Sinnattal occurred; both had had issue; there was nothing to occasion survivorship between the sisters, and the descent of the property was regulated by the Hindu law of inheritance, which gave it to the husband. Therefore the judgment of the first Court had been rightly reversed.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was, afterwards on the 30th March, delivered by Lord HOBHOUSE.

JUDGMENT.—This is a family dispute, arising out of the will of Gurunadha Pillai, which was made on the 19th October 1864. The plaintiff, who is now represented by the appellants, was the testator's elder daughter Pichayi. The principal defendant, now represented by the respondent, was the husband of the testator's younger daughter Sinnattal.

By his will the testator states that he is dangerously ill, and has no male issue, but has two daughters, Pichayi, aged seven years, and Sinnattal, aged three, born of his fourth wife Sivagangai; and that by means of this will he has given away his estate, which he describes, to the said two daughters. Then occur the following sentences:—

"The aforesaid two daughters after their marriage shall with their "husbands remain in this family and enjoy as one family the income "of the aforesaid properties without division and without alienating "by sale, &c."

"If in so doing there should be disagreement between them, the "income thereof minus the just expenses, shall be enjoyed by them "both in equal shares. If both the said daughters have issue, they

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"shall divide the said properties equally. Those who have no issue "shall as aforesaid enjoy the income for their lives, and those who have "issue shall enjoy the whole property. Till then the miras shall "continue in my name. In case your mother and you disagree and "live separately you shall pay 21 kalams of paddy and 7 rupees a "year for her maintenance."

He further provided that if he should recover and get a male child, the entire property should go to that child. He died however a few days afterwards, and there has been no male child born.

Pichayi married and had issue, the present appellants, and Sinnattal also married one Subbaraya, and died on the 20th January 1885. Whether or no she had a child is matter of dispute. She had none living at the time of her death.

In the year 1872 there was litigation between Pichayi's husband purporting to sue as her guardian, and Sivagangai, which was ended by an agreement of the 2nd October of that year. It was agreed that the entire family property should remain, as it had been, in the management of Sivagangai, the family living together as one family. But in case they could not agree to live together, then Pichayi, being entitled under the will to one-half of the property, was to receive from Sivagangai half the net income of the immoveables, without making division of them; and each was to take half the moveables and pay half the debts.

Disagreements soon arose, and in June 1877 two deeds were executed by which Sivagangai agreed, first with one of her daughters and then with the other, upon a partition of the property.

The first deed (marked No. I) bears date the 11th June 1877. It is expressed to be made between Sivagangai, Sinnattal, and Subbaraya. It refers to the will of Gurunadha and states the joint enjoyment of his property by the three parties. Then, stating that disagreement has arisen, it provides a maintenance for Sivagangai, and subject thereto allots a moiety of the estate for the half share of Sinnattal and Subbaraya. The lands so allotted which were then registered in Sivagangai's name are to be registered in Subbaraya's name. And he and his wife undertake to bear a moiety of the family debts.

The second deed marked as exhibit B bears date the 13th June 1877. It is expressed to be made between Sivagangai and

Pichayi. It refers to the will of Gurunadha, and states that the two parties have been living together as one family in conformity with the will and with the agreement of the 2nd October 1872. Then, stating that disagreements had arisen, the deed goes on to provide for Sivagangai's maintenance, and to allot to Pichayi her moiety of the property and the charges in a way corresponding in substance to the partition with Sinnattal. This deed, however, differs in expression and arrangement from No. I, and it contains one passage which is not found in No. I, and which has been the subject of a great deal of comment. Immediately after declaring Pichayi's reversionary right to a moiety of the lands allotted for Sivagangai's maintenance, and her right to a moiety of the lands and other things held in common (apparently a repetition and quite superfluous) the deed proceeds as follows :—"In continuing "to enjoy (as aforesaid), those who have no issue shall in confor- "mity with the terms of the will left by the said Gurunadha Pillai "remain in enjoyment so long as they live and those who have "issue shall enjoy the whole property inclusive of the property of "those that are issueless."

Why the family should have chosen to effect their partition by the circuitous method of treating each daughter in turn as if she and her mother were joint-owners, is not explained. There can be no doubt that they intended a partition binding on the two daughters. The stipulated mutations of names were duly effected, and the benefits of the family estate were received in moieties from that time to the institution of this suit. It is not now disputed by either party that the two deeds embodied one family arrangement. The peculiar position taken by Sivagangai does not affect the validity of the transaction as between the others, though it probably accounts for differences of expression in the two deeds.

In September 1885 Pichayi brought the present suit. She states the will as providing that "I and my said sister should, till "we get issue" enjoy the property in moieties "and that if either "of us die without issue" the other shall take the whole. She then states that Sinattal "died without issue," and she claims the estate accordingly.

In his written statement Subbaraya rests his title on the partition of 1877. He introduces the matter thus :—"At the time when "the two daughters of Gurunadha Pillai mentioned in the plaint "had issues and were living together as one family it was arranged

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"&c., &c." Sivagangai also put in a written statement to the same effect.

Now it is a remarkable thing that if the story of Sinnattal having a child was an invention after her death, it should have been introduced in this casual and indirect way by her husband and her mother, and that the plaintiff should not at once have denounced it as a fraud and claimed to have it tried. But what happened was that directly after the defendants' statements were filed, the first hearing for settlement of issues took place, and that there is no issue directed as to the birth of a child. When the parties came to put in their evidence, the plaintiff asserted that Sinnattal never had a child born alive; and she brought an uncle of Sivagangai and some residents in the village to say the same thing. On the other hand Sivagangai, who was called by the plaintiff, adhered very clearly to her statement that Sinnattal had children. Subbaraya stated that at the time of partition he had a son, and a number of witnesses were called to support them. On that evidence the case came to trial.

The Subordinate Judge held that unless the partition had been made in accordance with the will it would not have the effect of barring the plaintiff's right to recover. That view, the correctness of which has not been impugned in the High Court or here, brought the case to turn on the question whether the events had happened in which the will directed a partition; which, as the plaintiff's children were living, was in effect the question whether or no Sinnattal had a child. The Subordinate Judge found that she never had any.

His mind was very strongly impressed by the terms of the partition-deeds. If it were true that Sinnattal had a child, it must, he says, have been mentioned in the deeds as the cause of the partition, whereas disagreement is the cause mentioned; and it is impossible, on the same supposition, to account for the insertion in exhibit B of the clause above quoted which expresses a contingent gift to the daughter who has issue. In the face of this written evidence he disbelieves the whole of the defendants' oral evidence. He does not so much as mention the evidence of Sivagangai or Subbaraya, nor indeed that of the plaintiff, and he hardly discusses the other witnesses.

The High Court took a different view. They considered the evidence of Sivagangai to be of paramount importance. She and

the plaintiff and Subbaraya are the only persons of whom it may be affirmed with certainty that they knew the truth; and the High Court considered that Sivagangai was free from the bias of pecuniary interest, and, according to all appearance, of all other bias or unfairness. Mr. Justice Wilkinson also points out that her evidence is supported by the statements of other persons who were in a position to know the facts.

As to the passages in the partition-deeds which so strongly affected the mind of the Subordinate Judge, the learned Judges discuss them, not with reference to their bearing on the disputed question of Sinnattal's children, but apparently with reference to other arguments as to the effect of the partition which have not been brought before their Lordships. Their conclusion is that the partition-deeds, followed as they were by mutation of names, possession, and continued enjoyment, vested an absolute estate in each of the sisters, such as was contemplated by Gurunadha's will.

On the question of fact their Lordships have to express agreement with the High Court. It appears to them that the Subordinate Judge exaggerates the effect due to the partition-deeds. It is fair matter of observation that both deeds are silent about the birth of children to either sister, and mention disagreement as the cause of partition. But it does not go very far. There was disagreement in fact, and it gave a motive for separating at that time. Both the will and the deed of October 1872 mention disagreement as a reason for partition of a less complete kind, viz., of the net income; but not as a reason for that complete partition of the corpus which was actually intended, and actually effected so far as the parties had power. It would have been more obvious, and more workmanlike, to state the birth of children and the directions of the will as the ground of partition; but the omission to do so is hardly a reason for rejecting a body of positive testimony.

With respect to the passage in exhibit B which repeats the will, it is certainly difficult to say why it should be there. Whether it should be entirely connected with the property allotted for Sivagangai's maintenance, as Mr. Justice Kernan thinks; whether the plaintiff had a notion that the gift over turned on the contingency of issue living at the death, as seems to be indicated by her plaint; or some vaguer notion that she might somehow gain some advantage by putting into her deed what is not to be found in No. I; is all

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guess-work. At best the presence of the clause only raises some probability in her favour.

It should also be remembered that there is a probability in the other direction, arising from the proceedings in the suit before observed on, that the plaintiff used language compatible with the birth of children who died in Sinnattal's lifetime as well as with the entire childlessness; that the defendants stated the birth of children incidentally, as they might have stated any undisputed matter; and that the plaintiff did not treat the statement as she would have been likely to treat a falsehood called up to oppose her. It would be easy to make too much of such a matter, just as too much has been made of the statements in the partition-deeds. It seems to their Lordships that the High Court have been right in fixing their attention on the positive testimony to the exclusion of more conjectural matter.

That testimony preponderates largely in favour of the defendants. Their Lordships have referred to the opinion of the High Court upon the evidence of Sivagangai; which they think must be taken with the qualification that she is not wholly free from pecuniary interest, because the amount of her maintenance might be affected by the suit. But their Lordships have the opinion of the High Court as to her apparent fairness, and no adverse opinion from the Subordinate Judge who examined her. She is supported by three household servants of the defendants against whose testimony the Subordinate Judge says nothing except that they are servants. But in such a matter as the birth of a child in the house servants are persons having means of knowledge; and to pass over their evidence not otherwise impeached, as worth nothing, is somewhat too sweeping. The defendants' eighth witness, Narayana Pillai, gave his evidence, as the Subordinate Judge states, so as to allow no room for unfavourable observations. He was a neighbour and a friend of the family, and he deposed to having seen Sinnattal's child several times at the house of Sivagangai and at the house of one Chidambara Pillai, another neighbour and friend, who was ill and could not attend the Court. The defendants' first witness attested exhibit B and on that occasion he says that Sinattal's child was shown to him by the grand-mother. On this witness the Subordinate Judge has no remark to make except that his opportunities for knowledge have not been accounted for. But his opportunity was going to the family house to attest exhibit B.

It has been observed that the Subordinate Judge does not so much as mention the evidence of the plaintiff or that of either of the defendants. Probably he thought that they were all tainted by self-interest. But if they are to be set aside, what remains? On the defendants' side, several persons, with means of knowledge, affirming a definite fact; on the plaintiff's side, four witnesses, who are all outside the household, of whom only one is related to the family, who speak to a negative, and that very loosely, since they take on themselves to deny, not only the birth of a child, but Sinnattal's pregnancy, of which they could know nothing. It is evident that the Subordinate Judge has not balanced the oral evidence, but has dismissed it in a summary way by reason of the excessive effect which he has ascribed to the language of the partition-deeds.

It remains to construe the will with reference to the fact that both daughters had issue. The High Court have held that on the birth of children to both, the will gave them absolute interests in severalty. The Subordinate Judge apparently acted on the same view, though on his view of the facts, it was not necessary to decide the point. Mr. Doyne contended first that the testator's intention was to let the estate devolve as joint family property. That however is manifestly inconsistent with the position assigned to his widow, and with the gift first of the income and afterwards of the property to his daughters in moieties. Then Mr. Doyne contended that the contingency on which the absolute gift is made must be taken to be not the birth of issue, but having issue who survive the parent.

Their Lordships must take the will as it stands in the English translation. Indeed it is not suggested, except as an argument *ad ignorantiam*, that the plaintiff's case would be strengthened if they could have before them, and could be made to understand, the Tamil original. It is clear that great pains have been taken to ensure accuracy, because the sentence relating to joint enjoyment has been retranslated, though it is difficult to perceive any substantial difference between the two translations. And their Lordships observe that the Subordinate Judge, who would know the Tamil language, states the critical terms in a way even less open to the suggested modification than the term "have issue." He says that if both the daughters "beget issues" the property is to be

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divided; and again that it is not to be divided until they "beget issues."

Taking the words "having issue," as the true words, there can be no dispute as to their literal meaning in any of the three contexts in which they occur. In the first two the testator contemplates the continued existence of those who "have issue," and in the second it is almost impossible to construe the words as "leave issue." There is absolutely nothing on the face of the will to suggest any secondary meaning. The words "have issue" are often read as meaning "leave issue," but not without some reason derivable from the will. Here the reason suggested is that their Lordships are construing a Hindu will, and that a Hindu testator could not have meant that if his daughter had a child who lived for a day, she should take the estate as stridhan and pass it to her husband. That is pure conjecture and quite inadmissible to control the clear expressions of the will. Even as conjecture, it fails. How can their Lordships tell that this Hindu gentleman did not feel the simple distinction, which is widely felt, between a barren woman and one who bears a child? Or how can they tell that any conjectural emendation would have pleased him better? Mr. Doyne's suggestion is made to suit the event which have happened; but it would be easy to show that on his hypothesis another set of events would produce consequences just as untoward. Fortunately their Lordships are precluded from all this guessing by the sound principle of construction that where the language of a will is clear and consistent, it shall receive its literal construction unless there is something in the will itself to suggest departure from it. The result is that in their Lordships' judgment the view of the High Court is right, and that this appeal should be dismissed with costs. They will humbly advise Her Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants—*Burton, Yeates & Hart.*

Solicitor for the respondent—*R. T. Tasker.*