Rajah Velugoti Kumara Krishna ... vs Rajah Velugoti Sarvagna Kumara ... on 28 October, 1969

Equivalent citations: 1970 AIR 1795, 1970 SCR (3) 88, AIR 1970 SUPREME COURT 1795

Author: V. Ramaswami

Bench: V. Ramaswami, J.C. Shah, A.N. Grover

PETITIONER:
RAJAH VELUGOTI KUMARA KRISHNA YACHENDRAVARU & ORS.

Vs.

RESPONDENT:
RAJAH VELUGOTI SARVAGNA KUMARA KRISHNAYACHENDRA VARU & ORS.

DATE OF JUDGMENT:
28/10/1969

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
SHAH, J.C.
GROVER, A.N.

CITATION:
1970 AIR 1795 1970 SCR (3) 88
1969 SCC (3) 282
CITATOR INFO :
R 1973 SC2438 (4)
RF 1981 SC1937 (24,25)
D 1982 SC 887 (20,22,23,25)

ACT:
lmpartible Estate-Venkatagiri Estate-linpartible by custom-Impartible Estates Act, 1904 including estate in Schedule-Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 vesting estate in Government-Whether impartibility continues in respect of properties not to vested-Impartible estate, incidents of.

HEADNOTE:
The appellants filed a suit for partition claiming their

share in certain properties of the Venkatagiri Estate which did not vest in the State by virtue of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 and in the alternative for maintenance in terms of an agreement entered into in 1899. Their contention was that the Venkatagiri Estate became an impartible estate only under the agreement entered into in 1889 and became a statutory impartible estate by virtue of its inclusion in the schedule to the Impartible Estates Act, 1904 and on the repeal of that enactment by the Abolition Act, 1948, the estate became partible; that the properties claimed in the suit, though outside the territorial limits of the Zamindari, were held impartible only as appurtenant to the main estate and after the impartible character of the main estate was lost those properties became partible. The High Court held that the estate was impartible by custom and was not made impartible for the first time under the agreement of 1889 or by the Acts of 1902 or 1904 and the claim for partition was negatived. As regards the claim for maintenance the court held that a similar claim had been rejected by the judicial committee as not tenable either under the agreement of 1889 or under Hindu law or on the basis of custom. In appeal to this Court,

HELD : (i) There is no reason to differ from the finding of the High Court that the estate of Venkatagiri was an ancient impartible estate by custom and was not made impartible for the first time under the agreement of 1889 or by Madras Acts of 1902 or 1904. [100 A]

Gopala Krishna v. Sarvarna Krishna, 1955 A.W.R. 590, Nargunt Lutchmedavanah v. Vengama Naidoo, 9 M.I.A. 66, Raja Ras Venkata Mahipathy Ramkrishna v. Court of Wards I.L.R. 2 Mad. 283 and Pushavathi Viziram Gajapathy Rai Maina v, Pushavathi Viseswar, [1964] 2 S.C.R. 403,

(ii) In relation to Venkatagiri Zamindari the Madras Impartible Estates Act has been repealed so 'far as the Act applied to the Estate which by operation of s. 3(b) of the Abolition Act got transferred and became vested in the State Government. In 'relation to properties which have not become so vested in the Government the Madras impartible Estates Act, 1904 continues to be in force. Since the Abolition Act did not affect the plaint properties these have continued to be what they were at the time of incorporation with the Zamindari, namely. the properties retain their impartible character. The principle cossante ratione legis-

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cessat ipsa lex has no application in the present case for many times custom outlives the condition of things which give it birth. The junior members of a 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 nature, of the estate which is impartible. [102 D-H, 103 H, 104 E-F]

Rai Kishore Singh v. Mst. Gahanabai, A.I.R. 1919 P.C. 100, C. 1. T. Punjab v. Dewan Krishna Kishore, 68 I.A. 155 and Raja Velugoti v. Raja Rajeshwara Rao, 68 I.A., 181,

(iii) The agreement of 1889 in so far as it relates to payment of maintenance continues to be in force in spite of the coming into operation of the Abolition Act. In the absence of express words to the effect, it would not be right to attribute to the legislature an intention to free the properties not transferred to the Government by the operation of s. 3(b) of the Act from liability to contribute towards the maintenance of the, junior members under such a contract or family arrangement, and while leaving the land-holder in possession of those other properties, limit the, maintenance holders to a share of a fifth of the compensation amount.

[109 C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2113 of 1966.

Appeal from the judgment and decree dated August 13, 1965 of the Madras High Court in O.S.A. Nos. 40 and 53 of 1961. C. R. Pattabhiraman, V. Suresham and S. Balakrishnan, for the appellants.

V. Vedantachari -and K. Jayaram, for respondent No. 1. The Judgment of the Court was delivered by Ramaswami, J. This appeal arises out of a suit O.S. 351 of 1952 filed for partition by 7 plaintiffs viz. : (1) Sri Raja Venkata Kumara Krishna Yachendra, (2) Sri Rajah V. V. Ramakrishna, (3) Sri Raja V. V. Rajagopala Krishna, (4) Sri Raja V. V. Muvva. Gopala Krishna, (5) Sri Raja V. Rajeswara Rao, (6) Sri Rajah V. Maheswara Rao and (7) Sri Raja V. Madana Gopala Krishna, minor by next friend and mother Smt. Sridevamma in respect of the Venkatagiri Estate and other properties as accretions to this estate. The first defendant in the suit was the holder of the zamindari until it was notified and taken over by the State on September 7, 1949. The 3rd and 4th defendants are brothers of the first defendant. The third defendant died during the pendency of the suit and defendants 7 and 8 are his sons. Defendants 4, 5 and 6 are the sons of the 4th defendant. The 9th and 10th defendants are the sons of the 1st defendant. The 4th plaintiff Shri Raja V. V. Muvva Gopala Krishna died during the pendency of the appeals against the suit in the High Court of Madras. After the filing of the petition of appeal in this Court Sri Raja V. Maheswara Rao, L6Sup. C.I./70--7 the 6th plaintiff also died. The relationship of the parties will appear from the following pedigree Sri Rajah Velugoti Kumara Yachendra Nayudu Bahadur Raj Rajagopalakrishna Muddu Krishna Venkata (diedissueless Krishna in1921) (died in 1916) Krishna Bahadur Raja Govinda Krishna (plff.1) (died in 1937) V. V.Rama Krishna Raja V Sarvagna (plff.2) Krishna V.V. Raja GOPALAKRISHNA (deft) (DLFF NO.3) D-9 V.V. Morva D-10 Gopalakrishna (dlff.4) Second prince Third prince D-7 D-8 D-4 D-5 D-6 (II) Venu Gopla Rajeswara Rao Maheswara Rao (plff. 5) (plff. 6) Madana Gopala (Minor) by next friend and mother Sreedevi (Plff. 7) (III) Rama Krishna Rao Seshchala pathi Vekata Lakshmana (adopted to Ranga Rao Rao Pithapur) (adopted to (adopted away) Bobbili) The Venkatagiri Estate is an ancient impartible estate in Nellore District included in the Schedule under the Madras Impartible Estates

Act (Act II of 1904). In the year 1878, Raja Velugoti Kumara Yachema, who heads the above pedigree, was the Zamindar. He had seven sons of whom three had been given away in adoption. The eldest of the sons was Rajagopala Krishna to whom Raja Velugoti Kumara Yachama handed over the entire estate and certain other properties with a view to spend the rest of his life in piety and meditation. In 1889, Muddukrishna and Venkata Krishna, two of the sons, claimed a share in the estate contending that the estate was partible and the four sons were each entitled to a fourth share in the family properties. Rajagopalakrishna, however, asserted its impartible character. Ultimately there was a settlement between the parties wherein Muddu Krishna and Venkata Krishna withdrew their claim to partition and recognised the impartible character of the Zamindari. The settlement involved the payment of large sums of money by Rajagopala Krishna to his three younger brothers Muddu Krishna, Venkata Krishna and Venugopal. Venugopal was then a minor and was represented by the father Raja Velugoti Kumara Yachama himself. The terms of the settlement were embodied in a stamped document bearing the date April 8, 1889. Its terms may be summarised as follows : (a) recognition by all the brothers that the Venkatagiri estate-was impartible with descent along the eldest line, that is, by Rajagopala Krishna the then Zamindar and after him by his son, son's son and so on in the eldest male line; (b) the three brothers of the then Rajah, Muddukrishna, Venkata Krishna and Venugopal, should each receive a sum of Rs. 5,81,252-11-10; (c) Muddu Krishna, Venkata Krishna and Venugopal should also receive a sum of Rs. 40,000 each for providing themselves with residence; (d) a provision for the marriage expenses of Venkata Krishna and Venugopal and (e) provision that Rajagopala Krishna and his successors to the estate should pay to Muddukrishna, Venkata Krishna and Venugopal a sum of Rs. 1,000/- each per mensem for life -and on their death a similar amount to their male descendants (Purusha Santhathi) by way of allowance, the amount payable to each branch being Rs. 1,000/- irrespective of the number of descendants.

Venugopal, the last of the four brothers, never married and plaintiffs 5 -and 6 to the suit are his illegitimate sons. In 1932 plaintiffs 5 and 6 instituted a suit against the Estate (O.S. No. 30 of 1932) claiming maintenance allowance and relying upon the agreement of 1889 and in the alternative on custom and Hindu law. The Subordinate Judge found that custom was not proved and that they were not entitled to maintenance under the Hindu law. But he found that the claimants were entitled to the maintenance under the deed as Purusha Santhathi. On 'appeal the High Court agreed with the finding of the trial Court as regards the absence of any custom but differed from the interpretation of Purusha Santhathi and held that the term was applicable only to legitimate sons and not to illegitimate sons. The High Court, however, took the view that the plaintiffs 5 and 6 were entiled to maintenance under the Hindu Law. The judgment of the High Court is reported in Maharaja of Venkatagiri v. Raja Rajeswara Rao(1). The matter was taken in appeal to the Judicial Cornmittee and the Judicial Committee allowed the appeal of the Rajah holding that the illegitimate sons of Venugopal were not entitled to maintenance either under the agreement of 1889 or under the Hindu law. The decision of the Judicial Committee is reported in Raja Krishna Yachendra v. Raja Rajeswara Rao(1). At the time of the notification. of the estate under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Act 26 of 1948) (hereinafter called the Abolition Act), the first defendant in the suit held the estate and was the principal landholder under the Act. Under s. 66 of the Abolition Act, on and from the notified date, the Madras Impartible Estates Act, 1904 (Act 2 of 1904) shall be deemed to have been repealed in its application to the

estate. Out of the advance compensation first deposited, plaintiffs 1 to 4 had been paid a sum of Rs. 75,000/as maintenance holders under s. 45 of the Abolition Act. They were entitled under the Act to a further sum of Rs. 75,000/- in the second instalment of compensation and a share in such additional compensation that may be given. They were also given interim payments at Rs. 9,000/- per year under s. 50 of the Abolition Act. Under s. 47 of the Act they were also entitled to ryotwari patta.

The case of the plaintiff was that the Venkatagiri Estate became an impartible estate only under the agreement of 1889 between the parties and became a statutory impartible estate by virtue of its inclusion in the Schedule to the Madras Impartible Estate Act, 1904 and that on the repeal of that enactment by s. 66 of the Abolition Act the Estate became partible. The contention of the plaintiffs was that as junior members of a joint family they were entitled to a share in the compensation amount and also to a share in Schedule B properties which were not vested in the State Government. So far as the claim to a share in the compensation amount is concerned, there were proceedings under the Abolition Act itself. The suit was principally confined to the claim for a share, in the B Schedule properties and for -an alternative claim for maintenance at Rs. 1,000/- p.m. So far as the B Schedule properties are concerned, the claim was confined to shares in three items of immovable properties namely (1) Motimahal No. 187, Mount Road, Madras, (2) Venkatagiri Rajah's Bungalow at Nellore and (3) Venkatagiri Rajah's bungalow at (1) I.L.R. [1939] mad. 622.

(2) I.L.R. [1942] mad. 419.

Kalahasti. Out of the movable properties the claim was confined to sub-item8 of item 8 of the B Schedule, that is, a golden howdah. It is the case of the plaintiffs that the repeal of the impartible Estates Act by virtue of the notification will have the effect of changing the character of the properties in the B Schedule and making them partible. It was contended that even if for any reason the plaintiffs are not granted a share in the properties of the estate, they must be paid a sum of Rs. 1,000/- per mensem in terms of the original agreement of April 8, 1889. The trial Judge, Subramaniam J., held that the Venkatagiri Zamindari was impartible by custom even apart from the agreement of 1889 and the Impartible Estates Act of 1902 and 1904. Even after the abolition of the Venkatagiri Estate the character of impartiability was found to continue in respect of B Schedule properties which formed part of the Zamindari. The learned Judge held that the plaintiffs 1 to 4 were not entitled to a share in the immovable properties of B schedule but were entitled to recover such sum as may be needed to make up the monthly allowance for their branch at Rs. 1,000/- p.m. after taking into consideration, the amount which plaintiffs 1 to 4 were given under the Abolition Act. They were granted a charge for the amount on items 1, 14 and 16 of Plaint B Schedule. Plaintiffs 1 to 4 were also given a decree for one-third share sub-item 8 of item 8 of Schedule B properties, namely, the golden howdah. So far as plaintiffs 5 to 7 were concerned, they were held not entitled to any relief. The plaintiffs 1 to 7 preferred appeal, O.S.A. 53 of 1961 against the judgment of the trial Judge in O.S. 351 of 1952. The first defendant also filed OSA 40/61 against that portion of the judgment in O.S. 351 of 1952 whereby the trial judge held that even after the notification of the Venkatagiri Estate under the Abolition Act and the payment of the compensation under that Act to plaintiffs 1 to 4 their claim for maintenance under the agreement of April 8, 1889 continued in force and that plaintiffs 1 to. 4 were entitled to a payment of Rs. 1,000/- p.m. each after giving credit for payments

made under the Abolition Act. Both the appeals O.S.A. 53 of 191 and O.S.A. 40 of 1961 were heard together and disposed of by a Division Bench consisting of Chandra Reddy, C.J. and Natesan, J., by a common judgment dated August 13, 1965. The Division Bench held that plaintiffs 1 to 4 having enjoyed the benefit of payment under s. 45 (5) of the Abolition Act and got capitalised by the Tribunal of their maintenance rights on the basis of the extinction of the Estate cannot make a further claim as if the agreement of 1889 was a subsisting one and call upon the 1st defendant to make up for any deficiency from the properties that had pot vested in the Government. The Division Bench also disallowed the claim of plaintiffs 1 to 4 for a share in the value of the golden howdahs. It was pointed out that silver, and the golden howdah were not treated as an impartible but were actually divided among the family members. Accordingly the Division Bench allowed the appeal O.S.A. 40 of 1961 filed by the 1st defendant. In regard to C.S.A. 53 of 1961 the Division Bench held the claim that the Venkatagiri Estate was not an impartible estate by custom was devoid of merit. It was pointed out that before the Special Tribunal under the Abolition Act the plaintiffs had advanced the same, contention but it was rejected. Plaintiffs 1 to 4 filed an appeal to this Court against the decision of the Special Tribunal. The decision of this Court is reported in Raja Muvva Gopalakrishna Yachendra and others v. Raja V. V. Sarvagana Krishna Yachendra and others(1). Before this Court plaintiff 1 to 4 did not question the finding of the Special Tribunal that Venkatagiri Estate was an impartible Estate. On the other hand the contention advanced by the plaintiffs was that the Venkatagiri Estate was impartible by custom and that the impartibility continued under the Madras Impartible Estates Act but ceased when the estate vested in the State Government. The Division Bench upon an examination of the evidence held that Venkatagiri Estate was an impartible estate by custom and was not made impartible for the first time under the-agreement of 1889 or by Acts of 1902 or 1904. The claim for partition made by plaintiffs in respect of the B Schedule immovable properties was negatived. As regards the claim to maintenance made by plaintiffs 5 to 7 the Division Bench held that a similar claim had been rejected previously by the Judicial Committee as not tenable either under the Agreement of 1889 or under Hindu Law or on the basis of custom. In the result OSA 53 of 1961 filed by the plaintiffs was dismissed. OSA 40 of 1961 preferred by the 1st defendant was allowed and the suit was dismissed in its entirety.

The first question to be considered in this appeal is whether the plaintiffs are entitled to claim a share in the three items of immovable properties of B Schedule already referred to. The argument on their behalf may be sumtnarised as follows : Venkatagiri Estate admittedly an ancestral estate was not impartible by custom but for the first time by the agreement of 1889 the parties thereto agreed to hold it as an impartible estate, succession being governed by the law of primogeniture. The arrangement was brought about to preserve the integrity of the Estate and to preserve its past glory. By reason of the notification of the Estate under the Abolition Act and the vesting of the Estate in the Government the purpose for which the agreement was entered into was frustrated. The agreement of 1889 could therefore be no longer relied upon for preserving the impartible character of the Estate or what was left of it. The three items of immovable (1) [1963] Supp. 2 S.C.R. 280.

properties though outside the territorial limits of the Zamindari ,were held impartible only as appurtenant to the main Estate and after the impartible character of the main estate was lost, these properties became partible. Even though the estate was treated as an impartible estate, it was an ancestral estate as there was joint ownership of the Estate in the family members. Plaintiffs 1 to 4,

therefore, were entitled to one-third share of the properties of B Schedule which are not vested in the Government and plaintiffs 5 to 7 were entitled similarly to another one- third share.

In our opinion the contention of the plaintiffs that Venkatagiri Estate was not impartible by custom is untenable. The 'early history of the Zamindari is summarised in Gopalkrishna v. Sarvagna Krishna(") as follows :

> The estate of Venkatagiri has been in existence since Muhamadan times. On the disruption of the Moghal Empire, it owed allegiance to the Nawabs of Arcot. In addition to the payment of peshkush they had to maintain an armed force 'for the assistance of Government in times of disorder or rebellion. As a result of the treaty between the East India Company on the one side and the Nawab of Arcot on the other the Administration of that part of the country under the suzerainty of the latter was made over to the British. Under this treaty the Zamindary of Venkatagiri was recognised and the Rajah had to pay to the East India Company what be was paying before to the Muhammadan rulers. Sometime later, in accordance with the arrangement entered into between the Zamindars in Western Arcot and Lord Olive, the East India Company took over the responsibility for the preservation of law and order and the Zamindars were relieved of the task of maintaining armed forces and in its stead they undertook to pay an additional revenue on their estate, which was added to the peshkush. It was assured that the fixed peshkush would remain unalterable. In pursuance of this agreement, a sanad was granted in 1802 to the Zamindar of Venkatagiri and other Zamindars embodying the terms agreed upon. Ever since, successive Zamindars held the estate paying peshkush which has been invariable." The Estate is described in the official documents in the year 1801 as one of the Western palayama. It was observed by the Privy Council in Naragunty Lutchmeedavamah v.Vengama Naidoo(1):
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> (1) (1955) A.W.R. 590.
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> (2) 9 M.I.A. 66.

.lm15 A Polliam is explained in Wilson's Glossary to be a tract of country subject to a petty Chieftain." In speaking of Polligars, he describes them as having been originally petty Chieftains occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent, but as having, at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. This corresponds with the account read at the Bar from the Report of the Select Committee on the affairs of India, in 1812. A Polliam is in the nature of a Raj; it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the Polligar, the other members of the family being entitled to a maintenance or allowance out of the estate.

The document of 1889 also negatives the case of the plaintiffs that the Estate was made impartible for the first time by that document. The language of the document clearly shows that it only recognised the then subsisting impartible character of the Estate. In other words the document proceeds on the assumption that the Zamindari was made impartible by custom from the very beginning. The relevant portion of the Agreement of 1889 Ex. A-1 is to the following effect :

> "On the 18th April 1889, the Contract entered in writing by Raja Velugoti Rajagopala Krishna Yachandra Bahadur, Rajah of Venkatagiri, eldest son of Sri Raja Velugoti Kumara Yachama Naidu and his three uterine brothers (1) Muddu Krishna, (2) Venkatakrishna and (3) Minor Venugopala by his father and guardian Raja Velugoti Kumara Yachama Naidu is as follows :
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> Out of the sons of the said Sri Raja Velugoti Kumara Yachama Naidu, excluding the three .... who, have been given in adoption .... while we remaining four brothers comprising the parties to this document are sons of the said Raja V. Kumara Yachama Naidu and members of an undivided family; because the Venkatagiri Estate is impartible and subject to the law of Primogeniture our father Sri Raja V. Kumara Yachama Naidu, with the intention of his seeing, and approving of, the ruling of the estate by his eldest son the Raja Rajagopala Krishna, and with the intention of passing his time thereafter in future in the meditation of God, as means to attain to the world beyond, transferred on the 28th October, 1878 to the eldest of us four and the heir apparent to the estate, namely, the Raja Rajagopala Krishna, Raja of Venkatagiri, the Venkatagiri Zamindari, the immovable Properties relating thereto, the other immovable properties which were acquired, by means of the income of the said Zamindari and all his ancestral and his self acquired movable properties, excepting the nine lakhs and odd rupees and all the properties connected therewith including its accretions which he retained for his charitable expenses. Since, then, the aforesaid Raja Rajagopala Krishna Yachandra, Raja of Venkatagiri, has, been ruling the estate..... When the matters stood thus, on account of ill-feeling that arose between some of us, two of us, namely Muddukrishna Yachendrulu and Venkata Krishna Yachendrulu, expressed the desire that the said Venkatagiri Zamindari, the immovable properties connected therewith, the other immovable properties acquired by means of the income of the said Venkatagiri Zamindari and all the movable properties should be divided into four shares and their respective shares should be given to them. The Raja Rajagopala- krishna, Raja of Venkatagiri, becoming aware of this fact, contended that the Venkatagiri Zamindari, the other immovable properties connected therewith, the other immovable properties which were acquired by his father out of the income of that Zamindari and trans- ferred by him to him alongwith the estate and ancestral and sell acquired movable properties of his father which the latter transferred to him alongwith the estate, were impartible. "Thereupon, all of us brothers consulted about the aforementioned points of dispute, our father who is all-knowing and who has considerable experience. He considered it well and positively expressed his opinion that, regard to immovable property the Venkatagiri Zamindari was originally earned by our ancestors by reason; of velour in war, that it

was an ancient Zamindari, that it was an impartible estate devolving along the eldest line of descendants, that it was permanently settled, that, when Sannad Milikiyat Istimirar was granted to the ancestors, who was then the Zamindar of Venkatagiri, the peshkush for this Venkatagiri Estate was fixed with reference to the amount of expenses of the military troops and servants which he (our ancestor) was supplying and with reference to the money paid as tribute to the former Government, namely, Nawab, that therefore this Venkatagiri estate was not partible, that the immovable properties connected therewith, and other immovable properties acquired by means of the income of the said estate were also, of course, impartible-that, in regard to movable property, his ancestral and self-acquired money in cash, the money consisting of deposits kept in the firms of Arbuthnot & Co., and Binny & Co., all the silver, gold and precious stones, jewels, which were on the 26th October, 18'/8 transferred along with the said Venkatagiri Estate to this eldest son, the Raja Rajagopala Krishna, Raja of Venkatagiri, together with the accretions thereto upto now should be divided equally ;among his four sons who are among the parties to this document-that such would be a just arrangement. In regard to our father's opinion _about the - immovable property, the three youngest of us brothers consulted their proper friends and in regard to our father's opinion about the aforementioned movable properties which were acquired by Raja Velugoti Kumara Yachama and transferred along with the Venkatagiri Estate, the eldest of these four brothers, . . . consulted his proper friends. On account of the cogent reasons urged by the respective friends of these both parties, and for the reasons urged by the respective friends of these both parties, and for the reason that all family feuds would (thereby) end and compromised the opinions of one of the parties to this document, namely, Raja Velugoti Kumara Yachama Naidu, on the two points referred to above hAve been agreed in, as certainly correct and accepted, by the remaining parties, namely, we four brothers. Therefore, the parties to this document, namely, we four brothers, and our father Raja Velugoti Kumara Yachama do now jointly and severally hereby determine, agree and affirm as follows "All this Venkatagiri Estate is impartible descendible along the eldest line (of descent) of the said Estate, the immovable properties connected therewith and the other immovable properties acquired by means of the income of the said estate should be enjoyed by the eldest of us four brothers and the heir of the aforesaid Raja Velugoti Kumara Yachama namely the aforesaid Velugoti Rajagopala Krishna and after him by his son, son's son and so on in the eldest male line of descent..... subject to the condition of paying allowances to other members of our family, suitably to their respective status out of the income from the estate and the properties. And so we divide in the manner shown below all the money, silver, gold and precious stones, jewels and the accretions resulting thereto upto this day which formed ancestral and self acquisition of our father..... along with the said estate....."

Counsel for the plaintiffs has been unable to show any term in this Agreement to support his contention that it was only by virtue of that document that the parties agreed to call the Estate impartible. On the contrary the document indicates that there was clear recognition by the

executable of the then character of the Estate as an impartible zamindari.

We shall then deal with the inclusion of the Venkatagiri Zamindari in the Impartible Estates Act passed by the Madras Legislature in 1902 and 1904. These Acts became necessary as a result of the ruling of the Privy Council in Sri Raja Rao Venkata Mahipati Rama Krishna Rao Bahadur v. The Court of. Wards(1). The decision of the Judicial Committee was given in 1889 and the Impartible -Estates Act was passed in Madras in 1902 with a view to preserve the ancient zamindaris of the Madras Presidency. Referring to the Schedule to the Act the statement of objects and reasons explained that the schedule contained only Permanent Settlement Estates in existence before the date of Permanent Settlement Regulations and which have been declared by the judicial decisions to be impartible or locally considered by ancient custom to be so impartible and had in fact descended without partition since that date, The Impartible Estates Act, 1904 finally took the place of 1902 Act. The Estate of Venkatagiri has been included in the schedule annexed to both the Impartible Estates Acts. The obvious inference is that the Government had made enquiries and were satisfied that the Estates included in the schedule to Act 2 of 1904 were impartible and the inclusion of the Estates therein is a legislative determination that they were impartible. In Pushavathi Viziaram Gajapathi Rai Manne v. Pushpavathi Visweswar Gajapathi Rai(1) this Court observed "Soon after these decisions were pronounced by the Privy Council, the Madras Legislature stepped in because those decisions very rudely disturbed the view held in Madras about the imitations on the powers of holders of impartible estates in the matter of making alienations of the said estates. That led to the passing of the Madras Impartible Estates Acts II/1902, 11/1903 and II/1904. The Legislature took the precaution of making necessary enquiries in regard to impartible estates within the State and made what the legislature thought were necessary provisions in respect of the terms and conditions on which the said estates were held."

(1) I.L.R. 22 Mad. 383, (2) [1964] 2 S.C.R. 403.

In these circumstances we see no reason to differ from the finding of the High Court that the Estate of Venkatagiri was an ancient impartible Estate by custom and was not made impartible for the first time under the agreement of 1889 or by the Madras Acts of 1902 and 1904.

The next question for determination is what is the effect of the Abolition Act on the rights and obligations of the members of the family in relation to the Venkatagiri Zamindari. According to the plaintiffs the property described in the B Schedule appended to the plaint did not vest under s. 3 (b) of the Abolition Act. The properties in the B Schedule include a building in Mount Road, Madras a bungalow at Kalahasti and the District Judge's bungalow at Nellore Town. These buildings are situated outside the territorial limits of the Venkatagiri Estate. Section 3 (a) and (b) of the Abolition Act states "3. With effect on and from the notified date and save as otherwise expressly provided in this Act-

1 (a) [the Madras Estates] Land (Reduction of Rent) Act, 1947 (Madras Act XXX of 1947) 3 [in so far as it relates to matters other than the reduction of rents and the collection of arrears of rent and the Madras Permanent Settlement Regulation, 1802 (Madras Regulation XXV of 1802), the Madras Estates Land Act, 1908 (Madras Act 1 of 1908), and all other enactments applicable to the estate as

such shall be deemed to have been repealed in their application to the estate.]

(b) the entire estate (including -all communal lands; porambokes; other non-ryoti lands; waste lands; pasture lands; lanka lands; forests; mines and minerals; quarries; rivers and streams; tanks and irrigation works; fisheries and ferries), shall stand transferred to the Government and vest in them, free of all encumbrances and the Madras Revenue Recovery Act, 1864, the Madras Irrigation Cess Act, 1865, and all other enactments applicable to ryotwari areas shall apply to the estate;

Section 1(3), state (3) It applies to all estates as defined in section 3, clause (2), of the Madras Estates Land Act, 1908, except inam villages which became estates by virtue of the Madras Estates Land (Third Amendment) Act, 1936.

Section 2 (3) defines "estate" to mean.... (3) "estate" means a Zamindari on an undertenure or an inam estate;

Section 2(16) defines "Zamindari" as follows (16) "zamindari estate" means-

(i) an estate within the meaning of section 3, clause (2) (a), of the Estates Land Act, after excluding therefrom every portion which is itself an estate under section 3, clause (2) (b) or (2) (e), of that Act; or

(ii) an estate within the meaning of section 3, clause 2(b) or 2(c), of the Estates Land Act, after excluding therefrom every portion which is itself an estate under section 3, clause (2) (e), of that Act.

Section 3(2) of Estate Land Act (Madras Act 1 1908) defined an "estate" to mean :

> (a) any permanently-settled estate or temporarilysettled zamindari;
>
> (b) any portion of such permanently-settled estate or temporarily-settled zamindari which
>
> -is separately registered in the office of the Collector;
>
> (c) any unsettled palaiyan or jagir;
>
> x x x x Section 2(2) of the Madras Impartible Estates Act, 1904 (Madras Act 2 of 1904) defines an "impartible estate" as an estate descendible to a single heir and subject to the other incidents of impartible estates in Southern India. In relation to the Venkatagiri Zamindari the expression Estate in s. 3(a) of the Abolition Act refers obviously to the Venkatagiri Estate which till then was subject to the operation of the Madras Permanent Settlement Regulation and the Madras Estates Lands Act. In relation to the Venkatagiri Zamindari s. 66 of the Abolition Act enacts that with effect from the notified date the Madras Impartible Estates Act, 1904 shall be deemed to have been repealed in its application to the Estate. The question arises whether the

word' " estate" in s. 66 of the Abolition Act denotes the zamindari consisting of properties which stood transferred to the Government under the Abolition Act and properties which are not so transferred, or whether the expression 'estate' refers to only the Venkatagiri Estate which until the notification issued under the Abolition Act took effect was the subject of the Permanent Settlement Regulation and the Madras Estates Land Act. The High Court has given sufficient reasons in support of its view that the word " estate" in s. 65 of the Abolition Act denotes only the estate, Governed by the Permanent Settlement Regulation and the Estates Land Act and not any other part of the impartible zamindari. In other words the Abolition Act has no application to properties which are outside the territorial limits of the Venkatagiri Estate. The result, therefore, is that in relation to Venkatagiri Zamindari the Madras Impartible Estates Act has been repealed so far as the Act applied to the Estate which by operation of s. 3 (b) of the Abolition Act has got transferred and became vested in the State Government. In relation to other properties which have not become so vested in the Government the Madras Impartible Estates Act (1904) continues to be in force. It is the case of the plaintiffs that items 14, 15 and 16 of Schedule B did not vest in the Government under s. 3 (b) of the Act. Item 14, 15 and 16 are Motimahal, Mount Road Madras, the District Judge's Bungalc Nellore and Vengatagiri Raja's bungalow, Kalahasti. It is conceded on behalf of defendant No. 1 that items 14, 15 and 16 did not vest in the Government under s. 3 (b) of the Abolition Act. It is further claimed on behalf of the plaintiffs that items 14, 15 and 16 have become partible properties after the coming into force of the Abolition Act and plaintiffs should be granted their shares of these properties. The contention of the plaintiffs is that the Zamindari was made impartible by the agreement entered into by the brothers in 1889 and the properties which have not been taken over by the Government should 'be divided among the family members. We have already given reasons for the view that the Zamindari was impartible independently of the agreement of 1889 and that the agreement was no more than a conscious affirmation by the parties of what the position was previously in fact and in law. To put it differently the agreement of 1889 merely acknowledged and defined antecedent rights and antecedent obligations. It is therefore difficult to accept the contention of the plaintiffs that the three items of property in Schedule B have become partible properties.

Since the Abolition Act did not affect these items the properties have continued to be what they were ,at the time of incorporation with the zamindari, namely the properties retain their impartible character.

We are also not impressed with the argument that as there was incorporation of the buildings with the original. impartible estate the building ceased to have any impartible character when the impartibility of the parent estate was gone. 'It is true that the buildings which are outside the geographical limits of the Venkatagiri Zamindari cannot be brought within the definition of the Estate as defined in the Estates Lands Act and the Abolition Act cannot therefore be made applicable to such buildings. But the buildings have acquired the character of impartibility as a result of incorporation with the parent estate and that character cannot be lost unless the statute

intervenes. Section 4 of the Impartible Estates Act itself contemplates parts of an Estate being impartible. In Pushavathi Viziaram Gajapathi Rai Manne v. Pushavathi Visweswar Gajapathi Raj(1) the effect of integration is described as follows :

> "In all such cases, the crucial test is one of intention. It would be noticed that the effect of incorporation in such cases is the reverse of the effect of blending self-acquired property with the joint family property. In the latter category of cases where a person acquires separate property and blends it with the property of the joint family of which he is a co-parcener, the separate property loses its character as a separate acquisition and merges in the joint family property, with the result that devolution in respect of that property is then governed by survivorship and not by succession. On the other hand, if the holder of 'an impartible estate acquires property and incorporates it with the impartible estate he makes it a part of the impartible estate with the result that the acquisition ceases to be partible and becomes impartible. In both cases, however, the essential test is one of intention and so, wherever intention is proved, either by conduct or otherwise, an inference as to blending or incorporation would be drawn."

It was urged on behalf of the plaintiffs that the effect of the Abolition Act in regard to Venkatagiri Estate was to take away the character of impartibility in relation to property both inside and outside the territorial limits of the Estate. It was also contended that the object of the Abolition Act was threefold : (1) to eliminate the class of middlemen (2) to abolish permanent settlement and (3) to introduce ryotwari system. The argument was that in the face of the avowed objects of the legislation it was futile to contend that the character of impartibility still continued in a truncated form. It was said Cessante ratione legis, cassat et ipsa lex (reason is the soul of the law and when the reason for

(1) [1964] 2 S.C.R. 403.

any particular law ceases, so does the law itself). It is not possible to accept this principle in the present case. For, many times custom outlives the condition of things which give it birth. As observed by Lord Atkinson in Rai Kishore Singh v. Mst. Gahenabai(1) It is difficult to see why a family should not similarly agree expressly or impliedly to continue to observe a custom necessitated by the condition of things existing in primitive times after that condition had completely al- tered. Therefore, the principle embodied in the expression 'cessat ratio cessat lex' does not apply where the custom outlives the condition of things which gave it birth." We accordingly reject the contention of the plaintiff on this aspect of the case.

We are also unable to accept the contention of the plaintiffs that the property of the impartible estate was held in coparcenary as joint family property and became partible amongst the members once it lost its character of impartibility. In other words the contention was that junior members had a present interest in the impartible estate and were entitled to a share in the estate once impartibility was removed. In our opinion there is no justification for this argument. The law regarding 'the nature and incidents of impartible estate is now well settled. Impartibility is essentially a creature of custom. The junior members of 'a 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 it is impartible. Secondly, they have no right to interdict alienations by the head of the family either for necessity or otherwise. This, of course, is subject to s. 4 of the Madras Impartible Estates Act in the case of impartible estates governed by the Act. The right of junior members of the family for maintenance is governed by custom and is not based upon any joint right or interest in the property as co-owners. This is now made clear by the judicial committee in C.I.T. Punjab v. Dewan Krishna Kishore(2) and Raja Velugoti Sarvagna Kumara Krishna Yachendra Bahadur Varu v. Raja Rajeswara Rao (3) The income of the impartible estate is the individual income of the holder of the estate and is not the income of the joint family. In the former case Sir George Rankin observed :

> "But they find it necessary to say that the law as declared in the cases of Baijnath (2) and Shiba Prasad (1) A.T.R. 1919 P.C. 100.
>
> (2) 68 I.A. 155.
>
> (3)68 I.A. 181.

Singh (3) has not been unsettled by the Gorakhpur case (1). The observation itself and its context show that the reference to the other judgments of the Board is controlled by the reference to Baijnath's case (2) as having negatived the view that an impartible estate could not be in any sense joint family property. The issue in the Gorakhpur case (1) was Indarjit's right to succeed, and the passage cited was addressed to that. It appears to waive aside, as no longer an obstacle, the extreme logic that as there is no right to a partition the junior branch could have no right, actual or prospective, which the enjoyment of maintenance could evi- dence. It need not be taken as swinging to the opposite extreme, indeed, it would be in a high degree unreasonable, having regard to the line of decisions, to interpret it as meaning that there is no reason why holders of impartible estates should not now be told that, unless they can prove 'a custom to the contrary, all junior male members of the family have a claim for maintenance that is, all who have not relinquished their right of succession. The point made is only this, that rights of maintenance, out of an impartible family estate however little they may be, and to whichever member they be extended-would not be enjoyed or enjoyable by anyone who had ceased to be joint in respect of the estate. In their Lordships' opinion,, this should not be taken to affirm any disputable doctrine as to the origin of the right of maintenance, or any other doctrine which would make junior members "actual co-owners" or the right a "real right" in the sense negative by the Board in Baijnath's case (2)."

To this extent the general law of Mitakshara applicable to joint family property has been modified by custom and an impartible estate, though it may be an ancestral joint family estate, is clothed with the incidents of self- acquired and separate property to that extent. The only vestige of the incidents of _joint family property, which still attaches to the joint family impartible estate is the right of survivorship which, of course, is not inconsistent with the custom of impartibility. For the purpose of devolution of the property, the property is as I sumed to be joint family property and the only right which a member of the joint family acquires by birth is to take the property by survivorship but he does not acquire any interest in the property itself. The right to take by survivorship continues only so long as the joint family does not cease to exist and the only manner by which this right of

survivorship could be put an end to is by establishing that the estate ceased to be joint family property for the purpose of suc 6 Sup. C.I./70-8 cession by proving an intention, express or implied, on behalf of the junior members of the family to renounce or surrender the right to succeed to the estate. In the latest case Anant Bhikappa v. Shankar Ramchandra(1) the judicial committee clearly affirmed the principle that the property)Was not held in coparcenary.

> "Now an impartible estate is not held in coparcenary (Rani Sartaj Kauri v. Rani Deoraj Kuari) though it may be joint family property.

It may doolve as joint family property or as separate property of the last male owner. In the former case, it goes by survivorship to that individual, among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom, e.g., lineal male primogeniture. In the latter case jointness and survivorship are not as such in -point; the estate devolves by inheritance from the last male owner in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by custom."

We proceed to consider the next question arising in this appeal namely whether the agreement of 1889 in so far as it related to payment of maintenance allowance of Rs. 1,000 p.m. to plaintiffs 1 to 4 continues to be in force even after the abolition of the Estate -and the vesting of the Zamindari estate in the Government under the Abolition Act. It was argued on behalf of defendant No. 1 that plaintiffs have enjoyed the benefit of payment under s. 45 (5) of the Abolition Act and got capitalised by the Tribunal the maintenance rights on the basis of the extinction of the Estate. Section 45(1), (4) and (5) of the Abolition Act states :

> "45. (1) In the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the following provisions shall apply."
>
> (4) The portion of the 'aggregate compensation aforesaid payable to the maintenance-holders shall be determined by the Tribunal and notwithstanding any arrangement already made in respect of maintenance whether by a decree or order of a Court, award or other instrument in writing or contract or family arrangement, such portion shall not exceed one-fifth of the remainder referred to in sub-section (3), except in the case referred to in the second proviso to section 47, sub-section (2).
>
> (1) 70 I.A. 232.

(.5) (a) The Tribunal shall, in determining the amount of the compensation payable to the maintenance holders - and apportioning the same among them, have regard, as far as possible, to the following considerations, namely :-

> (i) the compensation payable in respect of the estate;
>
> (ii) the number of persons to be maintained out of the estate;

(iii) the nearness of relationship of the person claiming to be maintained;

(iv) the other sources of income of the claimant; and

(v) the circumstances of the family of the claimants

(b) For the purpose of securing (i) that the amount of compensation payable to the maintenance-holders does not exceed the limit specified in sub-section (4) -and (ii) that the same is apportioned among them on an equitable basis, the Tribunal shall have power, wherever necessary, to reopen any arrangement already made in respect of maintenance, whether by a decree or order of a Court, award, or other instrument in writing, or contract or family arrangement."

Under the Agreement of 1889 plaintiffs 1 to 4 are entitled to an allowance of Rs. 1,000/- if paid out of the income of the Zamindari, that is to say, the income of the Venkatagiri Estate strictly so called and the income of the properties which did not get transferred to the Government under the Abolition Act. The Madras Impartible Estates Act, 1904 provides by section 9 for the payment of maintenance of junior members of an impartible Zamindari family.

"9. Where for the purpose of ascertaining the succession to an impartible estate, the estate has to be regarded as the property of a joint Hindu family, the following persons shall have a right of maintenance out of the impartible estate and its income, namely :-

(a) the son, grandson, or great-grandson, in the male line, born in lawful wedlock or adopted, of the proprietor of the impartible estate or of any previous proprietor thereof.

Provided that where maintenance is payable to a son or grandson, by or under any decree or order of court, award, contract, family arrangement or other instrument in writing, and such instrument, expressly or by necessary implication, makes it clear that the maintenance is payable to such son or grandson as representing his branch of the family, it shall not be open to a son or grandson of such son, or to a son of such grandson, as the case may be, during the period for which such maintenance is payable, to claim maintenance either in his individual right or as representing his branch of the family;

(b) the widow of any previous proprietor of the impartible estate so long as she does not remarry.

"(c) the widow of the son, grandson or great-

grandson of the proprietor of the impartible estate or of any previous proprietor thereof, so long as she does not remarry, provided she has no son or grandson living;

(d) the unmarried daughter born in lawful wedlock of the proprietor of the impartible estate or any previous proprietor thereof; and

(e) the unmarried daughter, born in lawful wedlock, of a son or grandson of the proprietor of the impartible estate or of any previous proprietor thereof, provided she has neither father nor mother nor a brother living.

Explanation.-Maintenance shall, where necessary, include a provision for residence and in the case of an unmarried daughter of the proprietor or any previous proprietor, a provision for the expenses of her marriage in accordance with the scale customary in the family."

Where there is in force an agreement relating to payment of maintenance the Act does not authorise reduction of the quantum of maintenance provided by such agreement except in the circumstances stated in s. 14(2)-circumstances which are not applicable to the present case. It is admitted that junior members of the Venkatagiri family were receiving maintenance, under the Agreement of 1889 until the coming into force of the Abolition Act.

Section 45 (2) of the Abolition Act provides for the ascertainment of the amount of maintenance payable to persons who, before the notified.-date, were entitled to maintenance out of the estate and its income either under S. 9 or s. 12 of the Madras Impartible Estates Act or under any contract or family arrangement. The total sum payable to the maintenance holders out of the compensation should not under S. 45 (4) exceed one-fifth of the remainder of the compensation after the claims of creditors are satisfied. It is not possible to accept the argument of defendant No. 1 that S. 45 should be construed as extinguishing the right secured to junior members under the provisions of contract or family arrangement granting a new right limited to the measure stated in the section. It is manifest that s. 45 is concerned only with the 'apportionment at compensation amount. , The section is concerned with the rights and liabilities in relation to properties which are represented by the compensation. - There may be a case of an impartable Zamindari where the properties not transferred under s., 3

(b) 'are quite as valuable as the properties transferred. If, in such a case, there is a contract or family arrangement for the payment of maintenance, such contract or family arrangement would as regards the quantum of the allowance, have some relation to the total income of the properties of the Zamindari. In the absence of express words to that effect, it would riot be right in our opinion to attribute to the Legislature an intention to free the properties not transferred to the Government by the operation of s. 3 (b) of the Act from liability to contribute towards the maintenance of the junior members under such a contract or family arrangement, and, while leaving the landholder in possession of those other properties, limit the maintenance holders to a share of a fifth of the compensation amount. We are therefore unable to accept the argument that ss. 45 to 47 of the Abolition Act have the effect of extinguishing any rights which the junior members of the zamindari family may have had before the notified date to receive maintenance out of the entire income of the zamindari under the contract or family arrangement. It follows that the agreement of 1889 in so far as it relates to payment of maintenance of Rs. 1,000/- p.m. to plaintiffs 1 to 4 continues to be in force in spite of the coming into operation of the Abolition Act. Under the Agreement of 1889

plaintiffs 1 to 4 are entitled to payment of Rs. 1,000/- per month from the income of the Venkatagiri Zamindari. That part of the zamindari which consisted of the Venkatagiri Estate has been converted into compensation deposited and to be deposited in the office of the Tribunal. The first defendant and plaintiffs 1 to 4 would also be entitled to ryotwari pattas under ss. 12 and 47 of the Abolition Act. It is not disputed that plaintiffs 1 to 4 have been paid Rs. 75,000/- when the second instalment of compensation is deposited by the Government. If additional compensation is allowed under s. 543 of the Abolition Act plaintiffs 1 to 4 would get a part of such additional compensation. The trial Judge calculated that plaintiffs 1 to 4 have been paid total amount of compensation to the extent of Rs. 1,37,000/-. Interest on this amount at 3 1/2 % p.a. works out to Rs. 4,795/- p.a. The trial Judge directed that plaintiffs 1 to 4 would be entitled to payment of such additional sums which together with interest would add up to Rs. 1,000/- p.m. In other words the plaintiffs 1 to 4 were held entitled to recover from defendant No. 1 the difference between the interest payable on the compensation and the sum of Rs. 1,000/- p.m. and the difference was made a charge on items 1, 14 and 16 of Schedule B Properties. The trial Judge directed that interest should be calculated at 3 1/2% p.a. on the compensation amount. In our opinion the proper rate of interest should be 5 1/2% p.a. Subject to the modification we consider that the decree granted by the trial Judge should be restored if during any part of the period subsequent to September 7, 1949 plaintiffs 1 to 4 have not been in receipt of the -amount of Rs. 1,000/- per month calculated in the above manner they would be at liberty to file an application for the recovery of such sums as may be needed ` to make up the allowance to Rs. 1,000/- per month for that period. For such decree as may be passed on such application a charge is created on items 1, 14 and 16 of plaint Schedule B properties.

We pass on to consider the question whether plaintiffs 5 to 7 are also entitled to maintenance at the rate of Rs. 1,000/- p.m. according to the agreement of 1889. Plaintiffs 5 and 6 are illegitimate sons of Raja Venugopal, the youngest of the four brothers who entered into the Agreement. The seventh plaintiff is the son of the 5th plaintiff. The material part of the, document states "After the life of the said Sri Venugopala Krishna Yachendrulu, his purusha santhathi, shall, in perpetuity, be paid the same allowance amount, that is, at the rate of rupees one thousand (Rs. 1,000) per month, in the aforesaid manner. But, if, at any time, in any one of the branches of the said Sri Muttukrishna Yachendrulu, Sri Venkatakrishna Yachendrulu and Sri Venugopala Krishna Yachendrulu there be more than one male member, much males, and their purusha santhathi shall take the said allowance amount of rupees one thousand in proportion to their respective shares, in the same manner as they would respectively take their other properties separately by way of inheritance according to the Hindu Law."

The Subordinate Judge, Nellore held in O.S. No. 30 of 1932 that plaintiffs 5 and 6 were not the Purusha Santhathi of Venugopal. The decision was affirmed, by the High Court in Maharajah of Venkatagiri v. Raja Rajeswara Rao(1) and on appeal against the judgment of the High Court was dismissed by the Judicial Committee. That decision is binding upon the plaintiffs 5 and 6 on the ground of res judicata. The seventh plaintiff as the son of the 5th plaintiff can claim no higher rights than the 5th plaintiff. It was contended that plaintiffs 5 to 7 were entitled to claim that I L.R. 1933 Mad. 622.

allowance under certain other clauses of the agreement of 1889.

Reference was made to the following clause :

> "Moreover, if in any of the aforesaid three branches of our family, viz., the branch of Sri Muttukrishna Yachendrulu, the branch of Venkatakrishna Yachondrulu, and the branch of the minor Sri Venugopala Krishna Yachendrulu, any male should die without purusha Santhathi either by way of aurasa or by way of adoption, the allowance amount that was being received by the person who so died without purusha Santhathi shall go to the gratis (agnates) who are nearest to him in his own branch according to Hindu Law. Should the aforesaid person who dies without purusha santhathi leave any widow or widows and maintenance has to be paid to them, only the nearest gnatis who get the allowance of such deceased person in the manner mentioned above shall be liable therefor. Further should any of the said three branches of our family become extinct by the total absence of purusha santhathi either by way of aurasa or by way of adoption, the allowance being paid to that branch shall be stopped subject to the condition that, if there be then 'a widow or widows- left of the last male who died in that branch, one-half of the -allowance of rupees one thousand (Rs. 1,000) that was being paid to that male, namely, Rupees five hundred (Rs. 500), shall, be paid to the widow or Widows of the person who so died without purusha santhathi -as maintenance for life".

This clause provides that on the death of any male member entitled to maintenance allowance under the deed without leaving any male issue either 'by birth or adoption the

-allowance which was received by that person should go according to Hindu Law to the Gnatis who in the same line as the deceased are nearest to such deceased member. Plaintiffs 5 to 7 alternatively claimed to be the Gnatis of Venugopal In our opinion it is not open to plaintiffs 5 to 7 to re-agitate the matter which should have been pressed as a ground of claim in the previous suit. In any case the

-argument is without substance. It is true that the word Gnati in Sanskrit literally interpreted includes a brother also. But in the context of the particular passage in the agreement it could not have been the intention of the parties that when there was a failure of legitimate or adopted son, gnatis' including illegitimate sons would take the allowance. The question in reality is not whether an illegitimate brother is a gnati or not for purposes of succession, but whether the word is used in that unusual sense in the Agreement. As pointed out in the previous case this clause has no application and the case is really governed by the earlier clause already referred to. We accordingly reject the argument of plaintiffs 5 to 7 on this aspect of the case.

Lastly was contended on behalf of plaintiffs 1 to 4 that they were entitled to one-third share of the golden howdah sub-item 8 of item No. 8 of B schedule. The only evidence upon which plaintiffs relied was clauses 5 and 6 in the will of Rajagopalakrishna dated 22nd September, 1910 which states :

> "Our Venkatagiri Samasthanam is an ancient and impartable estate. It has also been established by the Madras Act II of 1902 that it is an impartible Zamindari. The

> Village and other landed properties in the talukas of the aforesaid ancient Venkatagiri Zamindari acquired by my ancestors, and myself, as well as the houses, bungalows, forts, gardens, places, etc. possessed by us in the four places, viz., Nellore, Kalahasthi, Madras and Banaras those within and around Venkatagiri, and those in other taluses all these have been included in the impartible estate. All these, as well as elephants, horses, carriages, ambaris (Howdahs, Honzas (seat) and furniture exclusive of those made of silver and gold were treated as such (impartible even in the partition between me and my youngest brother. They shall hereafter also remain as such."

It is evident from this clause that what was treated as impartible were Ambaris Henzas, and furniture exclusive of those made of silver and gold. In other words silver and gold howdas were not treated as impartible. Counsel on behalf of defendant No. 1 referred to paragraphs 5 and 6 of the will which are to the following effect :

> "Further, as many matters under dispute between myself and my brothers have to be settled, the value of some goldware, silver were jewel of precious stones etc. belonging to the Estate Regalia was paid to my brothers from out of myself acquired money and I have taken possession of these items at the time of partition. Besides these, some more jewels of precious stones, etc., which were acquired, were paid for from my self-acquired money -and have been received by-me."

Clause 6 runs thus "The jewels made of precious stones as well as gold and silverware which fell to my share from out of the aforesaid share inclusive of those which have been improved and converted and mentioned in detail in Schedule 'A' appended hereto. The jewels set with precious stones and gold and silver were got by me from my brothers at the time of partition of paying their value to them (brothers) from out of self acquired money. . . . "

> These clauses make it cleat that the golden howdah had been divided and nothing was left for further division. In our opinion the Division Bench was right in taking the view that the plaintiffs 1 to 4 are not entitled to division of the golden howdah.
>
> For the reasons expressed we hold that the judgment of the Division Bench dated, August 13, 1965 should be set aside. It is declared that plaintiffs 1 to 4 are entitled under the Agreement of 1889 to be paid Rs. 1,000/- p.m. out of the income of the Venkatagiri Zamindari. Out of the compensation amounts so paid to plaintiffs 1 to 4 interest shall be calculated at 51% per annum. If the interest so calculated falls short of Rs. 1,000/- per month,' plaintiffs 1 to 4 are entitled to the payment of such additional sums
>
> -as would enable them to be in receipt of a total income of Rs. 1,000,/- per month. If for any period subsequent to 7th September, 1949 plaintiffs 1 to 4 have not received allowance of Rs. 1,000/- p.m. they are granted liberty to file an application for the recovery of such sums as may be needed to make up the allowance to Rs. 1,000/- for that period. For such decree as may be passed on such application a charge would be

created on items 1, 14 and 16 of plaint B Schedule properties. The suit is dismissed so far as plaintiffs 5 to 9 are concerned. The appeal is allowed to the extent indicated above with proportionate costs.

R.K.P.S. Appeal allowed.