Revathinnal Balagopala Varma vs His Highness Shri Padmanabhadasa Bala ... on 28 November, 1991

Equivalent citations: JT1991(5)SC301, 1991(2)SCALE1142, 1993SUPP(233)SCC1, [1991]SUPP3SCR30, AIRONLINE 1991 SC 71, (1991) 5 JT 301 (SC) 1993 SCC (SUPP) 1 233, 1993 SCC (SUPP) 1 233

Author: S. Ranganathan

Bench: S. Ranganathan

JUDGMENT

N.D. Ojha, J.

1. These two appeals by special leave have been preferred against the judgment dated 8th October, 1982 of the High Court of Kerala in A.S. No. 210 of 1979. Appellant in Civil Appeal No. 534 of 1983 instituted Original Suit No. 253 of 1976 against the since deceased respondent No. 1 (who shall hereinafter for the sake of convenience be referred to as the appellant and respondent No. 1 respectively) for partition and rendition of accounts in the court of Subordinate Judge, Trivandrum. Respondent No. 1 till the integration of the States of Travancore and Cochin on 1st July, 1949 was the Ruler of the erstwhile State of Travancore and thereafter until the formation of the State of Kerala on 1st November, 1956 he was the Rajapramukh of the State of Travancore-Cochin. The suit was instituted by the appellant on the assertion that defendants 1 to 34 (respondent No. 1 being the defendant No. l in the suit) were members of the Travancore Royal Family. This family according to the appellant was an undivided marumakkathayam tarwad governed by Marumakkathayam Law as modified by custom and usage in respect of succession, inheritance and some other matters and that respondent No. l had been managing the properties of the tarwad in his capacity as its karnavan. According to him the properties in suit being tarwad properties were liable to be partitioned among the appellant and defendants 1 to 34 on per capita basis and the appellant was entitled to a 1/35 share. Some of the properties had been alienated by respondent, No. 1 but the appellant in place of challenging such alienations preferred to seek relief for accounting with regard to the proceeds of the alienations and for division of those proceeds among the members of the tarwad. He also prayed for a decree with regard to his share in the income of the tarwad properties which according to him were received by respondent No. l as karnavan. Some of the landed properties had been the subject-matter of the ceiling proceedings under the Kerala Land Reforms Act, 1963. In those proceedings accepting the properties to be of respondent No. l the Kerala Land Board, Travancore by its order dated 15th February, 1972 declared excess lands liable to be surrendered to the Government. Against the aforesaid order the appellant filed a revision before the High Court which

was dismissed on the ground of being belated. Thereupon the appellant made an application under Section 85(9) of the Land Reforms Act before the Land Board for setting aside its order dated 15th February, 1972 aforesaid. This petition was rejected by the Board on 7th August, 1978 and possession over the land declared to be excess was resumed by the Government. Against the order rejecting his application under Section 85(9) the appellant filed a revision before the High Court which was disposed of on 11th September, 1979 reserving liberty to the appellant to move for relief under Section 85(9) on the basis of the decision in A.S. No. 210 of 1979 as and when it was given. As noticed earlier A.S. No. 210 of 1979 was decided by the High Court on 8th October, 1982 by the judgment under appeal. The case of the appellant even with regard to the properties which were the subject-matter of the ceiling proceedings was that since they were tarwad properties they were to be treated as belonging to different families which constituted independent units in the tarwad and on that basis the tarwad was entitled to retain much larger area than the area which respondent No. 1 was found entitled to retain on the basis that these properties belonged to him.

2. Respondent No. 1 contested the suit and filed a written statement. Even though it was not disputed that the appellant and defendants 1 to 34 were members of a family it was denied that they were members of an undivided marumakkathayam tarwad and that respondent No. 1 was the karnavan thereof. His case was that defendants 3 and 12 who were the two senior female members in the family and were junior and senior Maharanis of Travancore respectively along with their descendants formed a tarwad known as Sreepadam (the tarwad set up by the appellant in his plaint was, according to him, known as Valiakottaram). The case of respondent No. 1 further was that this Sreepadom tarwad known as the Royal Family of Travancore had its own properties which were divided per stirpes on 13th July, 1971 in two equal halves between the branch of defendant No. 3 on the one hand and of defendant No. 12 on the other. It was also asserted that the branch of defendant No. 12 made a further partition in which the appellant who was a member of that branch was given an individual share. According to Respondent No. 1 after the partition of the properties of Sreepadom on 13th July, 1971 there ceased to be any undivided tarwad. He asserted that the properties in suit belonged to him absolutely who before the integration of the States of Travancore and Cochin was the sovereign Ruler of Tranvancore and in that capacity held all the properties including the properties in suit, there being no distinction at that time between the properties of the Ruler and that of the Government. The properties in suit which according to respondent No. 1 were held by him as sovereign as his own were retained by him for himself absolutely when he surrendered the sovereignty of the State. Respondent No. 1 further asserted that he was competent to deal with these properties in any manner as he liked and his action in this behalf was beyond challenge. Subsequently, an additional written statement was also filed by respondent No. 1 wherein it was inter alia pleaded that the suit itself was not maintainable inasmuch as the Royal Family of Travancore even though governed by the Marumakkathayam Law as modified by custom and usage was not governed by any Statute and no member could ask for a compulsory partition of the properties of a family governed by Marumakkathayam Law. Another written statement was filed by defendant No. 3 who was the mother of respondent No. 1 wherein pleas identical to those raised by respondent No. 1 were taken. Defendant No. 12 also filed a written statement wherein inter alia she claimed absolute right over item No. 10 of Schedule A to the plaint on the basis of a grant by His Highness the Late Sreemoolam Thirunal who was at the time of the grant the Ruler of the erstwhile Travancore State. Some of the defendants who were the descendants of defendant No. 12 also filed

written statements supporting the claim of the appellant except with regard to item No. 10 aforesaid which even according to them belonged absolutely to defendant No. 12. A written statement was filed also by defendants 32, 33 and 34 supporting the case of the appellant with the exception that defendant No. 32 took a further plea that she having married on 14th May, 1952 under the Special Marriage Act, 1872 became divided in status from the rest of the members of the tarwad and was consequently entitled to a l/6th share in all the property of the tarwad as at the time of her marriage there were only six members in that tarwad. The guardian of defendants 6, 7 and 10 who were minors also filed a written statement supporting the case of respondent No. 1. The State of Kerala which had been impleaded in the suit as defendant No. 35, in its written statement supported the order passed by the Kerala Land Board in the ceiling proceedings.

3. The trial court framed necessary issues arising out of the pleadings of the parties and after giving them an opportunity of producing evidence both oral and documentary in support of their respective pleas dismissed the suit. It specifically held that the appellant and defendants 1 to 34 did not belong to an undivided marumakkathayam tarwad and that respondent No. 1 was not karnavan of any such tarwad nor were the properties in suit tarwad properties as claimed by the appellent. It also repelled the claim of defendant No. 12 that item 10 of Schedule A to the plaint was her absolute property.

4. Aggrieved by the decree of the trial court the appellant preferred A.S. No. 210 of 1979 in the High Court whereas two cross-objections were filed, one by defendant No. 12 and the other by defendant Nos. 32 to 34. The appeal as well as the cross objections were dismissed by the High Court. Against this decree of the High Court the appellant has preferred Civil Appeal No. 534 of 1983 whereas defendant Nos. 32 to 34 have preferred Civil Appeal No. 535 of 1983. Yet another Civil Appeal being Civil Appeal No. 536 of 1983 was preferred by defendant No. 12. Since, however, defendant No. 12 died during the pendency of that Civil Appeal and no consequential steps were taken, the said appeal by order dated 16th August, 1991 passed by this Court was abated.

5. Since it has not been seriously challenged before us that respondent No. 1 was a sovereign ruler of Travancore till 1st July, 1949 we find it unnecessary to dwell upon the question as to how sovereignty came to be vested in the rulers of Travancore. As was agreed by the parties before the High Court as also before us the crucial question for determination is about the title of the appellant over the properties in suit In other words, in the context of the pleadings of the parties the question which falls for consideration is whether the family of the appellant and defendants 1 to 34 was an undivided Marumakkathayam tarwad known as Valiakottaram governed by Marumakkathyam Law as modified by custom and usage in respect of succession, inheritance and some other matters and the properties in suit belonged to this Tarwad and respondent No. 1 had been managing the same as its Karnavan as alleged by the appellant or whether these properties were held by respondent No. 1, as asserted by him, as his personal properties carved out by him as such in his capacity as the sovereign ruler of Travancore and were retained by him as his personal properties even after he surrendered his sovereignty as indicated in the inventory furnished to the Government of India in pursuance of the convenant dated 27th May, 1949 (Ex.A2) and accepted by the Government of India vide Ex.A3.

6. Before adverting to this question, we find it appropriate at this stage to deal with a legal plea raised by learned Counsel for the appellant about the nature and extent of authority of respondent No. 1 over the properties in suit in his capacity as the sovereign ruler of Travancore. According to learned Counsel for the appellant since the properties in suit belonged to a Tarwad and respondent No. 1 was managing them as Karnavan, as asserted by the appellant, the mere fact that he was also the sovereign ruler of Travancore was of little significance. He also urged that since respondent No. 1 was not only a Karnavan of a Tarwad but also the sovereign ruler of Travancore, the properties in suit were made impartible in order to maintain his status but after he ceased to be ruler of Travancore, these properties even though were impartible earlier became partible. Reliance was placed in this behalf on certain statutory provisions including the Hindu Succession Act to which reference shall be made later. He also placed reliance on certain decisions dealing with the nature and legal incidents of an impartible estate. We propose to consider these decisions first to clear the legal ground based thereon.

7. The first decision to which reference was made by learned Counsel for the appellant is the Privy Council decision in the case of Baijnath Prasad Singh and Ors. v. Tej Bali Singh AIR 1921 Privy Council, page 62. In this case it was reiterated that when a custom is found to exist it supersedes the general law which however still regulates all beyond the custom. It was also held that the Zamindari which was in dispute in that case being the ancestral property of a joint family though impartible the successor fell to be designated according to ordinary rule of Mitakshra law and that the respondent in that case being the person who in a joint family would, being the eldest of the senior branch, be the head of the family was the person designated in this impartible raj to occupy the Gaddi. In so far as the proposition that when a custom is found, to exist it supersedes the general law which, however, still regulates all beyond the custom is concerned no exception can be taken to it. In regard to the other proposition it may be pointed out that the dispute in that case was about the succession to the Zamindari of Agori Barhar as is apparent from the very first sentence of the judgment even though the ancestors of the parties were referred to as Rajahs. It was apparently not a case of a sovereign ruler. The other cases on which reliance was placed in this behalf are these:

8. In Shiba Prasad Singh v. Rani Prayag Kumari Debi and Ors. it was held:

> Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have : (1) the right of partition: (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance; and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right therefore still remains, and this is what was held in Baijnath's case A.I.R. 1921 P.C. 62. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a co-parcener acquires by

> birth in joint family property no longer exsit, the birthright of the senior member to take by survivorship still remains. No. is this right a mere spes succession is similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship. Admittedly there is no evidence in this case of any such intention. The plaintiffs therefore have failed to prove separation, and the defendant is entitled to succeed to the impartible estate. Being entitled to the estate, he is also entitled to the improvements on the estate, being the immovable properties specified in items 9 to of Schedule Kha. These improvements, in fact, form part of the impartible estate.

9. The question in that case related to the right of succession to an estate and other properties left by Raja Durga Prasad. This case too does not appear to be a case of a sovereign ruler as is apparent from the recital of facts inter alia to the effect that On 27th August, 1915 Raja Durga Prasad made a will whereby he purported to dispose of some of the properties in dispute and that the will was governed by the Hindu Wills Act, 1870 and several sections of the Indian Succession Act, 1865, were thereby made applicable to wills governed by that Act. Had it been a case of a sovereign ruler neither of these Acts would have been applicable to him.

10. In Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore v. Dewan Bahadur Dewan Krishna Kishore, Rais, Lahore AIR 1941 P.C. page 120, it was held that holder of an impartible estate receiving income from house property was not owner of the property and such income, therefore, was not assessable under Section 9 of the Income Tax Act, 1922 and further that income from impartible estate of holder of such estate was income of individual and not income of undivided family of himself and his sons for purposes of the said Income-tax Act. This again was apparently not a case of a sovereign ruler inasmuch as such ruler could not have been governed by the Income-tax Act, 1922.

11. In Mirza Raj Shri Pushavathi Viziaram Gajapathi Raj Manne Sultan Bahadur and Ors. v. Shri Pushavathi Viswesar Gajapthi Raj and Ors. it was held that i an ancestral estate to which the holder has succeeded by the custom of primogeniture is part of the joint estate of the undivided Hindu family. Though the other rights enjoyed by member of a joint Hindu family are inconsistent in the case of an impartible estate the right of survivorship still exists. Unless the power is excluded by statute or custom, the holder of customary impartible estate, by a declaration of his intention, can incorporate with the estate his self-acquired immovable property and thereupon the said property accrues to the estate and is impressed with all its incidents including a custom of descent by primogeniture. In all such cases the crucial test is one of intention. A holder of an impartible estate can alienate the estate by gift inter vivos, or even by a will, though the family is undivided; the only limitation on this power could be by a family custom to the contrary or the conditions of the tenure which have the same effect.

12. In Nagesh Bisto Desai etc. etc. v. Khando Tirmal Desai etc. etc it was held:

> It is trite proposition that property though impartible may be the ancestral property of the joint Hindu family. The impartibility of property does not per se destroy its nature as joint family property or render it the separate property of the last holder, so as to destroy the right of survivorship; hence the estate retains its character of joint family property and devolves by the general law upon that person who being in fact and in law joint in respect of the estate is also the senior member in the senior line.
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> It was further held that since the decision of the Privy Council in Shiba Prasad Singh's case (supra), it is well settled that the fact that an estate is impartible does not make it the separate and exclusive property of the holder: where the property is ancestral and the holder has succeeded to it, it will be part of the joint estate of the undivided family.

13. The decision in this case has been reaffirmed in Kalgonda Balgonda Patil v. Balgonda Kalgonda Patil and Ors. 1989(Supp.) 1SCC page 246.

14. In Anant Kibe and Ors. v. Purushottam Rao and Ors. 1984(Supp.) SCC 175, it was held that the junior members of the joint family in the case of ancient impartible joint family estate take no right in the property by birth and, therefore, have no right of partition having regard to the very nature of the estate that is impartible. The only incidence for joint property which still attaches to the joint family property is the right of survivorship which, of course, is not inconsistent with the custom of impartibiliy. Referring to the facts of the case it was pointed out in paragraph 8 of the Report that there was ample evidence on record to show that the inam lands although impartible were always treated by members of the family as part of the joint family properties and the succession to the inam was by the rule of survivorship as modified by the rule of lineal primogeniture. It was also clear that the junior members were in joint enjoyment of the inam lands and the evidence showed that the properties acquired by the inamdar for the time being from out of the income of the inam such as the two houses at Indore, and other properties were always dealt with as part of the joint family property.

15. In Thakore Shri Vinayasinhji (Dead) by Lrs. v. Kumar Shri Natwarsinhji and Ors. 1988 (Supp) SCC 133, the decision of the Privy Council in the case of Shiba Prasad Singh (supra) was referred to with approval.

16. In Bhaiya Ramanuj Pratap Deo v. Lalu Maheshanuj Pratap Deo and Ors. also the decision of the Privy Council in the case of Shiba Prasad Singh (supra) was referred to with approval. It was further held in this case relying on Chinnathayi. alias Veeralakshmi v. Kulasekara Pandiya Naicker and Anr. (1952) SCR 251,that to establish that an impartible estate has ceased to be joint family property for purposes of succession it is necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate.

17. So far as these decisions are concerned, apart from the fact that in the instant case the respondent No. 1 was holding the properties in dispute as a sovereign rule and his right over these properties will have to be considered in this background, what has been held in the aforesaid cases may be of some assistance if it is found as a fact that the family of the appellant and defendants 1 to 34 was an undivided Marumakkathayam tarwad known as Valiakottaram governed by Marumakkathayam Law as modified by custom and usage in respect of succession, inheritance and some other matters and the properties in suit belonged to this Tarwad and respondent No. 1 had been managing the same as its Karnavan as alleged by the appellant. On the other hand, if it is found that these properties were personal properties of respondent No. 1 in the manner alleged by him, these decisions will be of no assistance. The fate of this appeal really, therefore, depends on the decision of the question referred to above with regard to the nature of the property.

18. The decision on the said question one way or the other would have bearing on the other submission made by learned Counsel for the appellant that the impartible nature of the property in suit came to an end on the commencement of the Hindu Succession Act, 1956 and at all events on the commencement of the Kerala Joint Hindu Family System (Abolition) Act, 1975. As regards the Hindu Succession Act, 1956 reliance was placed on Section 4 and Sub-section (1) of Section 7. It was urged that Respondent No. 1 having since died, the properties in suit in view of Sub-section (1) of Section 7 and the overriding effect of Section 4 "'shall devolve by testamentary succession, as the case may be, under this Act and not according to the Marumakkathayam or Nambudri Law" as contemplated by Sub-section (1) of Section 7 read with the Explanation thereto which reads as hereunder:

> 7. Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom:-
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> (1) When a Hindu to whom the marumakkattayam or nambudri law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a tarwad, tavazhi or illom, as the case may be, his or her interest in the intestate succession, as the case may be, under this Act and not according to the marumakkattayam or nambudri law.

Explanation:- For the purposes of this sub-section, the interest of a Hindu in the property of a tarwad, tavazhi or illom shall be deemed to be the share in the property of the tarwad, tavazhi or illom, as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the tarwad, tavazhi or illom, as the case may be, then living, whether he or she was entitled to claim such partition or not under the marumakkattayam or nambudri law applicable to him or her, and such share shall be deemed to have been allotted to him or her absolutely.

(2)...

(3) ...

19. In so far as the Kerala Joint Hindu Family System (Abolition) Act, 1975 is concerned reliance has been placed on Section 4 which contemplates replacement of joint tenancy by tenancy in common. Sub-section (1) applies to members of an undivided Hindu family governed by Mitakshara Law holding common coparcenary property on the day the said Act came into force. Sub-section (2) on the other hand applies to members of a joint Hindu family, other than undivided Hindu family referred to in Sub-section (1). Since reliance has been placed on this sub-section it is reproduced hereunder:

> 4. Joint tenancy to be replaced by tenancy in common:
>
> (1) ...
>
> (2) All members of a joint Hindu family, other than an undivided Hindu family referred to in Sub-section (1), holding any joint family property on the day this Act comes into force, shall, with effect from that day be deemed to hold it as tenants-in-common, as if a partition of such property per capita had taken place among all the members of the family living on the day aforesaid, whether such members were entitled to claim such partition or not under the law applicable to them, and as if each one of the members is holding his or her share separately as full owner thereof.

20. A perusal of the provisions in the two Acts referred to above makes it clear that Sub-section (1) of Section 7 of the Hindu Succession Act, 1956 would apply only if the properties in suit were "property of a tarwad, tavazhi or illom, as the case may be," and Respondent No. 1 had, at the time of his death,' 'interest" therein. Sub-section (2) of Section 4 of the Kerala Joint Hindu Family System (Abolition) Act, 1975 on the other hand would apply to the members of the joint Hindu family concerned "holding any joint family property on the day this Act comes into force". On a plain reading of the sub-sections referred to above it is apparent that neither of them would apply if the properties in suit did not fall under the categories referred to therein but were at the relevant time the personal properties of Respondent No. 1. It is for this reason that the applicability of these two Acts would depend as indicated earlier on the finding of the crucial question in regard to the nature of the properties in suit.

21. Before adverting to the question referred to above we consider it appropriate to deal with another submission made by learned Counsel for the appellant that the properties in suit constituted "Sthanam" and Respondent No. 1 was a Sthani thereof and consequently the provisions of Sub-section (3) of Section 7 of the Hindu Succession Act, 1956 would be applicable to the properties in suit. This plea was raised before the High Court also and was repelled inter alia by holding:

> Before we look into the law on this subject we have to consider whether there is any foundation for such a case in the pleadings of the parties. We found in the pleadings no reference to the office of the Ruler being that of a Stani. Stanom is a peculiar institution familiar in the northern part of the Kerala State, namely, Malabar and is

> not a well-known institution in Travancore. The institution of Stanom has peculiar incidents. Merely because a person is an eldest member of the family he does not become a Stani. We are mentioning this only to emphasise our point that if it is a case based upon stanom that the court is now called upon to consider that must necessarily have been a matter of pleadings. There is no such pleading in the case.

22. While referring to the observations of Lord Dunedin in Siddik Mahomed Shah v. Mt. Saran that 'no amount of evidence can be looked into upon a plea which was never put forward", it was held by this Court in Nagubai Ammal and Ors. v. B. Shama Rao and Ors. :

> The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto.

23. The same view was reiterated in Moran Mar Basselios Catholicos v. Thukalan Paulo Avira and Ors. AIR 1959 SC Page 31.

24. Nothing on the record has been brought to our notice by learned Counsel for the appellant that Respondent No. 1 went to trial with knowledge that the question of there being a Sthanam and he being a Sthani thereof was in issue and that any evidence on the basis of such knowledge was produced on his behalf. Consequently the use of the word "Sthanam" in Exhibits A-3 and B-9 on which reliance was sought to be placed before us by learned Counsel for the appellant cannot be made the foundation for decision of the question about the existence of a Sthanam and Respondent No. 1 being a Sthani thereof.

25. It was, however, urged by learned Counsel for the appellant that whether or not there was a Sthanam is a pure question of law and consequently even in the absence of any pleading or issue on the point the question can still be raised. We find it difficult to agree with this submission. The Treatise on Malabar & Aliyasanthana Law (1922 Edition) by P.R. Sundara Aiyar which is a standard book on the subject has been relied on even by learned Counsel for the appellant with regard to the origin and nature of Sthanam. In the said book itself, however, it is specifically stated in paragraph 154 at page 256:-

> The question whether there is a stanom in any particular case must be decided upon the evidence of usage adduced, and the onus is of course upon those who assert that any particular property belongs to an individual and not to the family to which the individual belongs. It is not sufficient to make a stanom that properties are temporarily allotted to a person filling a particular position; the evidence must be sufficient to prove a long continued usage recognising the property in question as belonging to the person filling a particular position without any interest in the members of the family to which the person holding the position belongs and without

> any power in them to terminate the arrangement. Is it open to a family to constitute a fresh stanom? The answer would probably be the same as to the question whether it is open to the members of a family governed by the Mitakshara Law to constitute certain property impartible and vest it in a single individual with succession according to the rule of primogeniture. In both cases the answer must be in the negative. Impartible estates and sthanams are recognisable only on the ground of custom. They are held not according to the rules of the common law of the land but in a manner different from such rules but sanctioned by usage.

26. In this view of the matter in the absence of any pleading or issue on the point the appellant cannot be permitted to raise this question on the footing that it was a pure question of law. There is yet another ground which disentitles the appellant from raising this plea. In his grounds of appeal before the High Court the appellant has taken a specific ground being ground No. 29 to the following effect:

> The court below should have found that Ex.A3 has hot created a sthanam in respect of the plaint schedule properties and the court below also failed to note that the 1st defendant has no case that he is a sthani and that the plaint A schedule properties are sthanam properties. The decision in 1960 K.L.T.S.C. 31 quoted by the court below should have been found not applicable to the facts of the case.

27. This being his categorical stand before the High Court, he cannot now be permitted to take a somersault. On this view, we find it unnecessary to deal with certain cases relied on by learned Counsel for the appellant to indicate the nature and incidence of the properties of a Sthanam and the rights of a Sthani therein.

28. At this stage another plea raised by learned Counsel for the appellant with regard to the burden of proof may also be disposed of. Relying on the decision of the Privy Council in Martand Rao v. Malhar Rao AIR 1923 Privy Council Page 10 it was urged that when there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, was not liable to partition. For Respondent No. 1 on the other hand it has been urged that it not having been disputed that, at any rate till Respondent No. 1 was the sovereign Ruler of Travancore, the properties in suit were impartible and descendible to a single person the burden to prove that those properties were joint family properties and thus partible was on the appellant, he being the plaintiff so as to be able to obtain a decree in his favour. Suffice it to say, so far as the question of burden of proof is concerned, that it has been held in Moran Mar Basselios Catholicos (supra) that the question of burden of proof at the end of the case when both parties have adduced evidence is not of very great importance and the Court has to come to a decision on the consideration of all materials". This view has been reiterated in Narayan Bhagwantarao Gosavi Balajiwale v. Gopal Vinayak Gosavi and Ors. and several other subsequent decisions and is by now settled law.

29. Now we may consider the legal effect of respondent No. 1 being a sovereign ruler of Travancore till he surrendered the sovereignty as indicated earlier. In Ameer-un-Nissa Begum and Ors. v. Mahboob Begum and Ors. dealing with the efficacy of certain 'Firmans' issued by the Nizam of Hyderabad who was a sovereign ruler, it was, with regard to the powers of the Nizam, held:-

> It cannot be disputed that prior to the integration of Hyderabad State with the Indian Union and the coming into force of the Indian Constitution, Nizam of Hyderabad enjoyed uncontrolled sovereign powers. He was the supreme legislature, the supreme judiciary and the supreme head of the executive, and there was no constitutional limitation upon his authority to act in any of these capacities. The 'Firmans' were expressions of the sovereign will of the Nizam and they were binding in the same way as any other law; - nay, they would override all other laws which were in conflict with them. So long as a particular 'Firman' held the field, that alone would govern or regulate the rights of the parties concerned, though it could be annulled or modified by a later 'Firman' at any time that the Nizam willed...
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> The Nizam was not only the supreme legislature, he was the fountain of justice as well. When he constituted a new Court, he could, according to ordinary notions, be deemed to have exercised his legislative authority. When again he affirmed or reversed a judicial decision, that may appropriately be described as a judicial act. A rigid line of demarcation, however, between the one and the other would from the very nature of things be not justified or even possible.

30. The same view was reiterated in Director of Endowments, Government of Hyderabad and Ors. v. Akram Ali wherein it was held:

> Now the Nizam was an absolute sovereign regarding all domestic matters at that time and his word was law. It does not matter whether this be called legislation or an executive act or a judicial determination because there is in fact no clear cut dividing line between the various functions of an absolute ruler whose will is law. Whatever he proclaimed through his Firmans had the combined effect of law and the decree of a Court: see the judgment of this Court in - 'Ameerunnissa Begum v. Mahboob Begum' (A). Therefore, the effect of this Firman was to deprive the respondent and all other claimants of all rights to possession "pending enquiry of the case". Exactly what this means is not clear but, taken in conjunction with the surrounding circumstances and with the decision of the Director of the Ecclesiastical Department to which we have referred, it is fair to assume that it means, pending the enquiry by the Civil Courts about which the Director had twice spoken, that is to say, if there was a right to possession it was held in abeyance till established by the Civil Courts.
>
> Now, as we have said, the Nizam was at that time an absolute ruler and could do what he pleased. His will, as expressed in his Firman, was the law of the land. Therefore, even if it be assumed that the respondent was in possession, whatever they may have been, were taken away and held in abeyance till he could establish them in the Civil

Courts. The question now arises whether this enured after the Constitution and whether the respondent's right to possession, assuming he had any, revived when the Constitution came into being. We are clear that the Constitution effected no change.

It was conceded that the Nizam had power to confiscate the property and to take it away from the respondent 'in toto' and it was conceded that if he had done so the rights so destroyed would not have revived because the Constitution only guarantees to a citizen such rights as he had at the date it came into force; it does not alter them or add to them: all it guarantees is that he shall not be deprived of such rights as he has except in such ways as the Constitution allows. But if the Nizam could take away every vestige of right by a Firman he could equally take away a part of them and at the date of the passing of the Constitution the respondent would only have the balance of the rights left to him and not the whole, for what applies to the whole applies equally to the part.

Therefore, even if we accept all the respondent's facts, the position would still be that at the date the Constitution came into force he had no right to immediate possession; the utmost he had was a right to be restored to possession if and when he established his rights in a Court of law.

31. In Madhaorao Phalke v. The State of Madhya Bharat while dealing with the powers of Sir Madhavrao, who was a sovereign ruler of the State of Gwalior, it was held:-

It would thus be seen that though Sir Madhavrao was gradually taking steps to associate the public with the government of the State and with that object he was establishing institutions consistent with the democratic form of rule, he had maintained all his powers as a sovereign with himself and had not delegated any of his powers in favour of any of the said bodies. In other words, despite the creation of these bodies the Maharaja continued to be an absolute monarch in whom were vested the supreme power of the legislature, the executive and the judiciary.

In dealing with the question as to whether the orders issued by such an absolute monarch amount to a law or regulation having the force of law, or whether they constitute merely administrative orders, it is important to bear in mind that the distinction between executive orders and legislative commands is likely to be merely academic where the Ruler is the source of all power. There was no constitutional limitation upon the authority of the Ruler to act in any capacity he liked; he would be the supreme legislature, the supreme judiciary and the supreme head of the executive, and all his orders, however issued, would have the force of law and would govern and regulate the affairs of the State including the rights of its citizens. In Ameer-un-Nissa Begum v. Mahboob Begum (), this Court had to deal with the effect of a Firman issued by the Nizam, and it observed that so long as the particular Firman issued by the Nizam held the field that alone would govern and regulate the rights of the parties concerned though it would be annulled or modified by a later

> Firman at any time that the Nizam willed. what was held about the Firman issued by the Nizam would be equally true about all effective orders issued by the Ruler of Gwalior.

32. While dealing with a Firman issued by the Maharana of Udaipur who too was a sovereign ruler, it was held in Tilkoyat Shri Govindlalji Maharaj v. The State of Rajasthan and Ors. follows:

> In appreciating the effect of this firman, it is first necessary to decide whether the Firman is a law or not. It is matter of common knowledge that at the relevant time the Maharana of Udaipur was an absolute monarch in whom vested all the legislative, judicial and executive powers of the State. In the case of an absolute Ruler like the Maharana of Udaipur, it is difficult to make any distinction between an executive order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby.

33. In Civil Appeal No. 242 of 1955 Mangal Singh and Ors. v. The Legal Remembrancer, Punjab and Ors. decided by this Court on 23rd February, 1960 a plea questioning the validity of certain orders passed by the Maharaja of Patiala with regard to a Gurdwara had been raised. An issue about the jurisdiction of the Civil Court to adjudicate upon the said plea was framed While dealing with the plea a Constitution Bench after referring to certain earlier decisions of this Court held:

> It cannot be, and has not been, disputed that the position of the Maharaja of Patiala before the coming into force of the Constitution was the same as that, for example, of the Maharaja of Jammu and Kashmir, or the Maharao of Kotah, or the Nizam of Hyderabad. He would therefore, be in view of the cases cited above, an absolute sovereign so far as the internal administration of the State is concerned. Under the circumstances, the order Ex. DA of April 2, 1945, be it called judicial or executive, which expressed his will with respect to this Gurdwara and the land in dispute and the management of the Gurdwara and the land belonging to it would be binding on all authorities within his State, and it would not be open to any Court to question that will. In this view of the matter the High Court was in our opinion right in holding that the jurisdiction of the civil court was barred as the sovereign had expressed his will that the land in dispute belonged to the Gurdwara and ; should be managed by a committee which would be in-charge of the Gurdwara.

34. In another decision of this Court in Civil No. 226 of 1965 Mahant Hardial Singh v. Ajmer Singh and Ors. decided on November 20, 1968 with regard to the powers of Maharaja of Patiala this Court held:

> We think that this appeal must fail on the short ground that the sale in favour of Seth . Banarsi Das cannot be impugned in view of the orders made by His Highness the Maharaja of Patiala. It must be remembered that at the time the transaction took place, Patiala was a native State and the Maharaja enjoyed uncontrolled sovereign

powers. At that time he was the supreme legislature, the supreme judiciary and the supreme head of the executive. There was no constitutional limitation on his authority to act in any of the capacities. His . order were expressions of the sovereign Will and they were binding in the same way as any other law, nay, they would override all other laws which were in conflict with them. So long as his order held the field that alone would govern or regulate the rights of the parties concerned though it could have been annulled or modified by him at any time he willed.

35. In D.S. Meramwala Bhayala v. Ba Shri Amarba Jethsurbhai (1968) ILR 9 Gujarat Page 966 it was held:

There is, therefore, no doubt that the Khari-Bagasara Estate was a sovereign Estate and the Chief of the Khari-Bagasara Estate for the time being was a sovereign Ruler within his own territories subject to the paramountcy of the British Crown prior to 15th August, 1947 and completely independent after that date.

If the Khari-Bagasara Estate was a sovereign Estate, it is difficult to see how the ordinary incidents of ancestral coparcenary property could be applied to that Estate. The characteristic feature of the ancestral coparcenary property is that members of the family acquire an interest in the property by birth or adoption and by virtue of such interest they can claim four rights: (1) the right of partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of survivorship. It is obvious from the nature of a sovereign Estate that there can be no interest by birth or adoption in such Estate and these rights which are the necessary consequence of community of interest cannot exist. The Chief of a sovereign Estate would hold the Estate by virtue of his sovereign power and not by virtue of municipal law. He would not be subject to municipal law; he would in fact be the fountain head of municipal law. The municipal law cannot determine or control the scope and extent of his interest in the estate or impose any limitations on his powers in relation to the Estate, as a sovereign ruler he would be the full and complete owner of the Estate entitled to do what he likes with the Estate. During his lifetime no one else can claim an interest in the Estate. Such an interest would be inconsistent with his sovereignty. To grant that the sons acquire an interest by birth or adoption in the Estate which is a consequence arising under the municipal law would be to make the Chief who is the sovereign Ruler of the Estate subject to the municipal law. Besides, if the sons acquire an interest in the Estate by birth or adoption, they would be entitled to claim the rights enumerated above but these rights cannot exist in sovereign Estate. None of these rights can be enforced against the Chief by a remedy in the municipal Courts, the Chief being the sovereign Ruler, there can be no legal sanction for enforcement of these rights. The remedy for enforcement of these rights would not be a remedy at law but resort would have to be taken to force for the Chief as the sovereign Ruler would not be subject to municipal law and his actions would not be controlled by the municipal Courts. Now it is impossible to conceive of a legal right which has no legal remedy. If a claim is not

> legally enforceable, it would not constitute a legal right and, therefore, by the very nature of a sovereign Estate, the sons cannot have these rights and if these rights cannot exist in the sons, it must follow as a necessary corollary that the sons do not acquire an interest in the Estate by birth or adoption...
>
> ... Now it was not disputed on behalf of Meramvala that if prior to merger the Estate did not partake of the character of ancestral coparcenary property, the properties left with Bhayawala under the merger agreement would not be ancestral coparcenary properties: if Meramvala did not have any interest in the Estate prior to merger, he would have no interest in the properties which remained with Bhayavala under the merger agreement. It was not the case of Meramvala-and it could not be the case since the merger agreement would be an act of State-that as a result of the merger agreement any interest was acquired by him in the properties held by Bhayavala. Bhayavala was, therefore, the full owner of the properties held by him and was competent to dispose of the same by will...
>
> ...The argument of Mr. I.M. Nanavati however was that the effect of applicability of the rule of primogeniture by the paramount power was that the rights of coparceners under the ordinary Hindu law were eclipsed: these rights were not destroyed but they remained dormant and on the lapse of paramountcy, the shadow of the eclipse being removed, the rights sprang into full force and effect. This argument is wholly unsustainable on principle.

36. It has been brought to our notice by learned Counsel for Respondent No. 1 that Civil Appeal Nos. 1358-1359 of 1969 were filed in this Court against the aforesaid judgment of the Gujarat High Court which were initially dismissed on 29th March, 1974 with certain observations. Subsequently, two Review Petitions bearing Nos. 45-46 of 1974 were filed which were disposed of on 17th March, 1976 by the following order:

> The order dated 29-3-1974 in C.A. No. 1358-59/69 is recalled and the following order is passed by consent of parties:
>
> Both the C.As. 1358-59/69 had abated when they were heard. They are therefore dismissed. There will be no order as to costs.

37. Against a judgment of the then Supreme Court of Bombay an appeal was taken up before the Privy Council and the judgment of the Privy Council was reported in Elphinstone v. Bedreechund 12 English Reports Page 340. In the foot note of that judgment at page 345 while dealing with the question as to whether there was any distinction between the public and private property of Peishwa Bajee Row, the following passage occurs: The Privy Council reversed the judgment of the Court at Bombay. In the course of the argument Lord Tenterden asked, "What is the distinction between the public and private property of an absolute sovereign? You mean by public property, generally speaking, the property of the State, but in the property of an absolute sovereign, who may dispose of every thing at any time, and in any way he pleases, is there any distinction?" and in delivering the

judgment of their Lordships he also observed, "another point made, which applies itself only to a part of the information, is, that the property was not proved to have been the public property of the Peishwa. Upon that point I have already intimated my opinion, and I have the concurrence of the other Lords of the Council with me in it, that when you are speaking of the property of an absolute sovereign there is no pretence for drawing a distinction, the whole of it belongs to him as sovereign, and he may dispose of it for his public or private purposes in whatever manner he may think proper.

38. In Halsbury's Laws of England, Fourth Edition, Volume 8, under the caption "The Title to the Crown" paragraphs 851, 897 and 1076 have, in our opinion, a bearing on the question raised in the instant case with regard to the powers of a sovereign. In paragraph 851 it has been pointed out that on the death of the reigning sovereign the crown vests immediately in the person who is entitled to succeed, it being a maxim of the common law that the King never dies. The new sovereign is, therefore, entitled to exercise full prerogative rights without further ceremony. In paragraph 897 on the other hand it has been pointed out that the sovereign is regarded legally as immortal, the maxim of law being that "the King never dies". Paragraph 1076 inter alia provides:

> Priority of Crown rights. Where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred, the rule being "detur digniori". Thus, the Crown cannot have a joint property with any person in one entire chattel, or one which is not capable of division, and where the title of the Crown and a subject concur, the Crown takes the whole. So if an indivisible chattel or a debt are assigned to the Crown and a subject, or where two persons have a joint property in such a chattel or debt and one person assigns his share to the Crown, or where a bond is made to the Crown and a subject, the Crown takes the whole, for it cannot be a partner with a subject; nor can the Crown become a joint owner of a chattel real by grant or contract, but takes the whole.

39. This being the law with regard to the powers of a sovereign and the legal status of the properties held by him there can be no manner of doubt that till the sovereignty of the Maharaja of Travancore had ceased he was entitled to treat and use the properties under his sovereignty in any manner he liked and his Will in this regard was supreme. On the principle that a sovereign never dies and succession to the next ruler takes place without there being a hiatus there could be no change in the legal status of the properties held by one ruler and his successor. As seen above, one incidence of property held by a sovereign was that there was really no distinction between the public or State properties on the one hand and private properties of the sovereign on the other. The other incidence was that no one could be a co-owner with the sovereign in the properties held by him. As observed by Lord Tenterden referred to earlier when you are speaking of the property of an absolute sovereign there is no pretence of drawing a distinction, the whole of it belongs to him as sovereign and he may dispose of it for his public or private purposes in whatever manner he may think proper.

40. That respondent No. 1 was a sovereign and the properties in dispute as held by the sovereign rulers from time to time were impartible has not been disputed by the learned Counsel for the appellant before us. What has been urged by him, however, is that the properties in dispute belonged to a tarwad and were as such joint Hindu family properties and the attribute of

impartibility applied to them because by custom only the eldest member of the family could be the ruler and to maintain his dignity and status it was necessary to make these properties impartible.

41. In this connection it has to be kept in mind that the mode of succession of a sovereign ruler and the powers of such a ruler are two different concepts. Mode of succession regulates the process whereby one sovereign ruler is succeeded by the other. It may inter alia be governed by the rule of general primog(sic)iture or lineal primogeniture or any other established rule governing succession. This process ends with one sovereign succeeding another. Thereafter what powers, privileges and prerogatives are to be exercised by the sovereign is a question which is not relatable to the process of succession but relates to the legal incidents of sovereignty.

42. If some one asserts that to a particular property held by a sovereign the legal incidents of sovereignty do not apply, it will have to be pleaded and established by him that the said property was held by the sovereign not as a sovereign but in some other capacity. In the instant case apart from asserting that the properties in suit belonged to a joint family and Respondent No. 1 even though a sovereign ruler, held them as the head of the family to which the property belonged, the appellant has neither specifically pleaded nor produced any convincing evidence in support of such an assertion. It has been urged on behalf of the appellant that only the eldest male off-spring of the Attingal Ranis could, by custom, be the ruler and all the heirs of the Ranis who constituted joint Hindu family would be entitled to a share in the properties of the Ranis and the properties in suit were held by Respondent No. 1 as head of the tarwad even though impartible in his hands. This plea has been repelled by the trial court as well as by the High Court and nothing convincing has been brought to our notice on the basis of which the presumption canvassed on behalf of the appellant could be drawn and the findings of the courts below reversed. We are dealing with an appeal and as has been pointed out by this Court in Thakur Sukhpal Singh v. Thakur Kalyan Singh it is the duty of the appellant to show that the judgment under appeal is erroneous.

43. The following extract from pages 190 to 192 of Kerala District Gazetteers, Trivandrum by A. Sreedhara Menon will give a glimpse about the nature of property held by the Attingal Ranis.

Early in his reign Marthanda Varma assumed direct control over the so-called Attingal 'Queendom'. This was not an act of annexation or conquest, but Nagam Aiya has described the event as "the amalgamation of Travancore with Attingal". There has been some misunderstanding among contemporary and later writers in regard to the significance of this step taken by Marthanda Varma. This is the result of a general notion that Attingal was an independent State ruled by the Ranis and that the Kings of Travancore never exercised any authority in the tract. Certain statements found in the memoirs, commentaries and State papers of the Portuguese, the Dutch and the English have only served to strengthen this notion. According to Van Rheede (1677) "the Princess of Attingal who is not alone the mother of Travancore, but the eldest of Tippaporsorewam has a large territory of her own independent of Travancore". Hamilton even refers to a regular treaty between Marthanda Varma and the Rani by which the former strengthened the position of the King. He says that "the Tamburetties of Attingal possessed the sovereignty of Travancore from remote antiquity, until Raja Marthanda Varma persuaded the Tamburetty to resign the sovereign authority to the Rajas, both for himself and for all succeeding Tamburetties. To perpetuate these conditions, a regular treaty was

executed between the Raja and the Tamburetty, which was inscribed on a silver plate, and rectified by the most solemn imprecations, limiting the succession to the offsprings of the Attingal Tamburetties. Having concluded this arrangement Raja Marthanda Varma directed his arms against the neighbouring States". The theory that the Ranis of Attingal exercised sovereign powers is, however, incorrect. The fact is that in political matters the Ranis of Attingal as such exercised no sovereign rights. Any grant of rights over immovable property by the Ranis of Attingal required the King's previous assent or subsequent confirmation for its validity. It may be noted that the so-called Queendom of Attingal had its origin in the 5th century Kollam Era when two princesses were adopted into the Venad family from Kolathunad and the revenues from certain estates in and around Attingal were assigned to them for their exclusive use. Since then the female members of the ruling family of Travancore had come to be known as Attingal Ranis. It was only the male children of these Tamburatties, either by birth or by adoption, who could inherit the throne. Thus Marthanda Varma and the heir-apparent Rama Varma were both sons of Attingal Tamburatties. This tended to invest the Attingal Ranis with a special dignity in the eyes of the people, native as well as foreign, and led to the notion that they had sovereign rights over Attingal. But in reality the Kingdom of Venad extended from Kanyakumari in the south as far as Kannetti in the north, and there was no kingdom or principality intervening within its limits. When Marthanda Varma decided to assume direct control over the estates of Attingal and thus deprive the Rani of some of her rights, he was not interfering in the affairs of a sovereign State. As the head of the royal family and the ruler of the State, he had every right to interfere in the affairs of a part of his kingdom, The Rani of Attingal had neither territory nor subjects, except in the sense that the people of Venad paid respects to her as a senior member of the ruling family. What she possessed was nothing more than the control over the revenues of the estates and an outward status and dignity. Whatever powers she exercised were those delegated to her by the head of the family and the sovereign of the State.

44. The historical perspective referred to above runs counter to the case of the appellant with regard to the rights of respondent No. 1 over the properties in suit even if it may be accepted that at some point of time they or any part of them were held by the Attingal Ranis before Marthanda Verma had assumed direct control as sovereign ruler of Travancore over the properties of Attingal Ranis. After the assumption of direct control by Marthanda Varma the properties held by the Ranis, whatsoever the extent and nature of such properties may have been earlier, became properties of the State of Travancore and the legal incidents of property held by a sovereign as referred to above applied to them also. There was no scope of such properties continuing to be joint family properties after such assumption of direct control.

45. The properties in suit having passed on from one sovereign to the other came to be ultimately held by Respondent No. 1 in that capacity. Neither any principle nor authority nor even any grant etc. has been brought to our notice on the basis of which it could be held that in the properties of the State held by a sovereign an interest was created or came into being in favour of the family to which the sovereign belonged.

46. At this place reference may be made to the following finding of the High Court:

> No attempt has been made to adduce evidence directly bearing on the question as to how each one of the plaint schedule items are acquired. There is no pleading also as to the source of acquisition. There is no evidence not only as to how they were acquired, but even as to who acquired these items. Perhaps such evidence is not available and it is not possible to get at such evidence in the case.

47. We may here point out that such properties of the family to which the sovereign belonged as were allowed to retain their original character would of course fall in a different category. According to Respondent No. 1 there were such properties known as Sreepadam properties which fell in this category and in which the family members continued to have an interest. These Sreepadam properties according to him were only those which were partitioned in 1971 by the deed of partition executed in this behalf being Exhibit B-3 on the record of the suit. As regards the properties in suit what has been asserted on his behalf is that before he surrendered his sovereignty there was no distinction between the properties of the ruler and that of the State and that before surrendering his sovereignty he had entered into a covenant whereby he was given an option to furnish a list of such properties which he wanted to retain as personal properties and that he having furnished such a list which included the properties in suit and the same having been approved by the Government of India the properties in suit continued to be held by him as his personal properties in the capacity of being their absolute owner. We find substance in both these contentions.

48. As regards Exhibit B-3 it would be seen that this deed of partition was executed by the then living members of the Royal Family. Even the appellant who was a minor at that time was represented by his mother. This deed starts with the assertion that the parties to it "are members of the joint Hindu Kshatria family known as 'Sreepadom Palace' which by prerogative is the Royal House of Travancore." It then proceeds to describe the extent of the properties held by the Sreepadom and states:

> The lands and other immovable properties mentioned in the Schedule attached hereto have been inherited, held and enjoyed by our family, the aforesaid Sreepadom Palace, as Sreepadom Palace Private Properties and the family continues to have exclusive, absolute and undisputed title of ownership, possession and enjoyment by the laws of inheritance, custom, proprietorship and tradition.
>
> The Sreepadom Lands, enfranchised as aforesaid, as well as the private family properties, more particularly described in the Schedule hereunder, were administered by His Highness 'Sree Padmabha Dass Sri Chithira Thirunal Balarama Varma who is the senior most male member of the family.

49. After discussing in detail the status of Attingal Ranis and the mode in which some of the properties came to be held by them the High Court in the judgment appealed against has held:

> The Sreepadom Palace is the residence of the Attingal Ranees and naturally the Attingal Ranees and the children would constitute a Marumakkathayam Tarwad. Properties were assigned even at the time of the original adoption in 483 M.E. to the

> family of Attingal Ranees for the purpose of their maintenance in accordance with the style of living expected of them. It is these properties and properties which came into the family later which were subject matter of division under Ext B.3 partition deed in 1971.

50. From the aforementioned discussion by the High Court and the tenure of the deed of partition Exhibit B-3 particularly the meticulous care with which the properties which were the subject-matter of partition were described both in the body of the deed and the Schedule appended thereto were of the opinion that all the properties belonging to the joint family in which the appellant could have a share or interest were subject-matter of and covered by this deed of partition.

51. It is not disputed that the properties in suit do not form part of this deed of partition. No convincing reason for this significant omission has been brought to our notice. Keeping in view the fact as indicated above that meticulous care was taken to describe the properties which were being partitioned by Exhibit B-3 and the presumed knowledge ability of the persons who were parties to this deed with regard to the family properties it is difficult to believe that at the time when the deed of partition was executed the properties in dispute were not in the knowledge of the persons who were parties to the said deed. The conclusion and indeed the only conclusion which can be drawn from this omission is that at the time of the execution of the deed of partition the parties thereto were fully conscious of the fact that the properties in dispute were not joint family properties. In this context not much significance can be attached to paragraph 19 of the deed of partition on which reliance has been placed by learned Counsel for the appellant. The said paragraph reads as hereunder:

> If any property over which the Sreepadom Palace has ownership and remaining as Sreepadom Palace Private property has been omitted to be included in this partition, and the omission is detected at a subsequent date it will also be shared equally between the two branches by mutual agreement to be entered upon as and when such necessity arises.
>
> In our opinion, paragraph 19 referred to above was incorporated in the deed of partition in a routine manner it having become almost customary to include such a clause by way of abundant caution. As already indicated above and particularly keeping in view the extent and nature of the properties in dispute it is unbelievable that the parties to the deed of partition were not aware about the existence of these properties and left it to be partitioned in future as and when "the omission is detected".

52. There is another circumstance which supports this contention. Some of the properties in suit were made subject-matter of declaration of ceiling area under the Kerala Land Reforms Act, 1963. Section 82 of the said Act provides the extent of the land which is to constitute the ceiling area whereas Section 83 provides that with effect from such date as may be notified by the Government in the Gazette no person shall be entitled to own or to hold or to possess under a mortgage lands in the aggregate in excess of the ceiling area. For purposes of determination of ceiling area ceiling

returns were to be filed under Section 85 of that Act. Sub-section .(2) of Section 85 inter alia provided that where a person owned or held land in excess of the ceiling area such person shall within a period of three months from the date notified under Section 81 file a statement before the Land Board intimating the location, extent and such other particulars as may be prescribed, of all lands (including lands exempted under Section 81) owned or held by such person and indicating the lands proposed to be surrendered. The date which was notified under Section 83 was 1st of January, 1970. It is significant to mention here that only Respondent No. 1 had filed a return and that too in his capacity as an individual. Section 85A which was inserted by Act 17 of 1972 inter alia provided in its Sub-section (1):

> Notwithstanding anything contained in this Chapter, every family consisting of more than one member, owning or holding more than twelve acres in extent of land, every adult unmarried person and every family consisting of a sole surviving member, owning or holding more than six acres in extent of lands and every other person (other than a bank) owning or holding more than twelve acres in extent of land shall, within a period of seventy-five days from the commencement of the Kerala Land Reforms (Amendment) Act, 1972, file a statement before the Land Board intimating the location, extent and such other particulars as may be prescribed, of all lands (including lands exempted under Section 81 owned or held by such family or person).

53. The appellant or any other member of the family did not file a return as contemplated by either Sub-section (2) of Section 85 or by Section 85A. The consequence of not filing a return was that apart from the land which was found to be within the ceiling area of Respondent No. 1 who had filed the return the rest of the land was to be declared surplus and was to vest in the State Government. In our opinion, keeping in view the penal consequence of not filing a return namely being deprived of retaining land even to the extent of the ceiling area the circumstance that the appellant or any member of the family did not file a return is indicative of the fact that they did not consider these lands to belong to the joint family.

54. At this place, in order to keep the record straight we wish to point out that subsequently an application was made by the appellant under Sub-section (9) of Section 85 of the Kerala Land Reforms which inter alia provides:

> The Taluk Land Board may, at any lime, set aside its order under Sub-section (5) or Sub-section (7), as the case may be, and proceed afresh under that sub-section if it is satisfied that-
>
> (a) the extent of lands surrendered by, or assumed from, a person under Section 86 is less than the extent of lands which he was liable to surrender under the provisions of this Act, or
>
> (b) the lands surrendered by, or assumed from, a person are not lawfully owned or held by him; or

> (c) in a case where a person is, according to such order, not liable to surrender any land, such person owns or holds lands in excess of the ceiling area:
>
> xxx xxx xxx xxx

55. This application was, however, rejected by the Land Board. Against the order of the Land Board C.R.P. No. 3786 of 1976 was filed before the High Court. This civil revision was disposed of by the High Court on 11th September, 1979 by making inter alia the following observation:

> It is brought to my notice that the question which the petitioner sought to raise before the Land Board i.e. whether the property belongs to the joint family or to the Maharaja, is now before this Court in appeal in A.S. No. 210 of 1979. In the circumstances I think interests of justice will be served if I direct that the petitioner can move for relief under Section 85(9) of the Kerala Land Reforms Act on the basis of the decision in the appeal. The Land Board will decide the question of surrender of excess lands on the basis of the decision of the High Court in the appeal. The Land Board would be bound by the said decision and will have accordingly to modify the order if it is so necessary. Till the decision in the appeal and in case in the appeal the decision is in favour of the petitioner, till the Land Board takes a decision on the petition which the petitioner had filed before the Land Board afresh in accordance with the directions given herein, the Land Board shall not distribute any excess lands which they have come in possession on the basis of the order passed against the 1st respondent. Nor shall the State the 16th respondent herein alienate any such lands which might have come into their possession on the basis of the decision in the ceiling case against the Ist respondent. The State shall not do anything which might prejudice the right of the successful party in the appeal.

56. We shall now consider the second contention referred to above raised on behalf of Respondent No. 1.

57. It may be recapitulated that there are only two alternatives which fall for consideration with regard to the nature of the properties in suit, namely, whether they are joint family property as asserted by the appellant or personal properties of respondent No. 1 as asserted by him. As regards the properties being joint family properties apart from what has been discussed above, it may further be noticed that the Trial Court recorded a categorical finding not only that no title deeds or any other documentary evidence to prove the source of acquisition of these properties had been produced on behalf of the appellant, even PW.1, the father of the appellant who appeared as a witness on his behalf had to admit that he did not know whether these properties were settled in favour of anyone and that he had not seen any record to show that these properties belonged to the tarwad as alleged in the plaint. On the other hand, respondent No. 1, inter aha, produced settlement registers marked as Ex. B-10 to B-14, State Budget Ex. B 15 and.B-16, the Kandukrishi Proclamation dated 27th May, 1949 and Circular Ex. B-30 with regard to the properties shown in Schedule A to the plaint indicating that they belonged to the Sirkar or State. He also produced Ex.B-17 indicating that maintenance of the palace was being done by the State with the funds of the State exchequer.

With regard to securities and shares in the name of respondent No. 1 and the items of jewellery in his custody, the Trial Court has held that there was nothing on the record to show that they had been acquired with tarwad funds or that the tarwad had any interest in the same. The fact that the lacuna pointed out by the Trial Court as aforesaid did exist could not successfully be assailed on behalf of the appellant either before the High Court or even before us:

58. The Rulers of Travancore and Cochin with the concurrence and guarantee of the Government of India entered into a covenant dated 27th May, 1949 for the formation of the United State of Travancore and Cochin. This covenant was proved in the suit and marked as Ex. A-2. Article IV of the covenant provided that there shall be a Raj Pramukh for the United State. Article XV which is relevant for the purposes of the instant case provided as herender:-

> (1) The Ruler of each Covenanting State shall be entitled to the full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him immediately before the appointed day.
>
> (2) He shall furnish to the Government of India in the Ministry of States before the first day of September, 1949 as inventory of all immovable property, securities and cash balances held by him as such private property.
>
> (3) If any dispute arises as to whether any item of property is the private property of the Ruler or State property, it shall be referred to such person as the Government of India may nominate in consultation with the Ruler of Travancore or Cochin as the case may be and the decision of that person shall be final and binding on all parties concerned.

Respondent No. 1 furnished the relevant inventory contemplated by the aforesaid Article XV. Copy of Government proceedings consequent upon the aforesaid covenant and furnishing of the inventory was marked as Ex.A-3. It starts by saying:-

> The question of the private properties of His Highness the Maharaja of Travancore was engaging the attention of the Government of India. The conclusion reached and agreed to by this Government and embodied in three statements showing:
>
> (i) Immovable properties recognised as the Private Property of His Highness the Maharaja of Travacore.
>
> (ii) Immovable Properties to be handed over to the State Government, and
>
> (iii) Cash balance and securities recognised as His Highness' private property.

59. Thereafter are to be found the lists containing details of the aforesaid three categories of property. It has hot been disputed before us that these lists include the properties in suit.

60. White Paper on Indian States published by the Government of India, Ministry of States, in its part-VII dealing with 'Settlement of Ruler's Private Properties' contains in paragraphs 156 and 157, inter alia, the following statement:

> 156. The Instruments of Merger and the Covenants establishing the various Unions of States, are in the nature of over-all settlements with the Rulers who have executed them. While they provide for the integration of States and for the transfer of power from the Rulers, they also guarantee to the Rulers privy purse, succession to gaddi, rights and privileges and full ownership, use and enjoyment of all private properties belonging to them, as distinct from State properties. The position about the privy purses guaranteed or assured to the Rulers is set out in details in Part XI. The provisions of the Constitution bearing on the rights, privileges and dignities of Rulers and their succession to their respective gaddis are also explained in that Part. So far as their Private properties are concerned, the Rulers were required to furnish by a specified date inventories of immovable property, securities and cash balances claimed by them as private property. The settlement of any dispute arising in respect of the properties claimed by a Ruler was to be by reference to an arbitrator appointed by the Government of India.
>
> 157. In the past the Rulers made no distinction between private and State property; they could freely use for personal purposes any property owned by their respective States.

61. Just as the Rulers of Travancore and Cochin had entered into the aforesaid covenant, 35 States in Bundelkhand and Baghelkhand regions agreed on March 13, 1948 to unite themselves into one State which was to be called the United State of Vindhya Pradesh. Article XI of the said covenant as quoted in Vishnu Pratap Singh v. State of Madhya Pradesh and Ors. 1990 (Supp.) SCC 43, read as hereunder:

> (1) The Ruler of each Covenanting State shall be entitled 'to' the full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of his making over the Administration of the State to the Raj Pramukh.
>
> (2) He shall furnish to the Raj Pramukh before May 1, 1948 an inventory of all the immovable properties, securities and cash balances held by him as such private property.
>
> (3) If any dispute arises as to whether any item of property is the private property of the Ruler or State property, it shall be referred to a Judicial Officer to be nominated by the Government of India, and the decision of that person shall be final and binding on all parties concerned.

62. A dispute arose in regard to a house built by one of the 35 Rulers, namely, the Ruler of Chattarpur. Dealing with the effect of the Covenant in the background of the Instrument of Accession which each of the Rulers including the Maharaja of Travancore had from time to time signed in exercise of his sovereignty in and over his State, it was held in the case of Vishnu Pratap Singh (supra):

> Despite the distinction drawn in Article XI, there was in reality no distinction between State property and the property privately owned by a Ruler, since the Ruler was the owner of all the property in the State. For the purposes of arrangement of finance, however, such a distinction was practically being observed by all Rulers. The apparent effect of the covenant was that all the property in the State vested in the United State of Vindhya Pradesh except private property which was to remain with the Rulers. As is evident, the Ruler was required under Article XI to furnish to the Raj Pramukh before May 1, 1948 an inventory of all immovable properties, securities and cash balances held by him as such private property. Conceivably, on a dispute arising as to whether any item of property was or was not the private property of the Ruler and hence State property, it was required to be referred to a Judicial Officer to be nominated by the Government of India and the decision of that officer was to be final and binding on all parties concerned, xxx xxx xxx xxx xxx The Factual undenied position is that the Ruler of Chattarpur on July 5, 1948 (vide Ex. D-13-5) submitted a list to the Raj Pramukh of the United State of Vindhya Pradesh of his private properties, and in the said list the house in dispute, namely, Gulab Rai Wala house, was shown as the private property of the Ruler (by the then Maharaja Shri Bhawani Singh Je Deo). In the following month, on August 25, 1948, the said Maharaja Shri Bhawani Singh Ju Deo made a gift of the house in dispute in favour of his father-in-law Dewan Shanker Pratap Singh (now deceased and represented by his legal representatives- appellants). His gift has become the subject matter of dispute in the suit, out of which this appeal has arisen, for grounds to be taken note of later at an appropriate stage, xxx xxx xxx xxx Taking thus the totality of these circumstances in view, we are driven to the conclusion that the High Court committed an error that the Ruler lost his sovereign right to earmark the property in dispute as his private property after May 1, 1948, or that the said property vested in the State with effect from that date or that the letter Ex. P-9 of Shri N.M. Buch and the lists attached thereto, had the effect of divesting the appellants of the title to the property in dispute in favour of the State with effect from that date. In that strain, factual position having not been denied, the validity of the gift dated August 25, 1948, cannot be questioned on the grounds enumerated in the plaint, due to exercise of sovereign power of the Ruler in the grant thereof at that point of time.

63. In view of the foregoing discussion, there can, therefore, be no manner of doubt that the properties in suit were not joint family properties as asserted by the appellant but were the personal properties of respondent No. 1 as asserted by him. Consequently no exception can be taken to the dismissal of the suit filed by the appellant by the Courts below and Civil Appeal No. 534 of 1983 filed by the appellant deserves to be dismissed. For the same reason, Civil Appeal No. 535 of 1983 filed by

defendants No. 32, 33 and 34 claiming a larger share in the properties in suit on partition treating them to be joint family properties as asserted by the appellant also deserves to be dismissed.

64. We may, at this place, point out that reliance was placed by learned Counsel for the appellant on certain decisions laying down that if joint Hindu family property was by custom or otherwise impartible, its nature of partible joint Hindu family property will get revived on the commencement of the Hindu Succession Act, 1956 and the Kerala Joint Hindu Family System (Abolition) Act, 1975. Reference was also made to several passages from Chapter 12 of Hindu Law by S.V. Gupte dealing with impartible property including the circumstances in which impartible property becomes capable of partition. However, in view of our finding that the properties in suit were not joint family properties as alleged by the appellant but were the personal properties of respondent No. 1, we do not consider it necessary to deal with them. Neither any principle of law nor any authority has been brought to our notice in view whereof personal properties of respondent No. 1 could get transformed into joint Hindu family properties wherein the appellant could acquire an interest. Even if we proceed on the basis that the personal properties held by respondent No. 1 continued to retain the character of impartibility and they became partible subsequently, it would, in no way, advance the case of the appellant inasmuch as it has not been shown to us that the appellant would be an heir of respondent No. 1 with regard to his personal properties. Apparently such properties would on his demise be governed either by testamentary disposition or would devolve on his personal heirs.

65. Another point urged by learned Counsel for the appellant was that the covenant could not confer any right in favour of respondent No. 1 which he did not otherwise possess nor could it take away the rights of the members of the joint Hindu family by accepting the properties in suit to be the personal properties of respondent No. 1. Suffice it to say so far as this submission is concerned that as has been held above, the properties in suit had been earmarked by respondent No. 1 as his personal properties which he was competent to do as a sovereign and the Government by accepting or approving the list of properties submitted by him as his personal properties in pursuance of the covenant did not purport on its own to create any right in favour of respondent No. 1 in such properties. The Government could have disputed the list submitted by respondent No. 1 but it chose not to do so and the assertion of respondent No. 1 that the properties in suit were his personal properties was accepted;

66. In view of the foregoing discussion, both the Civil Appeals fail and are dismissed but there shall be no order as to costs.