# Vijaya Ramraj vs Dr. Sir Vijaya Ananda on 24 October, 1950

## Equivalent citations: AIR1952ALL568, AIR 1952 ALLAHABAD 564

JUDGMENT

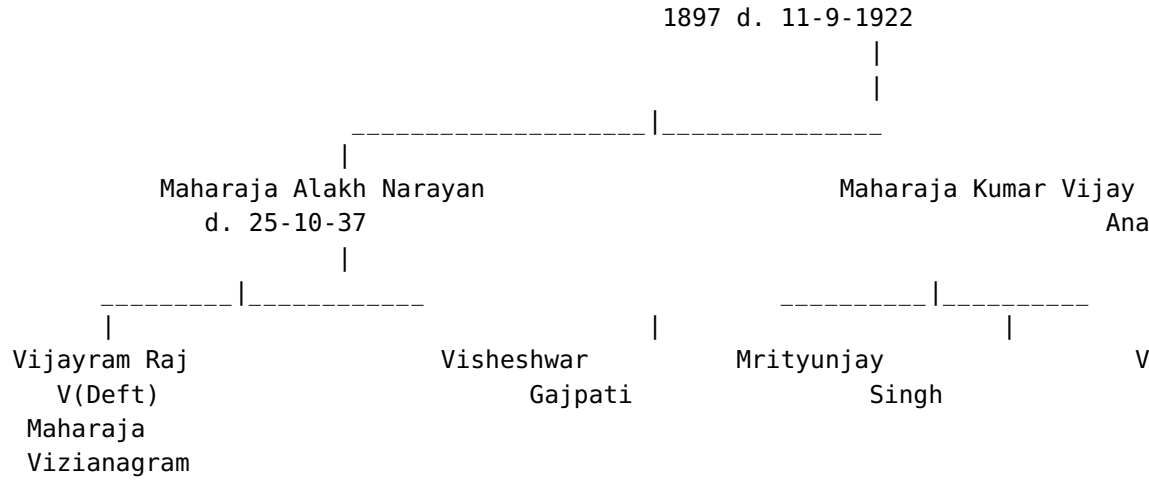
Agarwala, J.

1. This is a defendant's appeal arising out of a suit for recovery of two sums of money which the plff. respondent claimed were payable to him under two deeds one of 1912 & the other of 1928.

2. The appellant is the present holder of an impartible estate known as the Vizyanagram Raj or Samasthanam in the State of Madras. The plff. resp. is his uncle usually residing at Banaras. A pedigree of the family will be of help in understanding the narration of events to be made hereafter:--

PEDIGREE Vijayram Raj iii-Alakh Rajeshwari d.1879 | d. July 1902 _____|_____ | | | | Narayanna Ananda Gajpati Chitti Babu Rewa Gajpati d. d.23 5 1987 alias Vijay Maharani before his (died without ram Raj IV d.14.12.1912 father. leaving widow (adopted by Alakh Raje-

shwari in Dec.




3. The Vizianagram estate which is admittedly an ancient impartible estate was, at one time, owned by Vijayram Raj III. He died in the year 1879 leaving a widow Alakh

Eajeshwari & a son, Anand Gajpati, & a daughter who later became the Maharani Rewa. There was another son of Vijayram Raj III, Narain Gajpati who, however, had died in his father's lifetime. On the death of Vijayram Raj III, Anand Gajpati became the Raja & the holder of the estate. On 22-7-1896, Raja Anand Gajpati executed a will the contents of which will be set out later. Under this will he bequeathed the entire estate to one Chitti Babu, who was his mother's brother's son. Less than a year later, i. e. on 23-5-1897, Raja Ananda Gajpati died without leaving any widow or child & Chitti Babu became the holder of the estate & was known as Vijayaram Raj IV. A few months later, on 18-12-1897, he was adopted by Alakh Rajeshwari to her husband Vijayaram Raj III. Alakh Bajeshwaf i died in the year 1902 & on her death certain collaterals of Ananda Gajpati challenged the adoption of Chitti Babu & instituted suit NO. 18 of 1903 for a declaration that Chitti Babu's adoption was invalid & that he had no more than a life interest in the estate & that there was intestacy as regards the remainder which therefore vested in them. They asserted that the estate was an impartible Raj governed by the law & custom of primogeniture. The Court held that although Chitti Babu's adoption was invalid yet the will conferred upon him an absolute title & not merely a life estate. In the result the suit was dismissed. The plffs. of that suit appealed to the H. C. & Chitti Babu filed cross objections challenging the finding about adoption. In the High Court there was a compromise & on 12-3-1913 the Madras High Court passed an order in terms of the compromise declaring that Chitti Babu was validly adopted & was entitled to hold the estate as such adopted son & under the will of Ananda Gajpati.

4. The plff. respondent & his elder brother, Raja Alakh Narain, father of the present Raja, deft, appellant, were the two sons of Chitti Babu. On 28-10-1912 Chitti Babu executed a deed of trust in respect of the entire properties possessed by him--the impartible estate as well as his separate properties, conveying them to a trustee by the name of John Charles Hill Fowler & directing the trustee to convey the said properties to his eldest son, Raja Alakh Narain, on his attaining the age of twenty-one years & to pay to his second son, the plff. respondent, on his attaining majority & during his life time, a monthly allowance of Rs. 5,000 out of the rents, income & profits of the properties, which were the subject-matter of the trust. Chitti Babu died on 11-9 1922 & very soon thereafter, the trustee handed over the estate to Alakh Narain even before he had attained the age of twenty one. Alakh Narain, now having entered into possession of the estate, executed a deed of settlement in favour of his younger brother the Maharaj Kumar on 1-11-1922. Under this deed Raja Alakh Narain declared that the monthly allowance of rupees five thousand which was payable to Maharaj Kumar under the deed of 28-10-1912, executed by Cbitti Babu, was inadequate to support the Maharaj Kumar's rank & dignity as the Raja of Vizianagram's younger brother & that he desired to make a suitable additional provision for him settling upon him immoveable property known as the Banaras estate, & some other properties. Thereafter, on 11-2-1928, Raja Alakh Narain executed another deed of settlement in favour of the plff. resp. under which another sum of Rs. 5,000 per month was settled upon him for his life time.

This was in addition to the mothly allowance of Rs. 5,000 payable under Chitti Babu's deed of 1912. Raja Alakh Narain died on 25.10-1937 leaving two sons, of which the elder one was the present Raja, the deft, appellant who succeeded to the estate.

5. During the life time of Raja Alakh Narain his estate had been taken possession of by the Court of Wards in or about October 1935. The Court of Wards continued the payment of the monthly allowance of Rs. 5,000 payable under the deed of 1912 but questioned the liability of the estate to make payment of the additional allowance of Rs. 5,000 per month payable under the deed of 1928. But ultimately paid this amount also till it released the estate on 1-7 1946.

6. During this period the Maharaj Kumar had made certain claims in respect of the separate & partible properties left by Chitti Babu & which had come into the hands of his brother Raja Alakh Narain & which were then in possession of the Court of Wards. There was another claim in respect of the jwellery left by Maharani Bewa. Both these claims were given up by the Maharaj Kumar under a deed of release dated 9-10-1914 in consideration of receipt of Rs. 10,54,193 in cash.

7. One of the questions in this appeal is as to the effect of the release upon the right to receive the allowances under the deeds of 1912 & 1928.

8. No sooner did the Court of Wards release the property in favour of the present Raja the deft-applt. questioned the right of the plff.resp. to the payment of the monthly allowance of Rs. 5,000 under the document of 1928 & stopped this payment altogether with effect from July 1946. He also questioned the right of the plff.-resp. to get the whole of the sum of Rs. 5000 as maintenance allowance under the deed of 1912 & offered to pay him a sum of Rs. 2,500 instead of Rs. 5,000. Since the plff-respondent was not agreeable to accept this reduced sum the amount of Rs. 5,000 payable under the deed of 1912 was also not paid after September 1946.

9. The Maharaj Kumar thereupon filed the suit, which has given rise to this appeal, on 11-10-1946, in the Court of the Civil Judge of Banaras for recovery of rupees twenty thousand on account of arrears of maintenance for the months of July, August, September & October, payable in advance under the deed dated 11-2-1928 & for a sum of rupees five thousand on account of arrears of maintenance for the month of October 1946, payable in advance under the deed of 1912 & also for recovery of Rs. 109-10-8 as interest at 6% p. a, upon both these sums. It was claimed by him that both these sums were payable to him out of the funds of the impartible estate & out of the separate & personal properties of the late Raja Alakh Narain in the hands of the deft. Jurisdiction to try the suit was claimed for the Banaras Court on the ground that the amount in suit had been intended to be paid, & was in its very nature payable, & was, in fact, all along being paid, at Banaras where the plff. permanently resided since 1922 23, & farther on the ground that it was at Banaras that the deft, had communicated to the plff. his refusal to pay the amounts in suit.

10. In defence the Raja denied his liability to pay the amounts sued for. His main case was that the Vizianagram Raj was an impartible estate governed by the Madras Impartible Estates Act II [2] of 1904, with the consequence that any debt incurred by the holder of the estate, could not bind the estate beyond his life time, that under that Act the plff. had a right of maintenance out of the

impartible estate of Vizianagram as being the son of a previous proprietor of the estate & the amount of maintenance payable to him was to be determined in accordance with the provisions of the Act, that having regard to the net income of the estate & other circumstances which ought to be taken into account according to the aforesaid Act a sum of Rs. 2,500 per month as offered by the deft, was the proper maintenance allowance payable to the plff, that this amount of maintenance was payable only out of the profits of the impartible estate & was not a personal liability of the deft. & was not realisable out of the personal property of Alakh Narain in his hands; & that the Maharaj Kumar had given up his rights under the aforesaid deeds by virtue of the deed of release of 9-10-1944. The deft, further denied that the Banaras Ct. had jurisdiction to try the suit, & pleaded that the suit was bad for non-joinder of parties because the amounts payable to him could not be determined in the absence of Maharani Sahiba of Vizianagram & the Raja's younger brother Visheshwar Gajpati Raj, both of whom were entitled to maintenance.

11. The Civil Judge held that he had jurisdiction to try the suit, that the suit was not bad for non-joinder of parties, that the Madras Impartible Estates Act did not apply to the Vizianagram Estate because the estate was taken by Chitti Babu not by virtue of customary succession as an adopted son, but under the will executed by Anand Gajpati & fucther because Raja Alakh Narain did not take the estate as a son of Chitti Babu but by conveyance to him by the trustee under the trust deed executed by Chitti Babu, that the amount of maintenance allowance claimed by the plff. could not be reduced under the provisions of the Madras Impartible Estates Act even if that Act applied to the estate, that the amount was payable to the pltf. under the two deeds of 1912 & 1928 during the life time of the plff. Maharaj Kumar, that this amount was payable out of the funds of the impartible estate as well as the separate & personal property of the late Raja Alakh Narain in the hands of the deft.

& that the deed of release executed by the Maharaj Kumar did not affect his claim under the deeds aforesaid. In the result he decreed the suit for recovery of Rs. 35,000 as principal & Rs. 95-13-4 as interest at the rate of 3% per annum to be recovered from the Vizianagram estate & the property conveyed under the trust deed of 1912 & other separate & personal property of Raja Alakh Narain in the hands of the deft.

12. Against this decree the deft. Raja has come up in appeal to this Court & on his behalf most of the points urged in the lower Court have been reagitated before us.

13. We may first dispose of the preliminary points, namely, whether the lower Court had jurisdiction to try the suit & whether the suit was bad for non-joinder of necessary parties.

14. The objection to the jurisdiction of the Court below was based upon two facts, first, that the deft. not being personally liable, the amount claimed was relisable out of the impartible estate which is all situated within the territory of the state of Madras, & second that the allowances were not payable at Banaras, as alleged in the plaint, but were payable at Vizianagram.

15. An objection to the territorial jurisdiction of a Ct. cannot be allowed by an appellate Ct. unless there has been a failure of justice on ac-count of the suit having been filed in the wrong Court

(Section 21, Civil P. C.).

16. We are of opinion that the appellant has failed to prove that there has been a failure of justice on account of the suit having been tried at Banaras. It is claimed on his behalf that he could not produce evidence in the lower Court because of the difficulty of bringing voluminous evidence in the shape of registers & account-books from Vizianagram. The written statement was filed on 11-1-1947. The supplementary written statement was filed on 12-9-1947. During this interval the applt. got a commission issued for the examination of his witnesses at Vizianagram. He filed an extract culled from his registers with a list No. 530 & wanted the Court below to hand it over to the Commissioner so that original registers from which figures were taken may be produced before the Commissioner & proved. The Court passed an order on 8.6-1947 that the deft, could file original registers or copies from entries which were to be proved before the Commissioner. The pltf. was given liberty to inspect them at the place of the Commissioner after which the Comr. was to allow those entries or registers to be proved by the witnesses who were to be examined on Commission. The parties, however, agreed before the Commissioner that the inspection of the registers may be done at Vizianagram. When the Commissioner reached Vizianagram, both the parties again agreed that the appellant would produce all his account-books on which he wanted to rely before the Commissioner on 11-6 1946. The registers & account-bosks were produced & were inspected by the pltf's. counsel. The appellant filed fresh papers before the Commissioner. An objection was taken by the pltf. to their production, but it was overruled by the Commissioner. Then the appellant examined his witnesses, namely, Shri P. Eamchandra Rao, Shri Y. Subramania Sastri & Shri K. Venkateshwarlu, & then closed his evidence stating that he would produce the remaining witness at Banaras along with other witnesses as he may think necessary. The statement of the pltf's. mother was also recorded on behalf of the pltf. at Vizianagram. There was no suggestion by the deft. in the Court below that he had been handicapped in the examination of his witnesses from Vizianagram or in the production of his registers & account-books or other documents by reason of the fact that the suit had been filed at Banaras. We are Satisfied that no failure of justice has been occasioned on account of the suit having been filed at Banaras. In the circumstances, it is unnecessary to decide whether the suit was rightly instituted at Banaras. We may, however, state that we are in agreement with the conclusion arrived at by the Court below that it was intended by the parties that the amount of maintenace claimed by the pltf. was to be paid at Banaras where the pltf. permanently resided, after Maharaja Alakh Narain had settled the Banarae estate on the pltf. in the year 1922 & that, therefore, the Court below had jurisdiction to try the suit.

17. As regards the plea of non-joinder of necessary parties, the appellant's ease, as put before us, was different from what was urged before the lower Court. Before us, it was contended that since there were other persons entitled to maintenance, the amount of maintenance payable to the pltf. could only be settled or fixed in the presence of those other persons. This contention has no force.

18. The pltf. sues for the amount that is due to him under two documents, one of 1912 executed by Chitti Babu, & the other of 1928 executed by Maharaja Alakh Narain. It was not necessary for him to implead all other persons who may be entitled to get maintenance from the deft., appellant. If the deft-appellant desired that the amount of the various persons entitled to maintenance from him be fixed, it was open to him to have that done by means of a separate suit, & indeed, as we understand,

he has already filed such a suit in the State of Madras. The pltf. was under no necessity, in the present suit, to implead any other rerson.

19. This brings us to the main controversy between the parties. In order to appreciate that controversy, it will be necessary to refer to Sections 2, 3 & 4, Madras Impartible Estates Act II [2] of 1904, which we quote below:

> "Section 3 (2)--"Impartible Estates" mean an estate descendible to single heir & subject to the other incidents of Impartible estates in southern India."
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> "Section 8 (3)-- "Proprietor of an impartible estate" means the person entitled to possession thereof as single heir under the special custom of the family or locality in which the estate is situated or if there be no such family or local custom under the general custom regulating the succession to impartible estates in sourthern India."
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> "Section 3 -- The estates included in the schedule shall be deemed to be impartible estates." (the schedule includes the estates of Yizianagram & Kashipuram).
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> "Section 4 (1) -- The proprietor of impartible estate shall be incapable of alienating or binding by his debts, such estates or any part thereof beyond his own life-time unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family, not being the father or guardian of the other co-parceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the co-parceners independently of their consent."

20. The appellant's case is that the Vizianagram estate is an ancient impartible estate descendible by custom to a single heir, that Chitti Babu inherited the estate after Anand Gajpati in his right as an adopted son of Vijay Ram Raj & that the will of Anand Gajpati, did not have the effect of altering the line of succession & the estate remained as before an impartible Raj descendible by custom to a single heir, & the proprietor of the estate remained a person entitled to possession thereof as a single heir under custom within the meaning of Section 2 (3), Madras Impartible Estates Act, II [2] of 1904, that therefore Chitti Babu was subject to the disabilities imposed by that Act, that by reason of the provisions of Section 4 of the Act, liability or debt incurred by Chitti Babu under the document of 1912 could not enure beyond his lifetime, that for the same reasons, the liability incurred by Alakh Narain under the document of 1928 could not enure beyond his lifetime, & was not enforceable against the property in the hands of the appellant.

21. The plff.-respondent's answers to these contentions are that although the estate was an ancient impartible estate descendible under custom to a single heir, it ceased to be so when the last holder Anandgajpati transferred it by will to Chitti Babu who was at that time not even an adopted son, that his subsequent adoption did not change the nature of the estate & that although by the various Madras Acts relating to impartible estates, the estate did become an impartible estate, its proprietor was not a proprietor within the meaning of Section 2 (3) of Act II [2] of 1904 because he was not

entitled to possession thereof as a single heir under any custom -- it being pointed out in this connection that Chitti Babu took the estate under the will from Anandgajpati & not as adopted son of Yijaya Raj Ram that similarly Alakh Narain took the estate under the deed of trust executed by Chitti Babu & not by inheritance by virtue of custom -- & as such even Alakh Narain was not a proprietor within the meaning of Section 3 (8) & was not subject to the disabilities imposed by Section 4, Madras Act II [2] of 1904.

22. In the alternative, it was urged that even if the said Act applied to Chitti Babu & Alakh Narain, the document of 1912 merely fixed the amount of maintenance that was payable under the law to the plff. & did not create any debt which would be covered by s. 4, & that even if it were so covered it was a debt of such a nature as would entitle the managing member of a joint Hindu family to incur it & make it binding on the shares of the other (sic) independently of their consent.

23. Before entering upon the interpretation of the Madras Act II [2] of 1904, it is necessary to bear in mind the circumstances under which that Act came to be passed.

24. In regard to impartible estates, it is well settled that where property is ancestral & is by custom, descendible to a single heir, it is the property of the joint family consisting of the heir & the other members of the falimy.

25. Prior to 1888, the view prevalent in the H. Cs. in India was that a junior member of a family owning an impartible estate could challenge the alienations made by the holder thereof, if they were made without legal necessity. This view was overruled by the P. C. in Sartaj Kuari v. Deo Raj, 10 ALL. 272 : 15 I. A. 51, & it was held that an alienation made by the holder of an impartible estate could not be challenged by a junior member of the family, because the holder of such an estate, though joint with other members of the family, had unfettered powers of alienation. This case dealt with an alienation inter vivos. The question still remained whether the case of a will should be treated differently from that of an alienation inter vivos. A D. B. of the Madras H. C. held that an alienation by will also was governed by the rule laid down in Sartaj Kuari's case. This view was affirmed by the P. C. in the year 1899 in the first Pitapur case, Venkata Surya Mahipati Rama Rao v. Court of Wards, 22 Mad. 383. Thus for all practical purposes, the holder of an impartible estate became, so far as the power of alienation was concerned, an absolute owner of the estate.

26. The Legislature then intervened & the Madras Impartible Estates Act, II [2] of 1902, was enacted. It was a temporary Act valid for one year, namely, from 1-6-1902 to 81 5-1903. Under this Act the estates of Vizianagram & Kashipuram were declared to be -impartible estates. The preamble showed that it was "An act to declare that certain estates are impartible, & that the proprietors of such estates cannot exercisa unrestricted powers of alienation in respect thereof."

By Section 3, restrictions on alienations were placed upon proprietors of the estates deemed to be impartible under the Act. Section 3 ran as follows :

> " ..... the proprietor of every such estate shall be restricted from alienating his estate or any portion thereof except in circumstances where alienation would be parmissible

> by law if the estate were ancestral property & the proprietor occupied the position of managing member of a joint Hindu family governed by the ordinary law of succession, & no decrees for debts contracted after the passing of this Act by such proprietor otherwise than under the circumstances aforesaid shall be executed against his scheduled estate."

Then the Madras Act II [2] of 1903 continued the operation of Act II [2] of 1902 up to 31-3-1904. It is important to note that in none of these two Acts was there a definition of a 'proprietor of an impartible estate.' Before the expiry of Act II [2] of 1903, Act II [2] of 1904 was passed. This was a more elaborate Act providing for definitions of an impartible estate & its 'proprietor' & incorporating various other provisions which were not to be found in the previous Acts. Sections 3, 8 & 4 of this Act have already been quoted. This Act was amended in the year 1934 by the Madras Impartible Estates Act, Second Amendment Act, XII [12] of 1934, whereby Sections 9 to 15 were added. These related to maintenance payable out of impartible estates. We shall deal with these provisions & little later.

26a. It cannot be disputed that the Vizianagram estate, being included in the schedule attached to the Madras Acts II [2] of 1902, 1908 & 1904, is an impartible estate. Indeed, this is admitted in so many words by the plaintiff, respondent in the first para of his plaint. In that para he has further admitted that it is "joint family property subject to the custom of primogeniture." As there was no definition of a proprietor of an impartible estate under the Acts of 1903 & 1903, it cannot be denied that Chitti Babu was the holder of such an estate & that he was subject to the restrictions contained in Section 3 of Act II [2] of 1902. But it is urged that by virtue of Chitti Babu having succeeded to the estate of Vizianagram under the will of Anandgajpati, he could not be eaid to be "a person entitled to possession thereof as single heir under a custom regulating the succession to impartible estate in southern India,"

> within the meaning of Section 2 (3) of Act II [2] of 1904 & as such was not subject to the restrictions imposed by the provisions of Section 4 This argument, if accepted, creates an anomaly & defeats the very purpose of the Acts of 1902, 1903 & 1904 which. Was "to declare that certain estates are impartible & that the proprietors of such estates cannot exercise unrestricted Powers of alienation in respect thereof."

The argument was clearly unavailable under Act II [2] of 1902 because it applied to all proprietors of estates which were declared impartible by the Act. There would be no conceivable purpose nor has any been suggested why the Legislature in enacting Act II [2] of 1904 deemed it desirable to exclude certain classes of proprietors from the applicability of the Act when their estates were declared to be impartible by the Act & when they were governed by the provisions of the Aota of 1902 & 1903.

27. But it must be conceded that this is not a conclusive answer to the plff's contention. If the definition of a proprietor of an impartible estate, as given in Section 2 (8) of Act II [2] of 1904, does not cover the case of Chitti Babu or of Alakh Narain, then whatever be the intention of the Legislature, it may be a case of a cotsus omisus & the Cts. may be powerless to remedy the defect therefore, we have to examine the language of the Act & to see if Chitti Babu & Alakh Narain, holders

of the impartible estates did not fall within the definition of 'proprietor' as contained in Section 2 (3). Under this section "proprietor of an impartible estate is a person entitled to possession thereof as single heir under a custom." The words are "entitled to possession thereof as single heir under custom."

28. Were Chitti Babu & Alakh Narain entitled to possession as single heirs under custom ? It is conceded that Chitti Babu would have been so entitled if his adoption could relate back to the death of Anand Gajpati & Anand Gajpati had not executed the will. It is also conceded that Alakh Narain also would have been so entitled if he had not got the estate under the trust deed. Three questions then arise for decision : Could Chitti Babu be treated as in existence as an adopted son at the death of Anand Gajpati? What is the effect of the will of Anand Gajpati upon the succession of Chitti Babu to the estate? And what is the effect of the trust deed executed by Chitti Babu upon the succession of Alakh Narain to the estate?

29. As regards the adoption of Chitti Babu relating back to the death of Anand Gaipati, or rather to the death of Vijai Ram Raj III to whom he was adopted, it is well settled that an adoption by a widow dates back to the death of her husband. As observed by Mr. Ameer Ali in Pratap Singh v. Agarsinqji Raisingji, 43 Bom. 778 : 1918 P. C. 192.

> "An adopted son becomes for all purposes the son of his father & his rights unless curtailed by express texts are in every respect the same as those of a natural born son. He is the continuator of his adoptive father's line exactly as an aurasa son, & an adoption so far as the continuity of the line is concerned, has a retrospective effect ; whenever, the adoption may be made there is no hiatus in the continuity of the line."

30. Apart from the consequences of the Hindu Women's Bights to Property Act, 1937, the result of this theory of relation back of the adoption to the death of the adoptive father is that the adopted son succeeds by inheritance to the father's separate property in whosesoever's hand it may have gone by succession & acquires an interest in the property of the joint family of which the father was a member & in the latter case if the joint family estate is in the hands of the father's coparceners or coparcener the adopted son becomes joint with them in the estate, or if it has gone to the heir of the last surviving coparcener, he divests such heir, in the same way as a natural born son would have done. See Amarendra Man Singh v. Sanatan Singh, 60 I. A. 242 : 1933 P. C. 155 ; Anant v. Shankar, 70 I. A. 232 and Neelangouda v. Ujjangouda, A. I. R. (35) 1948 P. C. 165.

31. The adopted son also divests a person who has taken the estate by reverter by reason of the absence of a son to the adoptive father. See Partap Singh's case, 48 Bom. 778 : 1918 P. C. 192.

32. The adopted son also can claim re-partition of the property in the same way as a posthumously born son would have done, if there has been a partition of the estate in which the father was interested as a coparcener before the adoption was made Tatya Shantappa v. Ratnabai, A.I.R. (36) 1949 F. C. 101. The doctrine of relation back, however, has two exceptions ; the first is that it does not apply to the case of succession to a collateral's property. Bhubaneshwari Debi v. Nilkomal Lahiri, 12 I A. 137 & the second is that it does not divest a person who has taken the property not by

intestate suacession, but by transfer inter vivos or by will of the father or other preferential heir who had taken the estate in the meanwhile, Krishnamurthi Aiyar v. Krishnamurthi, 25 A. L. J. 945. Mr. Pearey Lal Banerji relies upon both these exceptions. According to him, this is a case of collateral succession the last owner being Anand Gajpati--a brother--& therefore there is no relation back of the adoption, & further the estate had already been taken away under the will by Chitti Babu, before he was adopted, and the subsequent adoption could not divest him from his title under the will. Now so far as collateral succession is concerned, there is a clear distinction between a succession to a collateral, who had himself succeeded to the father, & held the father's property, & a succession to a collateral who had died leaving his own property, which did not belong to the father. The exception applies to the latter case, as the facts of Bhubaneshwari v. Nilkomal, 12 I. A. 137, will disclose, & not to the former, which is governed by Amarendra Man Singh's case, A. I. R. (20) 1938 P. C. 155. The distinction between the two classes of cases was clearly pointed out by Sir George Rankin in Anant v. Shankar, 70 I. A. 282: A. I. R. (30) 1943 P. C. 198 & by the Patna High Court in Ghandraohoor v. Bibhutibhushan Dec, A. I. E. (32) 1945 Pat. 211. See also Mayne's Hindu Law, 11th Edn. pp. 257-258.

33. Mr. Baner]i, the learned counsel for the resp?., summoned in his support certain observations of Malik C. J. in Raghubans Kumari v. Raghuraj Singh, 1947 A. L. J. 542 at pp. 550 & 551. But it is clear to us that his Lordship's observations had reference to the second class of collateral succession mentioned above.

34. It is obvious that Anand Gajpati had taken the estate which originally vested in Vijai Ram Raj III & therefore the present case belongs to the category of which Amarendra mean Singh's case is an example.

35. Now with regard to the rule laid down in Krishnamurty's case, (25 A L. J. 945), it may be that when an estate is carried away by a will or transfer inter vivos before an adoption takes place, the adoption cannot displace the title acquired under the will or other transfer. But it does not affect the rule of relation back of adoption to the father's death. Just as the validity of an adoption does not depend upon the fact whether the adopted son can take any estate or not, (See the observations of Sir George Lowndes in Amarendra Man Singh's case, A.I.R. (20) 1933 P. C. 155) so also the doctrine of relation back does not rest upon the divestment of an already vested estate by the adopted son. The adoption in Hindu Law is made for spiritual purposes for the benefit of the ancestors, & the father is not supposed to have died issueless irrespective of the question whether the adopted son reaps any secular benefits. Therefore, the will of Anand Gajpati does not have the effect of preventing the doctrine of relation back coming into operation. Chitti Babu will be deemed to have been in existence as an adopted son when Anand Gajpati died.

36. This brings us to the effect of the will upon the nature of the impartible estate & upon the character of the bitle of the holder.

37. Before we discuss this question let us look at the will. It was in these terms :

> "I Anand a Gajapatiraj Maharaja of Vizianagram declare this to be my last will & testament & I hereby make the same in full possession of all my faculties &

understanding & with a view to perpetuate succession of my family, whereas I the abovesaid Ananda Gajpatiraj Maharaja of Vizianagram, have at present no issue either male or female. I do hereby appjint Chitti Babu Vijiaramaraj & his male issue to be my legal heir, successor & representative & I do hereby bequeath to the said Chitti Babu Vijiaramaraj all the property moveable & immoveable of the Samastanam as well as my personal property together with all rights, titles, privileges, honours & insignia of the family which I now possess or may hereafter acquire. I do make the above bequest subject to the conditions hereinafter set forth in Paras. 2 & 7 of this will.

(4) If I should beget a son or a daughter he or she shall be my legal heir & shall be entitled to all the property above described & this will shall be null & void provided that he or she survives me.

(5) In the event of the above said Chitti Babu Vijiaramraj predeueases me or surviving me dies without being adopted or without issue male or female Her Highness my mother or my sister whichever of the two may then be living shall have full power to appoint my successor & if both be living Her Highness mother alone shall exercise the right & after the demise of both without a successor being appointed by either of them the Ruling Power shall select a proper boy to be my heir & successor with the permission of my agnates.

(6) I do hereby require direct & authorise the above said Chitti Babu Vijiaramraj & his male issue of any successor that may be appointed in the several ways provided above, he, his heirs & representatives shall assume my family name of "Pushavati" & style himself Mirza Raja Vijiaramaraj Manya Sultan Bahadur of Vizianagram & shall be entitled to all the rights, titles, privileges, honours & insignia of the family as set forth in para. 7.

(8) I hereby desire, wish & direct that no part of the Estate should be alienated by mortgage or otherwise or dismembered for any purpose whatever & it is further desired that sufficient accumulation of funds would be made & set apart to meet the Govt. Deish cush so that the whole Estate may remain intact for ever & without having alienated even for the Govt. dues provided this aaaumulation shall not be prejudicial to the payment of tha sums of moneys directed to be given under paras 2 & 7.

(9) I do hereby appoint the said Chitti Babu Vijiaramraj to be my sole executor of this my will."

38. It will be observed that throughout the will the testator refers to Chitti Babu as Vijiaramraj & directs him to assume the family name of "Pushavati" & style himself as 'Mirza Raja Vijiaramaraj Manya Sultan Bahadur of Vizianagram,' & confers upon him the rights, titles, privileges, honours & insignia of the family. He was to be the legal heir, successor & representative of the testator who was

the last Raja & the will was made 'to perpetuate the succession of the family'.

39. It is clear that the intention of the testator was that the successor was to be the holder of the impartible Raj in the same manner as he himself held it & as his natural successor would have held it if there had been one. It is also clear that the adoption of Chitti Babu was in contemplation at the time when the will was made. The testator, therefore, did not desire that Chitti Babu, when adopted, should be placed in a position different from the holder of the estate as an adopted son of Vijiaramraj & consequently his own brother & next successor to the estate under the custom. If Chitti Babu had not in fact been adopted, things would no doubt have been different. He could not then claim to be in the line of natural successors to the estate. But, as it happened, he was in fact adopted, as was contemplated in the will, & if the adoption related back to the death of Vijiaramaraj in 1877 so that it would be deemed by a fiction of Hindu Law that Chitti Babu was an adopted son at the time when Anand Gajpati died & the will came into operation, the result was that the will operated in favour of an adopted son & the intention was that the estate should remain an impartible estate & the donee should retain all rights & duties as if he had succeeded under custom.

40. No doubt a will takes precedence over an intestacy & a person who takes under a will may not be said to have taken under custom. But this is quite different from saying that a succession under a will must necessarily result in destroying the rights attaching to customary or intestate succession. For the proposition that when a person takes an impartible estate under a will the estate ceases to be impartible & the owner ceases to be governed by Section 4, Madras Act, Mr. Pearey Lal Banerji relied upon Perumal Sethurayar v. Subbalakshmi, 71 M. L. J. 1 affirmed in Perumal Sethurayar v. Subbalakshmi, 66 I. A. 134: A.I.R. 1939 P. C. 95 & a passage in Maine's Hindu Law, Edn. 11 p. 847. The passage in Mayne's Hindu Law is as follows :

> "Nor can Section 4 of the Act restrict the powers of an owner who at the commencement of the Act, came into possession of an impartible estate not as an heir, but under a valid gift of devise."

In support of this statement, the learned author quotes Ulgalum's case (ubi supra).

41. In that case the holder of an impartible estate, desirous of excluding the eldest son, settled the entire estate upon the second son who succeeded to the estate in the life time of the eldest son. The settlement was, therefore, in favour of a person who was not entitled to succeed to the estate under the customary law at the time succession opened out. It was held that the estate ceased to be impartible & became partible property in the hands of the second son. While discussing the rule applicable to such cases, the Privy Council referred to an earlier decision of their own in another case: Ajai Verma v. Mst. Vijai Kumari, A. I. R. (26) 1989 P. C. 22, & observed at p. 98, A. I. R. (26) 1939 P. C. 95.

> "While their Lordships do not daubt that the High Court of Allahabad rightly held in that oaae that the property in question, if it passed under the will to Vijai Yerma became his self-acquired property, they are not to be taken in as affirming that any different result would have ensued had Vijai Verma been the person entitled to

> inherit. They say nothing here as to family arrangement or the power of a grant or to impose conditions, but otherwise, so far as regards the joint family, they see considerable difficulty in giving different effect to an alienation made under the power declared to exist in 15 I. A. 51 according as the grant be made voluntarily or for consideration, comprises the whole or only part of the estate, is in favour of a member of the family or a stranger, or in favour of the person entitled to succeed or of some other member of the family. They recognise however that ai between the grantee & his sons questions may arise upon which these considerations, or some of them, may have importance."

42. Mr. Pearey Lal Banerji contended that in the aforesaid case their Lordships of the Privy Council clearly laid down that there would be no difference whatever in the character of the property taken by the donee under the will by the mere fact that the will was in favour of a person entitled to succeed to the estate.

43. Their Lordships, however, considered this case in Shyam Pratap v. Collector of Etawah, 1946 A. L. J. 280. In that case, the holder of an impartible estate bad executed a document declaring that after his death, his adopted son, "shall be the gaddi-nashin & the owner of the entire moveable & immoveable property, & shall have, like myself, all the powers."

The H. C. held that since the adoped son had taken the estate under a will, the estate did not retain the character of an impartible estate & became the adopted son's self-acquired property & passed to his heirs under the ordinary Hindu law as partible property. For this view, they relied upon the decision of the Madras H. C. in Ulagalum Perumal v. Subbaluxmi, A. I. R. (23) 1936 Mad. 721 which was affirmed by the P. C. in 66 I. A. 134: A. I. R. (26) 1939 P. C. 95.

44. The P. C. however, in overruling this view, observed :

> "Their Lordships are unable to adopt the view of the High Court as to the effect of such gift on the character of the estate. The learned Judges referred to several cases & relied particularly on a recent decision of their Lordships Board Ulagulum Perumal v. Subhaluxmi (A. I. R. (26) 1939 P. C. 95). In that case the owner of an ancestral impartible estate in the Madras Presidency governed by the Mitakshara Law, wishing to exclude his eldest son from the succession, executed a deed settling the estate after his own death on his second son. The Board held that the settlement was within the power of the settlor, & that the second son took the property as his self-acquired property & that it passed on his death under the ordinary Hindu Law of succession. In that case, the settlor had deliberately broken the line of succession & settled the estate on somebody outside the line, & that is the ratio decidendi. But in the present case, Raja Hukum did not break the line of succession, on the contrary he gave the property to the person who would succeed under the rule of lineal primogeniture, and moreover expressly directed that he should be the gaddi-nashin & have all the powers which the testator had possessed. The various wajib-ul arz on record in the Mauza Partabner & other Mauzas show that the sole heir inheriting under the rule of

> primogeniture is always called the gaddi-nashin. In their Lordships' view it is impossible to hold that this will, even if it operated to gire the property to Raja Maha, had the effect of changing its character from that of an impartible Raj governed by the rule of lineal primogenture. So to hold would plainly defeat the intention of the testator as disclosed in the document."

In our opinion, this case is an authority for the proposition that where the will is in favour of a person who would take the estate even without the will, & the testator directed that the successor should be the holder of the impartible Raj (gaddinashin) & have all the powers which the testator possessed as such holder, then the fact that the successor takes under the will does not effect the line of succession or the impartible character of the estate. And as the line of succession is not affected, it can be said that the successor is a person "entitled to the possession of the estate as single heir under custom".

45. The principle may be stated in general terms thus. Where an estate is transferred by will to the next successor at law & the testator intends that the successor should take the estate in the same manner & with the same rights & status as he would have taken if there were no will, then neither the character of the estate nor the rights & status of the successor are affected & remain unaltered. The rule applies to the case of an adopted son whose adoption, though made subsequent to the death of the testator, relates back to the death of the testator or prior there to, provided that the will was made in contemplation of the adoption. What applies to a will, applies equally to the case of a gift whether made directly or through the medium of a trust.

46. The conduct of Chitti Babu also shows that he always insisted upon his being treated as the holder of the estate in his capacity as as adopted son, even though he was holding it under the will as well. In suit No. 18 of 1908 which certain collaterals filed against Chitti Babu, Chitti Babu's case was that he was holding the estate both under the will & as an adopted son under the customary law. And although the learned Dist. J. in that suit had held that the adoption was invalid & that Chitti Babu had taken the estate as an absolute owner under the will, this position was challenged in the appeal to the H. C., which appeal was decided by a compromise & it was declared that Chitti Babu "shall be entitled to hold as such adopted son, the impartible zamindari of Yizianagram and all properties in suit & all other rights & properties etc. appertaining thereto."

When Chitti Babu executed a trust deed of 1912, he declared that the settlor "It seized & possessed of or entitled to as for an estate of inheritance all that impartible estate & zamindari descendible to a single heir according to the lav & costom of primogeniture applicable to similar estate in southern India."

And in para. 33 of the said deed, he clearly considered that the Madras Impartible Estates Act II [2] of 1904 applied to the estate.

47. Indeed the plff.- respondent admitted in the plaint that the Yizianagram Raj is an ancient zamindari & is joint family property subject to the custom of primogeniture. If Chitti Babu be presumed not to have held the estate in the same capacity as an heir under custom would have held,

but to have held it without reference'to any such capacity purely under the will of Anandagajpati, the estate would have become his separate self-acquired property & could not have been described as a joint family estate.

48. For all these reasons, we hold that Chitti Babu was the proprietor of the estate as described in Section 2 (3), Madras Act (II [2] of 1904) & was subject to the limitations imposed upon such proprietors in respect of such impartible estates as are mentioned therein.

49. Throughout this discussion we have assumed that Chitti Babu took an absolute interest under the will. Mr. Pathak also advanced an alternative argument that Chitti Babu took merely a life estate under the will & by the adoption, obtained the remainder, so that he became a full owner by virtue of his adoption rather than under the will & as such also he could be said to be a 'proprietor' within the meaning of Section 2 (3), Madras Act & so liable to the restriction placed upon such proprietor by Section 4 of that Act. Since we have held that Chitti Babu was liable to those restrictions even if he got an absolute estate under the will, it is unnecessary for us to consider the precise nature of the estate that was conferred upon him under the will. But we may state that, in our opinion, the Dist. J.'s decision in the suit of the collateral's (Suit No. 108 of 1903), that Chitti Babu obtained an absolute estate subject to defeasance in certain contingencies (which never happened) was right, & that no tail male was intended to be created by Anand Gajpati under the will.

50. The effect of the trust deed executed by Chitti Babu in 1912 need not detain us very long. By the trust deed, the whole of the estate as also the self, acquired property belonging to Chitti Babu was given to Alakh Narain. As the transfer was made through the medium of a trust, it had to take the form of a transfer by Chitti Babu to a trustee & again a transfer by the trustee technically became the owner of the estate & the further fact that Alakh Narain obtained the estate not directly from Chitti Babu bat from the trustee do not affect the position in which Alakh Narain came to hold the property. He held it as a donee from Chitti Babu. Alakh Narain was Chitti Babu's elder son &, as such, entitled to succeed to the estate. The trust deed makes it clear that the intention of Chitti Babu was that Alakh Narain should hold the property as the holder of an impartible Raj under the custom attached to it. The trust deed recites that "the said settlor desires & has agreed to convey the said several properties mentioned in the first schedule hereto & his other properties as hereinafter mentioned to the said John Charles Hill Fowler Esq in trust in the manner hereinafter mentioned for the benefit of his eldest son the said Alakanarayana Gajapathi Raj so that be may have the same kind & nature of estate right & interest in the said zamindari its accretions & appurtenances & other properties hereby settled upon him as he would have if the same were now to devolve upon him from the settlor by right of in inheritance according to the said law & custom of primogeniture."

Again the trust deed directed "Upon the said Alakanarayana Gajapathi Raj attaining the age of twenty-one years the said John Charles Hill Fowler Esquire of other the trustee for the time being shall convey & transfer to the said Alakanarayana Gajapathi Raj all the property that shall remain vested in the said trustee in virtue of this settlement together with all savings, additions & accretions so that the said Alakanarayana Gajpathi Raj may have the same kind & nature of right & interest therein as he would have if the same were now to devolve upon him by right of inheritance."

And again at the end in para. 33 as already noticed, the applicability of the Madras Impartible Estates Act of 1904 to the estate was clearly envisaged.

51. As already stated, Chitti Babu died on 11-9-1929 & the trustee banded over the estate to Alakh Narain in October 1922 before Alakh Narain attained the age of 21 years but after he had become a major, without executing a deed of conveyance. The trustee could convey the property to the cestui que trust after he had attained majority, even though he had not attained the age of 21 by virtue of the provisions of Section 56, Trusts Act. The principle underlying Partap Singh's case applies with equal force to the case of a transfer inter vivos including a trust, when the intention of the last holder is that the donee or cestui que trust should take the property as if he had taken it in his capacity as a successor under custom. Alakh Narain also, therefore, was a proprietor of an impartible estate to which the provisions of the Madras Act (II [2] of 1904) applied.

52. If, under the trust deed of 1912 executed by Chitti Babu, under which an allowance of Rs. 5000 per month was granted to the pltf. & if under the deed of settlement of 1928 by which an additional sum of Rs. 5000 p. m. was granted by Alakh Narain, any fresh pecuniary liability attaching to the impartible estate was created, the executants thereof would be deemed to have "inourred debts" within the meaning of Section 4, Madras Act (II [2] of 1904), and such debts would not be binding beyond the life time of the executants, or payable out of the impartible estate unless the debts incurred were such as would be justifiable upon the ground that they were made :

> "under circumstances which would entitle the managing member of a joint Hindu family, not being the father or guardian of the other coparceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the coparceners independently of their consent."

Now it was admitted on behalf of the defendant-appellant that the pltf. was in fact entitled to a maintenance allowance out of the income of the impartible estate, being the son of the previous holder of the estate. This is also the settled law see Rama Bao v. Raja of Pitapur, 41 Mad. 778; Kunjandi v. Chinnavana Rowtha, A I R. (28) 1941 Mad. 110 ; & Venkayya v. Baghavamma, A. I. R. (39) 1942 Mad. 1.

53. Again, the manager of a joint Hindu family is entitled to pay maintenance allowance to a junior member of the family without the consent of the other coparceners. It is also conceded by both the parties that the allowance fixed in the trust deed of 1912 by Chitti Babu was in lieu of maintenance payable to the pltf. In fixing the amount of maintenance to be paid to the pltf. Chitti Babu did no more than fix the amount of an unliquidated pre-existing liability. In this sense, no new liability was incurred at all so far as the impartible estate was concerned because the liability already existed & as such, no debt was incurred within the meaning of Section 4, Madras Act. The incurring of a debt, as contemplated in that section, must mean the incurring of a liability that did not already attach to the impartible estate. Section 4, to our minds, speaks of the incurring of a fresh liability. Hence, the allowance fixed in the trust deed of 1912 is not hit by Section 4 at all.

54. Assuming, however, that in providing for the payment of the allowance of Rs. 5,000, per month, Chitti Babu incurred a debt within the meaning of Section 4, the debt must be held to be a debt which is binding on the estate within the meaning of that section. As already stated, the debt, was for the payment of the allowance of maintenace which Chitti Babu was bound to pay. Where a debt incurred consists of a promise to pay the amount of maintenance, by the manager of a joint Hindu family, the presumption is that the promise is binding upon the other members of the family & it is for them, if they challange it, to show that the amount promised to be paid is excessive. The reason is that the law presumes that the manager acted bona fide & as a prudent man in fixing the amount unless the contrary be shown or unless there be something, in the circumstances of the case, to suggest the contrary.

55. It was contended by Mr. Pathak that the pltf. had not set up in the plaint the case that the fixation of the amounts of maintenance by Chitti Babu was binding on the estate as a justifiable debt under the provisions of Section 4, Madras Act. His contention was that it was necessary for the pltf. to allege & prove that the maintenance allowance fixed under the deed of 1912 was for legal necessity. We think that this contention is not sound. The deft. had clearly admitted that the pltf. was entitled to some maintenance allowance being the son of a previous proprietor. As such the only question that remained to be decided, in order that the deed may be binding on the estate under Section 4, Madras Act, was whether the amount fixed by Chitti Babu was excessive. The deft. did raise the plea that it was excessive in the present circumstances of the family but did not raise the plea that it was excessive even when it was fixed. As we have said before, the presumption in a case like this, when there is nothing to lead to a contrary conclusion, is that the amout fixed by the father was reasonable. The burden of proving that the amount was excessive was, therefore, on the deft, and it was for him to ram the plea if he wanted to avoid the liability.

56. As regards the question whether the amount is excessive, it will be examined later.

57. The amount of Rs. 5,000 being a justifiable debt is undoubtedly payable out of the impartible estate. But is it also payable out of the separate & partible properties of Chitti Bibu that came into the hands of Alakh Narain & may now be in the hands of the applts?.

58. In providing for the payment of an allowance under the trust deed Chitti Babu must be presumed to have discharged the obligation under which he lay under the law to provide maintenance to the son of the holder of the estate, upon the principle that "where a man lies under an obligation to do a thing it is more natural to ascribe his act, in so doing, to the obligation under which he lies, rather than to a voluntary grace independent of the obligation," per Lord Talbot in Lechmere v. Earl of Carlisle, 3 P. Wms. 211 Oases lemp Talbot 80, cited in Velanki Venlcata v. Papamma Rau, 21 Mad. 299 at p. 802.

59. And since the liability to pay maintenance attached to the impartible estate, it must further be presumed, unless the contrary be shown that the amount directed by Chitti Babu to be paid to the plff. was payable out of the profits of the impartible estate only & not out of any other property. But there is nothing in law for an obligee liable to pay the amount out of one property, agreeing to pay it out of his other properties as well. Therefore, we have to find out what the intention of Chitti Babu

as expressed in the trust deed was. In the trust deed, both kinds of properties were settled upon Alakh Narain & it was provided that he shall take these properties subject "to such declarations, charges 4 provisions herein contained as may then remain subsisting.

One of the declarations, charges & provisions was that 'the second son of the settlor shall oa attaining majority be entitled daring his life time to bs paid a monthly allowance of rupees five thousand & to a provision for a suitable house."

The trustee was expressly directed to pay this amount out of the profits, rents & income of the entire property. Alakh Narain, therefore took the estate, both partible & impartible, subject to the liability to pay to the plff. during his lifetime a sum of Rs. 5,000. It is, therefore, recoverable out of the separate & partible properties also of Chitti Babu, provided the claim to it, so far as it is recoverable out of such properties, was not given up under the deed of release of 1944. This deed we shall consider later.

60. As regards the additional amount of Rs. 5,000 settled upon the plff. respondent under the deed of settlement executed by Alakh Narain in 1928, the plff. has claimed this amount also as maintenance allowance, vide Para. 20 relief (a) of the plaint. But in Para. 7 of the plaint he has stated that it was settled upon him by his brother Alakh Narain "out of natural love & affection which he bore to the plff." The claim that the amount is a personal grant made by Alakh Narain to the plff. irrespective of the question whether he was entitled to it as maintenance under custom or law, cannot be ruled out, & Mr. Pearey Lal Banerji has urged before us that it may be treated as a personal grant to the plaintiff irrespective of the question whether he was entitled to it as maintenance. The defendant, on the other hand, while admitting that the plff. was entitled to a reasonable amount of maintenance out of the profits of the impartible estate, alleged in the written statement that the deed of 1928 "amounts to nothing more than a personal covenant by the said Maharaja Alakh Narain to pay Rs. 5,000 as a voluntary payment during his life time." In this Court however, Mr. Pathak urged that the grant was a maintenance allowance payable to tbe plff. under law & custom.

61. We have, therefore, first to consider whether Alakh Narain intended tbat this amount of Rs. 5,000 was in discharge of his liability to pay a reasonable amount of maintenance. By an earlier settlement made by him on November 1-11 1922, Alakh Narain settled upon the plff. resp. when the plff. was still & minor aged 16 years & 10 months, the Banaras Estate, which was valued by him at 13 lacs of rupees. In this deed he stated that :

> "Whereas the money allowance of Rs. 5,000 a month which I am bound to pay you under the Trust deed is inadequate to support your rank & dignity as younger brother of the Raja of Vizianagram & whereas out of natural love & affection I have for you, I desire to make suitable additional provision for yon so as to enable you to maintain your status as the younger brother of Raja of Vizianagram by settling immoveable properties upon you & your heirs absolutely."

This settlement was, however, not a pure gift because it was partly in lieu of the amount due to the plff. under a will of Her Highness, the Maharani of Rewa. However that may be the deed was intended to be an additional provision to make up the deficiency in the maintenance amount which was payable under the deed of 1912.

62. In the deed of 1928, there is nothing to show that it was made because the settlor thought that the amount of Rs. 5,000 which was already payable to the plff. was still inadequate even after the settlement of the Banaras Estate in his favour. The deed simply states, "Whereas the settlor is the elder brother of the beneficiary & out of natural love & affection which the settlor bears to the beneficiary, the settlor is pleased to settle for the life of the beneficiary an allowance of Rs. 5,000 p. m. besides the allowance payable to the beneficiary, under the termsof the regd. trust deed dated 28-10-1912, executed by the father of both the parties to this documents this deed of settlement witnesseth that the settlor, the Raja of Vizianagram above referred to, has in consideration of natural love & affection which he bears to the beneficiary, hereby settles upon him a monthly allowance of Rs. 5,000 which shall from this date be payable to him on the first of every month during the life time only of the said beneficiary the said Maharaja Vijiyanand Gajpatiraj."

If this settlement was out of natural love & affection merely & was not made in order to make up the deficiency in the grant of maintenance already made under the deed of 1912, it may not be treated as a settlement in discharge of any pre-existing liability. The mere fact that this amount has been called as a maintenance allowance does not make it a maintenance allowance payable to the plff. as of right by virtue of any custom attaching to the Raj.

63. It was urged by Mr. Pathak that this allowance should be treated as having been made in lieu of the liability to pay maintenance, but the applt. does not admit that over and above the amount payable under the deed of 1912 there was still left a liability to pay an additional sum of Rs. 5,000 by way of maintenance.: The attitude taken up by the deft, appellant is contradictory. On the one hand, he says that the bond of 1928 was in discharge of a legal liability to pay maintenance. On the other hand, he says that the legal liability did not even extend to the extent of Rs. 5,000 secured under the previous deed of 1912. If the amount fixed under the deed of 1912 was more than enough, it cannot be said that the subsequent bond of 1928, was in discharge of the liability to pay maintenance. The principle enunciated by Lord Talbot & quoted earlier in this judgment cannot therefore apply to this bond.

64. It is true that the pltf. has been treating this amount of Rs. 5,000 also as a maintenance allowance. In an income tax reference reported in Vijaya, Ananda Gajapathiraj, In the matter of 56 ALL 1009, he seems to have put forward the claim that both the amounts payable to him were paid to him as allowances due to a junior member of a joint family. But his conduct in that case can be easily explained. He seems to have taken the plea in order to escape payment of income-tax. His admission that the amounts were maintenance allowances are not tantamount to an admission that both of them are payable in discharge of the legal liability of the holder of the Raj to provide for maintenance allowaneet to a junior member of the family. An allowance granted as a matter of grace or bounty or out of natural love & affection or by way of an affluent provision for the benefit of a near relation, may not inaccurately, be described as a 'maintenance' allowance. The plff. is,

therefore, not estopped from showing that the second sum of Rs. 5000 granted under the deed of 1928, was not in discharge of a legal obligation, & was not, therefore, subject to variation, as it was not payable out of the profits of the impartible estate.

65. We, therefore, hold that the amount payable under the deed of 1928 was not a maintenance allowance payable to the plff. under law but was a voluntary grant made out of natural love & affection & having been made by a registered instrument, was binding upon Alakh Narain & is binding upon his heir & legal representative, the deft, appellant & is payable oat of the separate & partible properties belonging to Alakh Narain in his hands, but is not payable out of the impartible estate. It may be noted that an agreement to pay a certain sum out of natural love & affection to a near relation is a 'contract' under Section 25, Contract Act & there is no reason why Section 37 of that Act should not apply to it. As such the agreement binds the legal representatives of the promisor as "no contrary intention appears from thecontract."

66. The contention that there is no unequivocal promise to pay the amount secured by the deed, appears to us to be untenable in view of the specific declaration that the amount "shall from this date be payable to him (the ptff.)." Nor does, in our opinion, the fact that the settlor describes himself as the Raja of Vizianagram necessarily import the consciousness, that he was discharging a 'legal obligation' as apart from the grant of a bounty as a matter of grace. Section 37, Contract Act, will also apply to the allowance payable under the deed of 1912.

67. This brings us to the deed of release of 1944.

It appears that the Court of Wards took possession of the estate in the year 1945 is the lifetime of Alakh Narain. The plff. laid certain claims to the partible & separate estate of Chitti Babu in the hands of Alakh Narain, to certain moveable properties other than regalia & jewels belonging to the female members of the family and to the movable properties dealt with under the will of Chitti Babu. This claim was made by the plff. on the ground that Chitti Babu had no right to create a trust giving the property exclusively to his elder son Alakh Narain to the detriment of the plff. This claim was contested by the Court of Wards on the plea that the trust deed had the effect of incorporating partible properties with the impartible estate. The plff. also claimed jewellery left by the Maharani of Rewa under a will executed by her. Thereupon, there was a settlement of the disputes & the plff. resp. relinquished his claims in consideration of receiving a sum of ten lacs of rupees in settlement of all his claims in respect of properties, moveable & immoveable, & a sum of Rs. 54,193 in settlement of the claim with regard to the jewellery of the Maharani of Rewa. In consideration of payment of these sums, the plff. released :

> "all his claims & those of the members of his family to any joint family property of the parties not now in the releasor's possession other than impartible zamindaris of Vizianagram & Kashipuram & to any part of what was the separate property of the releasor's father the said Chitti Babu, of which the said Chitti Babu, did not dispose by will,"

& to any other property then under the superintendence of the Court of Wards on behalf of Alakh Narain.

68. It was, however, provided that this release was without prejudice (a) to any right of succession to the impartible zamindaris of Vizi anagram which may ultimately accrue to the releasor or to his issue, (b) to releasor's right to maintenance out of the income of the said zamindari or either of them & (c) to any claim which the releasor may have against the separate property of his late brother the said Alakh Narain.

69. On behalf of the appellant, it was contended that this release relinquished all rights or claims, including claims to recover allowances under the deeds of 1912 & 1928, except such as were expressly reserved under this deed of release & that the only right reserved with regard to the claim for maintenance was a claim to recover it out of the income of the impartible estate. We do not think that this argument is sound. It will be noticed that the plff. clearly reserved his right to any claim which he might have against the separate property of Alakh Narain. The deed of 1928 granting a sum of Rs. 5000 to the plff. for his lifetime, not being a settlement in liquidation of Alakh Narain's liability of paying maintenance to the plff. & being recoverable from tha separate property of Alakh Narain, could not be said to have been given up. The only question is whether the claim to recover Rs. 5000 due under the deed of 1912 out of the partible properties of Chitti Babu, which were settled under the deed upon Alakh Narain, was given up or not ?

70. It has not been suggested before us that the plff.'s claims to recover allowances under the deeds of 1912 & 1928 were the subject-matter of dispute which was settled under tha deed of release. Further, the release was in respect of claims to certain properties. It follows, therefore, that the plff. did not release his right to recover simple money debts due to him under bonds of other deeds of settlement which could not be described as claims to property. The mere fact that there was a saving clause to a right to recover maintenance out of the impartible estate does not necessarily lead to the conclusion that the pltf. had given up or had waived all his other rights not being claims to the property. The saving clause with regard to the succession to Vizia-nagram Estate or the right to receive maintenance oat of its profits, was put merely by way of abundant caution & was wholly unnecessary, because even without it the rights mentioned in that clause would have been saved.

71. We are, therefore, of opinion that under the deed of release, the rights of the pltf. which he had acquired to the receipt of the allowance by virtue of the trust deed of 1912 & the settlement deed of 1928, were not released or given up by him.

72. This leaves us with the question whether the amount of maintenance claimed by the pltf. is liable to be varied having regard to the income of the estate & the circumstances of the pltf. & other factors.

73. As the amount due under the deed of 1928 was not in discharge of the liability to pay a maintenance allowance to the pltf., it is not variable. But assuming that this amount was also in discharge of the liability to pay maintenance, we have come to the conclusion that the deffc. has failed to prove that the amount of Rs. 10,000 per month is in any way excessive, or ought to be

reduced. The provisions of the Madras Aot, II [2] of 1904, which are relevant for the present purposes are as follows :

> "Section 10 (1)--In determining the amount of maintenance payable to any of the persons mentioned in Section 9, the Court shall intef alia have regard to the following considerations, namely,
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> (i) the net income of the estate;
>
> (ii) the number of persona to be maintained out of the estate;
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> (iii) the nearness of relationship of the person olaiming to be maintained;
>
> (iv) the other sources of income of the claimant &
>
> (v) She circumstances of the family of the claimant.
>
> (2) The Court shall so fix the amount of such maintenance that the total amount payable out of the estate by way of maintenance to the relations mentioned in Section 9 shall not exceed one-fifth of the net income.

Section 14 (2) -- Where the rate of maintenance periodically payable to any person mentioned in S. 9 out of an impartible estate has been fixed by a decree or order of Court, fatally arrangement, award, contract or other instrument in writing, whether before or after the commencement of the Madras Impartible Estates (Second Amendment) Act, 1934, it shall be lawful for the Court to reduce such rate of maintenance in order to provide maintenance for new claimants & to adjust it within the limits specified in Sub-section (2) of Section 10.

Section 15--Save as provided in Section 14, nothing contained in Sections 9 to 14, shall affect any contract, arrangement, award or decree of Court entered into or made before the date of the commencement of the Madras Impartible Estates (Second Amendment) Act, 1934."

A reading of these provisions clearly shows that, except as provided in Section 14, a contract or arrangement for the payment of maintenance entered into or made before commencement of the Madras Impartible Estates (Second Amendment) Act, will not be affected. Both the documents of 1912 & 1928 are, therefore, saved by Section 15 except in so far as they may be affected by Section 14.

74. Now under Section 14, the amount of maintenance which had already been fixed under a contract or arrangement, can be reduced only "in order to provide maintenance for new claimants & to adjust it within the limits specified in Sub-section (2) of Section 10."

Therefore, so far as Section 14 is concerned, we have merely to see whether provision for new claimants has to be made & if on making such provision the amount exceeds one fifth of the not income of the estate, as mentioned in Section 10 (2) the amount payable to the pltf. may be reduced.

75. On behalf of the appellant, it is pointed out that the new claimants to when maintenance allowance has got to be paid are his brother & mother. The Court below has remarked that "the total maintenance which the deft pays to his mother, brother, pltf. & his mother comes to Rs. 2,94 000 or almost Rs. 3,00,000."

This statement was not disputed before us. The net income of the estate, as found by the Court below, is Rs. 21,55,000. The maintenance of Rs. 3,00,000 does not exceed one-fifth of the income. It was not disputed that the figures mentioned by the Court below were correct. The lower Court arrived at the figure of net income of the estate by deducting from the gross income of Rs. 43,11,000 for the year 1355 F., the Govt. revenue of Rs. 9,84,000 Govt. commission of Rs. 44,000, repair charges Rs. 2,67,000 payment towards debts Rs. 4,30,000 & collection charges at Rs. 4,31,000. As against this, what was urged before us simply was that on the debit side the personal expenses of the appellant, investments & other expenses, like money spent on banquets etc., should be deducted & that the net income within the meaning of Section 10 of the Act means the balance remaining after deducting all kinds of expenses. We agree with the Ct. below that this is not the correct meaning of the phrase as used in the Act. The net income has to be arrived at after deducting from the gross income the necessary charges on the estate, like the Govt. revenues, Govt commission, collection charges & expenses incurred in repairs of maintenance of the properties. Under Section 14, Madras Act, therefore the amount of maintenance payable to the pltf. even if both the items of Rs. 5,000 payable under the two deeds are taken into account, is not excessive & cannot be varied.

76. The appellant has failed to establish that the amount should be varied under the general law. It has been pointed out to us on behalf of the appellant that the pltf. owns the Banaras estate which is worth two crores of rupees & that he has got ten lacs & odd of rupees under the deed of release of 1944. The value of the property of the Banaras estate is not so material as the income which the pltf. derives from it. In fact, there is no satisfactory evidence on the record to show what the actual income from the property in the pltf.'s possession is.

77. The defts.' witness, P. Rama Chandra Rao, stated that the pltf.'s income from the Banaras estate was about two lacs of rupees per year. But he admitted that he had no personal knowledge about it. An hearsay statement like this cannot take the place of evidence. It is not possible for us to say, on the materials on the record, that the sum of Rs. 10,000 p. m. is excessive. We are, therefore, not prepared to accept the deft's contention that the amount claimed by the pltf. should be reduced.

78. The result, therefore, is that the only modification required to be made in the decree of the Court below is that the amount of arrears of maintenance found to be payable under the deed of 1912 is recoverable from the impartible & non-impartible estate covered by the said trust deed executed by Chitti Babu & which may be in the hands of the deft, appellant, & that the amount of arrears of maintenance found to be due under the deed of 1928 is recoverable out of the separate & partible properties of Alakh Narain in the hands of the deft, appellant.

79. We, therefore, affirm the decree of the Court below decreeing the pltf.'s claim for Rs. 25,095-13-4 with proportionate costs & pendente lite & future interest at 3 per cent per annum against the deft.

80. The amount shall not be recovered from the personal property of the deft. Out of the decretal amount, a sum of Rs. 5,000 plus interest thereon at the rate of 3 per cent. per annum due under the deed of 1912 will be recoverable from the Vizianagram Samasthanam & the property conveyed by Maharaja Chitti Babu as mentioned in that deed; & a sum of Rs. 20,000 plus interest thereon at the rate of 3 per cent. per annum due under the deed of 1928 shall be recoverable from the separate & personal property of Alakh Narain now in the hands of the deft.

81. The pltf. will get his costs of both Courts from the deft, appellant.