

(1935) 03 MAD CK 0074
In the Madras High Court

Ulagalum Perumal Sethurayar and Others

APPELLANT

Vs

Rani Subbalakshmi Nachiar

RESPONDENT

Date of Decision : 19-03-1935

Acts Referred:

Citation : (1936) 44 LW 168 : (1936) 71 MLJ 1

Hon'ble Judges : Stone, J;Ramesam, J

Bench : Full Bench

Judgement

Ramesam, J.—This is an appeal against the decree of the Subordinate Judge of Tinnevely granting the plaintiff possession of the properties mentioned in the plaint Schedules A to C and E and the moveables mentioned in Schedule 1 with mesne profits (Schedule D) to be ascertained. Schedule A abovementioned consists of the impartible Zamindari of Urkad. One Section Kotilingam Sethurayar was the Zamindar of Urkad on 2nd June, 1902, when the first Impartible Estates Act was passed. On the 29th May, 1902, i.e., four days before the coming into force of the Impartible Estates Act of 1902, he executed a deed of settlement (Ex. D). At that time he had one son K. Kotilinga Sethurayar by his deceased first wife, and had married a second wife who was enceinte. Under the deed of settlement (1) he reserved for himself the estate for life in the Zamindari (2) he settled the Zamindari absolutely on the child to be born by his second wife Thanga Pandichi provided the child is born alive and a male with a defeasance clause in case the child predeceased the settlor without leaving a male issue (3) in case a male child was not born alive, the property was to be settled on Thanga Pandichi absolutely with a clause of defeasance, in case she died without leaving a male issue in favour of his brother's son. He makes a provision for a house worth Rs. 2,000 for his eldest son and also provides for his maintenance at the rate of Rs. 75 per mensem, for his brother's son at the rate of Rs. 125 per mensem, for his mother at the rate of Rs. 70 per mensem, for his step grandmother at the rate of Rs. 33 1/2 per mensem and for his second wife at the rate of Rs. 70 per mensem. The document was executed and registered at Mylapore, Madras, where he must have gone for legal advice in connection with

the settling of its terms. A son was born on the 13th August, 1902, - Meenakshisundara Vinayaga Perumal. Afterwards the second wife died in 1904 in child-birth. The Zamindar married a third wife and by her he had a son Ulagalum Perumal who was born in June, 1906, and who is the first defendant in the suit. Meanwhile the eldest son K. Kotlinga died in 1903. It may be mentioned here that the Impartible Estates Bill was published on the 11th May, 1902, and the Zamindar executed the deed of settlement in "anticipation of its being passed into an Act. After the Act his power of disposal over the property was very limited as under the Impartible Estates Act the position of a Zamindar is analogous to that of the manager of a Hindu Joint family or that of a Hindu widow. It is also agreed on all hands that the motive for the execution of the settlement deed was that he conceived a dislike for his eldest son because he entered into a marriage against his father's wishes. The Zamindar died on the 7th January, 1907. On the 4th March, 1907, the Court of Wards took charge of the estate on behalf of the minor Meenakshisundara and also the guardianship of both the sons, i.e., Meenakshisundara and the first defendant. Afterwards in 1923 the estate was handed over to Meenakshisundara when he attained majority. In July, 1929, he died leaving his widow Rani Subbalakshmi Nachiar who is the present plaintiff. Immediately after his death the Collector stated that he would recognise the first defendant as the heir and referred the plaintiff to a regular suit. The present suit was filed on the first October, 1929, to recover possession of the Zamindari (Schedule A)" and other connected properties. Schedule B relates to Devasthanams, charities, Kattalais and other endowments of which the Zamindar for the time being was the trustee. Schedule C relates to jewels, silver vessels and other moveables. Schedule D relates to mesne profits. The plaint also - contains an allegation that sometime after Meenakshisundara took charge of the estate he and the first defendant entered into a partition arrangement dividing the partible properties under which the properties in Schedule E fell to the share of Meenakshisundara and the properties in Schedule F to the share of the first defendant. Accordingly the plaintiff prayed for possession of the properties in Schedule E also. The second defendant who is a cousin of Section Kotilinga was impleaded as he was appointed manager by the last Zamindar under a title deed. Defendants 3 to 11 were tenants under rival leases. This portion of the suit has been either decided or compromised and we have got nothing to do with these defendants in appeal. The plaintiff having got a decree as prayed for, the first defendant files this appeal. His contention was that even if Meenakshisundara got a vested remainder in the Zamindari under the deed of settlement (Ex. D) which had fallen into possession on the death of his father, still he took it only as a member of the joint family and though for purposes of enjoyment he was the only person competent to enjoy the Zamindari on account of its impartible nature still for purposes of succession, it is joint property and the next heir has to be chosen on the footing of succession to joint family property, i.e., he contended that the property descended by survivorship to the first defendant and not to the plaintiff who would be the heir only if the suit property is the separate property of Meenakshisundara. This contention was negatived by the Court below and is

repeated before us.

2. The main point in the argument for the appellant as urged by his Advocate Mr. Venkatrama Sastri is that though when impartible property is alienated to a stranger, the stranger takes it free of all jointness, i.e., as his separate property, still when the alienation is made to a member of the family the member takes it as joint family property by reason of its character prior to alienation. Almost at the threshold of this argument we are met with this anomaly, namely, that if Meenakshisundara took the Zamindari under the settlement as joint property, K. Kotilinga and the first defendant would be members of the joint family of which Meenakshisundara would be the head being the Zamindar and the others would be entitled to maintenance only, so that if Kotilinga survived Meenakshisundara dying without male issue he would be entitled to succeed. But this is the very thing which the settlor desired should not happen. According to the contention of the appellant, the effect of the settlement is merely to supersede K. Kotilinga and to appoint Meenakshisundara as the Zamindar in his stead and he relies on instances of such supersession of one branch in favour of a junior branch as supporting his contention. These instances are (1) (1927) L.R. 55 I.A. 114 (Privy Council) In that case it appears that when Lakshmanappa died in 1822 he was succeeded by the second son though the eldest son was living. What happened then was described as a relinquishment by Lakshmanappa to this second son because the eldest son was of weak intellect and his son was an infant. The Courts found as a fact that by an arrangement between the Poligar and the adult members of his family the Paliyam was transferred to the second son Annadana and that information of this was given to the Revenue Officials and was recorded by them. (Vide page 197). (2) a similar supersession of an elder by the second line and later on of the younger line by the elder line in *Naraganti Achammagaru v. Venkatachala Nayanivaru* (1881) ILR 4 Mad. 250 and *Sri Rajah Yanumula Venkayamah v. Sree Rajah Yanumula Boochia Venkondora* (1870) 13 M.I.A. 333. It appears in that case the fifth Mansubdar Malappa Dhora fell out with his overlord. Thereupon Bapan Dhora turned out the said Malappa Dhora and took possession of the estate as the sixth Mansubdar. But it was held that Bapan Dhora took the estate on behalf of the rest of the undivided family. Now it appears that in the first and third of the above cases there is no document evidencing the transaction and the Courts inferred from the particular facts that a line was superseded or the Mansubdar was expelled with the result that the Zamindar in the first of the cases took it as head of the joint family and, in the second case, of the rest of the family other than Mallappa Dhora. In the decision in *Naraganti Achammagaru v. Venkatachalapathi Nayanivaru* I.L.R.(1881) 4 Mad. 250 two agreements were produced and it was held that they constituted a family arrangement. What was abandoned was only a "preferential right to the immediate enjoyment of the dignity of the Palayagar and actual possession of the estate". It was also observed that there was no evidence of any more extensive abandonment of their rights by the elder brothers of Kuppi Naidu (Vide page 261). It must also be remembered that at the dates when the incidents in the

above three cases happened it was supposed that the owner of an impartible Zamindari was under the same restrictions in respect of the alienation of the Zamindari as the owner of partible property, when there are other male members in the family such as sons or brothers. It was only in 1888 that the right of the holder of an impartible Zamindari to alienate property to any person he liked without any justifying necessity was recognised. Prior to that date as no Zamindar was conscious of any larger power it would be unreasonable to attribute to a Zamindar an intention to effect an alienation exceeding his powers as they were then supposed to be. The three instances on which the appellant relies are therefore in my opinion dissimilar to the case before us. In my judgment in the case in *Annadana v. Konammal* (1922) 17 L.W. 107 which was affirmed by the Judicial Committee in *Konammal v. Annadana* (1927) 54 M.L.J. 504 : L.R. 55 IndAp 114 : ILR 51 Mad. 189 (P.C.). I discussed the facts of each of these cases separately. At pages 120 and 121 I discussed the facts of *Naraganti Achammagaru v. Venkatachala Nayanivaru* (1881) ILR 4 Mad. 250 and at pages 122 to 124 I discussed the history of the family in *Rajah Yanumula Venkayamah v. Sree Rajah Yanumula Boochia Venkondora* (1970) 13 M.I.A. 333 and it is unnecessary to repeat those observations here. In the present case we have got a Zamindar trying to dispose of his property in full consciousness of the power of alienation he possessed according to the decision of the Judicial Committee in *Sartaj Kuari v. Deoraj Kuri* (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 (P.C.) which was followed up by the decision in *Sri Raja Rao Venkata Surya Mahipathi Ramakrishna Rao Bahadur v. The Court of Wards* (1899) L.R. 26 I.A. 83 : ILR 22 Mad. 383 : 1899 9 M.L.J. (Sup.) 1 (P.C.), which was a case of a will and not of alienation inter vivos. With the full knowledge of his power the Zamindar intended to set aside his eldest son and for this purpose he executed a deed of settlement Ex. D by which he vested the whole property in favour of his second son who had at that time existed en ventre sa mere and who was the only person in whom he was Very much interested. He had not at that time married a third wife. It is doubtful whether, if the power of the holder of an impartible estate is less than the power of alienation conceded to him by the decisions in *Sartaj Kuari v. Deoraj Kuari* (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 (P.C.) and 3 CWN 415 (Privy Council) he can set aside one son in favour of another except by a family arrangement to which all are consenting parties. The first two of the earlier instances must now be regarded merely as cases of family arrangement to which the superseded persons were consenting parties, and in the third case though Mallappa Dhora was expelled, Bapan Dhora came in only as the head of the undivided family. There was no alienation or other transaction in that case which made it possible for one to hold that Bapan Dhora took the estate for himself only.

3. A further argument has been addressed on behalf of the appellant in a somewhat different strain - Assuming that Section Kotilinga intended to settle the property on Meenakshisundara, still the effect of such a transaction under the Hindu Law, it is contended, would be that Meenakshisundra would take it only on

behalf of the family independent of the intention of the settlor. For this position Mr. Venkatrama Sastri relies on Mitakshara Chapter 1, Section 4. In verse 2 it is said only that property acquired by the co-parcener without detriment to the property of his father shall not appertain to the co-heirs; and it is argued that in the present case it is the father's property that is given to one of the sons. It is true that where the property is joint family property the father may distribute it among his sons by any equitable arrangement of his own but the sons will take it as ancestral property. "But where the property is the father's self-acquired property and he gives it to any one of his sons out of favour it is not clear that the son takes it as ancestral property. The learned Advocate-General who appeared for the respondent relies on verse 28 of the same section which says:

What is obtained through the father's favour will be subsequently declared exempt from partition.

4. The reference here is to verses 13 and 16 of Section 6 (Vide Stokes Hindu Law Books). Where a father gives his self-acquired property to one of his sons, the question whether he takes it as ancestral property or as self-acquired property as between himself and his sons, has been very much discussed in a number of cases in India in all the High Courts and the point was finally discussed by the Judicial Committee in *Lal Ram Singh v. Deputy Commissioner of Partabgarh* (1923) 47 M.L.J. 260 : L.R. 50 IndAp 265 : ILR 45 All. 596 (P.C.) the conflict between the decisions of the Indian High Courts was noticed. In *Muddun Gopal Thakur v. Ram Buksh Pandey* (1863) 6 W.R. 71 and *Hazari Mall Babu v. Abaninath Adhurjya* 17 C.W.N. 280 it was held that the property was ancestral. In Madras it was held that the father may determine whether it should be ancestral or self-acquired but if he does not fairly indicate his wish, it is presumed to be ancestral Vide *Tara Chund v. Reeb Ram* (1866) 3 M.H.C.R. 50 *Nagalingam Pillai Vs. Ramachandra Tevar*, . In Bombay it was regarded as self-acquired Vide *Jugmohandas v. Sir Mangaldoss Nathubhoy* I.L.R.(1886) 10 Bom. 528 and *Nanabhai v. Achratbai* I.L.R.(1886) 12 Bom. 122. So also in Allahabad *Parsotam Rao Tantia v. Janki Bai* I.L.R.(1907) 29 All. 354. In *Rameshar v. MT.Rukmin* (1911) 14 Oudh. Cases. 244 it was held that it would be ancestral. The Judicial Committee after noticing all these decisions finally remarked in *Lal Ram Singh v. Dy. Commissioner of Partabgarh* (1923) 47 M.L.J. 260 : L.R. 50 IndAp 265 : 1923 ILR 45 All. 596 (P.C.) (at p. 605):

Their Lordships deem it necessary to pronounce upon these points. It may be that some day this Board will have to decide between the conflicting decisions of the Indian High Courts, and it may be that when this time comes this Board will prefer to go back to the original text of the Mitakshara and put its own construction upon that text. It is not necessary to do so in this case.

5. Now it must be observed that in all the cases which have been just mentioned the only question that arose was whether the son who got the property from the father holds it as ancestral property or as self-acquired property as against his own son and not as against a brother or other collateral. Even in the earliest of

these cases *Muddun Gopal v. Ram Buksh Pandey* (1863) 6 W.R. 71 where the matter was somewhat fully discussed. It was observed at page 72:

it may well be that in property acquired by a man his sons may have an interest though mere co-sharers, such as brothers who have not contributed in any manner to the acquisition, may not be entitled to participation,

6. And at page 73 it was observed that property distributed by a grandfather amongst his sons does not by such gift become the self-acquired property of the sons so as to enable them to dispose of it without the consent and to the prejudice of the grandsons. And in the case in *Lal Ram Singh v. Deputy Commissioner of Partabgarh* (1923) 47 M.L.J. 260 : L.R. 50 IndAp 265 : ILR 45 All 596 (P.C.) though the decision turned "on the construction of the Oudh Estates Act the question was whether in the property of Lachman the plaintiff his son had any interest by birth. Now in the present case we are not concerned with any such question and it is not necessary to decide any such question. In *Shibaprasad Singh v. Prayag Kumari Debi* (1931) 63 M.L.J. 196 : 1931 L.R. 59 IndAp 331 : ILR 59 Cal. 1399 p. (P.C.) Sir Dinshah Mulla observes:

To this extent the general law of the Mitakshara has been superseded by custom and the impartible estate though ancestral is clothed with the incidents of self-acquired and separate property.

7. It is not suggested that the impartible estate is exactly in the position of self-acquired property, but for certain purposes (one of which is the matter of alienation) it is clothed with the incidents of self-acquired and separate property. Therefore looking at it as if it is clothed with the incidents of self-acquired property, when Section Kotilinga settled the Zamindari under Exhibit D, upon Meenakshisundara, Meenakshisundara took the property absolutely as his own so far as all the collaterals are concerned, i.e., his elder brother K. Kotilinga, his younger brother the first defendant and his cousin the second defendant, they have nothing to do with the property - not even the notional joint right useful at least for purposes of succession according to - the recent decisions of the Judicial Committee such as (1927) L.R. 55 I.A. 114 (Privy Council) *Shibaprasad Singh v. Prayagkumari Debee* (1931) 63 M.L.J. 196 : L.R. 59 IndAp 331 : ILR 59 Cal. 1399 (P.C.) and (1934) L.R. 61 I.A. 286 (Privy Council) . It may be that such a question would have arisen if Meenakshisundara had a son so far as that son is concerned. In my opinion therefore the argument based on the Mitakshara does not advance the case any further. If the holder of an impartible estate has an absolute right of alienation inter vivos or by will according to the decisions in *Sartaj Kuari v. Deoraj Kuari* (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 (P.C.) and 3 CWN 415 (Privy Council) then one has only to follow the logical effect of these decisions and to hold that the alienee takes the property as absolute property, i.e., as self-acquired property and not jointly with other members of the joint family of which the donor himself and others were members. To so hold would be to say that the holder of the Zamindari has not an absolute power of alienation. The argument is that if the alienee is a stranger he would no doubt take an

absolute estate but if the alienee is a member of the family he would take it only as joint property. Now seeing that even a member of a joint family may hold property as self-acquired when it is separately acquired, I do not see how the fact that the alienee is a member of the family can make any difference. To say that where the alienee is a member of the family he must hold it only as a member of the joint family is to really impose a restriction on the full power of alienation as recognised by the decisions of the Judicial Committee above mentioned. It imposes a disability on the holder of the estate and makes it impossible for him to pass an absolute estate to a member of the family which is inconsistent with the full power of alienation recognised by the decisions. If he has a full power of alienation, the immediate result of the alienation is that the alienee gets an absolute property. It is another thing to say that he afterwards threw it into the common stock or dealt with it as joint family property. Such subsequent conduct of the alienee is a different matter. In my opinion the alienation itself must pass an absolute estate.

8. It was very much pressed upon us that the object of the Zamindar was only to cut off K. Kotilinga and not to deprive the third son. This is indicated by the fact that the defeasance clause in Ex. D, providing that Meenakshisundara's mother Thanga Pandichi should take the property if Meenakshisundara dies before the settlor, allows such a defeasance only if Meenakshisundara dies before the settlor without leaving a male issue. No doubt the object of such a clause is that if Meenakshisundara dies leaving a male issue the document should not operate and the vested remainder of Meenakshisundara descends to his son. But this is merely a plain case. The mere fact that the settlor allows the property to go to Meenakshisundara's son gives us no indication that Meenakshisundara's son gets it by survivorship and not by inheritance. It is consistent with either alternative. Again it is said that the object of the defeasance clause vesting the property in Thanga Pandichi is to make it possible for a third son to get the property through her. This is true but the very method by which the result is arrived at shows that it cannot be held as joint family property. If the property goes, after Meenakshisundara, to his mother and then only goes to another son as the heir of the mother it cannot be joint family property. Therefore it cannot be said that Meenakshisundara himself held it as joint family property. Moreover if Thanga Pandichi had a son and a daughter instead of a son only, and in such a case Meenakshisundara died without male issue in the life time of the settlor the property would be Stridanam in the hands of Thanga Pandichi and then it would pass to her daughter in preference to the third son. The settlor had to risk these consequences because there was no means of giving the property direct to the third son after Meenakshisundara, no such son being in existence and it being impossible for a Hindu according to the then law to make a gift in favour of an unborn person as laid down in the Tagore case. The settlor's anxiety to supersede K. Kotilinga was so strong that he was willing to take the risk of things turning out not exactly as one would like. He provided for certain contingencies as far as he could and beyond that he left matters to take their own course.

Again it must be remembered that all the contingencies provided for are only in case Meenakshisundara died during the life time of the settlor leaving or without leaving a male issue as the case may be. If he succeeds the settlor and enjoys the property and then dies, the settlor had nothing to say by way of providing for such a contingency. He left the law to take its course. This is of course the contingency that has happened. An impartible estate goes by survivorship to the other member's of the family only if at the time the succession opens it is held as the property of the joint family the other members having no right of enjoyment nor the right of interdicting alienation but the right of maintenance limited only to the son of the (1918) L.R. 45 I.A. 148 (Privy Council) and waiting for the chance of succession on the basis of joint family. It is true that such chance of succession may not properly be described as a mere spes successionis, for here the chance of succession is the logical result of a notional interest in the property. In *Shiba prasad Singh v. Prayag Kumari Debee* (1931) 63 M.L.J. 196 :1931 L.R. 59 IndAp 331 : ILR 59 Cal. 1399 (P.C.) Sir Dinshah Mulla observes:

Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth right of the senior member to take by survivorship still remains. Nor is this right a mere spes successionis similar to that of a reversioner succeeding on...the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered.

9. But the impartible estate will not go by survivorship to another male member if at the time when the succession opens it is not held as joint property - even in the sense described above but is held only as the separate property of the propositus. Such cases can occur either by renunciation or by partition in which the Zamindari is also taken into account or by some such equivalent transaction. Examples of this are *Vadrevu Ranganayakamma v. Vadrevu Bulli Ramayya* (1879) 5 C.L.R. 439 (P.C.), *Gurusami Pandiyan Vs. Sendatti Kalai Pandia Chinnathambiar and Others*, , 19 CWN 1119 (Privy Council) and (1878) L.R. 5 I.A. 61 (Privy Council) . In the present case Meenakshisundara having got the property absolutely as separate property by an alienation of Section Kotilinga, his heir is to be sought on the footing of its being his separate property and not on the footing that he held it as a member of the joint family even in the limited sense in which an impartible property held by a single holder can be said to belong to the joint family. That being so, the property cannot go by survivorship to the first defendant but descends by succession to the plaintiff. Moreover if the settlor intended to give the vested remainder to Meenakshisundara as joint property up to a certain point of time, namely, the death of Meenakshisundara during the lifetime of the settlor without leaving a male issue, as contended for by the appellant, it is doubtful whether the settlor can make any further dispositions at all. Having given it away the property to be held by Meenakshisundara as the property of the joint family of which he is the enjoying head, how can the settlor at that stage change the character of the property and

make further dispositions regarding it on the footing of its being the separate property of Meenakshisundara and introduce a clause of defeasance? The moment Meenakshisundara dies without leaving a male issue, it will go by survivorship to any male member then existing such as K. Kottilinga if he had lived on or the present first defendant. The settlor can introduce a clause of defeasance so as to override the survivorship only by changing the character in which Meenakshisundara would have held up to his death. In the first place it is doubtful if he can do so. In the second place there are not words in the settlement showing that at that point of time the settlor wanted to impose a change of character on the holding of the property by Meenakshisundara. In my opinion this last consideration is conclusive on the matter but I thought it better, first to discuss the question apart from it.

10. It is next argued that there is conduct of Meenakshisundara which indicates that he held the estate as joint property. On this part of the case it is unnecessary to deal with the matter at great length. This question is the subject of the seventh issue and the Subordinate Judge has dealt with it in paragraph 38 of his judgment. It is now said that the Zamindar made his brother Diwan and was treating him on affectionate terms. This is true, but to hold that acts of affection amount to throwing the property into the common stock of the joint family is neither logical nor desirable. The only effect of Courts loosely holding that such results follow would be to make Zamindars treat their relations such as brothers without the smallest spark of affection or kindness. No one desires that anything that the Courts hold should have such consequences. But apart from such considerations it is impossible to say that Meenakshisundara thought that he was holding the Zamindari as joint property of himself and his brother from any item of conduct that has been brought to our notice.

11. Ex. XVI shows that the first defendant was getting some maintenance allowance regularly along with the allowance of the Rajah. I do not think any inference should be drawn from the fact that these two items are put together and not separately. There is no such unmistakable conduct on the part of the zamindar as would indicate that he intended that the zamindari should be regarded as undivided property.

12. I now pass on to the next point which is the subject of the ninth issue namely, whether there was a division of the partible properties. First we have got a draft partition deed in March, 1924 (Ex. H.). This is in tamil and incomplete as it does not state the boundaries and schedules. On the outside there are endorsements by the manager M.S. Subramania Pillai. One endorsement is dated the 30th May. "Enter boundaries and show". Again in June there is another endorsement "why not done yet". Up to this stage the first defendant is a minor and possibly this was the reason why nothing was done. Then we have got a second draft partition deed Ex. H. (i) The month and date are not mentioned but the year is given - 1,100 Andu-showing that it must have been drawn up after August 1924. This document seems to be a copy of Ex. H because in the body

the clause that the zamindar should pay Rs. 1000 to the first defendant on the 30th April, 1924, was repeated without any correction. For some reason the document was never registered though a gift deed to a sister drawn up at the same time was executed and registered. (Ex. XVI). However it appears that some of the terms mentioned in Ex. H (1) were carried out. For instance we find that Rs. 1000 was deposited in the name of the first defendant in a local bank. Ex. 1 is the ledger page in the bank's accounts in the name of the first defendant Ex. 14 is the pass book. There are similar ledger pages in favour of the zamindar and Ex. M is his pass book. Later on a sum of Rs. 600 is paid into the account to the credit of the first defendant (Vide Exs. L1 and L4). It is now said that this Rs. 600 represents the first defendant's share of the rent in respect of the Periyakulam Pannai lands. Ex. N. is an account of the same showing that for February, 1925 Rs. 600 was realised as the first defendant's share (Vide also Ex. N.3.). It shows that for the prior year the first defendant's share was Rs. 506 but there is no such account for the earlier year, supporting this statement; nor could there have been any partition in February, 1924 when the first defendant was a minor. Afterwards the same amount is again debited and a fixed deposit receipt was issued for the whole amount of Rs. 1600 and interest. This fixed deposit afterwards matured and the amount was drawn by the first defendant. Besides the cheque for Rs. 600 he seems to have written another cheque for Rs. 500 but it was not issued. The first defendant himself denies knowledge of any partition. There is no doubt about the genuineness of Ex. H, (1) L and N. Series. He also denies knowledge of the separate leasing out of his lands. The first defendant himself would have been just 18 in 1924 and 1925. Later years, entries in the accounts do not show a separate entry of Rs. 600 for the first defendant lands. All that can be inferred is that possibly Meenakshisundara and his manager conceived the idea of bringing about a partition, got a partition deed drafted, made payments amounting to Rs. 1600 and leased out the lands in different shares. But it does not appear that what they did was known to the first defendant. The first defendant does not seem to be a party to any act of division. Either the Zamindar was unwilling to mention to his younger brother his anxiety for a division or the Zamindar himself had dropped the idea. If they seriously desired to complete it, there was nothing to prevent it. It is said that the draft partition deed (Ex. H1) provides for the building of a separate palace for the first defendant but a foundation stone seems to have been laid for a house so long as January, 1924, when the first defendant was still a minor, and afterwards a house seems to have been built at a cost of Rs. 12,000. Neither the payments of Rs. 1000 and Rs. 600 nor the building of a separate house for him nor the fact that a separate bandy and bullocks were allotted to him (which also appears from the evidence) conclusively shows a partition. These transactions are consistent with gifts made by the zamindar to the first defendant on account of affection. Under these circumstances I am unable to agree with the finding of the Subordinate Judge that there was a completed partition. It appears that the house was actually decreed to the plaintiff. This portion of the decree must any how be erroneous on

any footing. If the house was separately built for him and this is one of the items of the division, the first defendant is entitled to the house. If there was division, then also the first defendant is entitled to it by survivorship. It is conceded that this portion of the decree cannot stand (Schedule A-(II) item C). But on my finding that there was no partition the decree of the Lower Court for the whole of the properties in Schedule E as well as the house in Schedule A II item C and the properties in Schedule I to the written Statement must be vacated and the appeal must be allowed to this extent.

13. It was suggested in one portion of the argument that we might fix the maintenance of the first defendant. No such question was raised in the Court below or in the grounds of appeal though to save litigation the amount might as well be fixed now. We cannot do it without the consent of the respondent.

14. The result is except as to the properties in Schedule E the appeal is dismissed. The parties will pay and receive proportionate costs throughout. No evidence has been adduced regarding items referred to in the memo of objections. It is therefore dismissed with costs.

Stone, J.

15. As regards the facts, the question of the partible property, and maintenance I agree with the judgment pronounced by my learned brother and have nothing to add.

16. On the main question debated before us the point is one of importance, is, as to one part, new, and is one of difficulty. I shall endeavour to state what I have to say as briefly as possible.

17. The settlor, Section Kotilinga Sethurayan was, at the time of the Deed of Settlement Ex. D (29th May, 1902) possessed of the impartible zamindari of Urkad. He was the senior member of a joint hindu family which included his brother. He was married and his wife was enceinte. He had a son K. Kotilinga. It was the primary purpose of the settlement to destroy the proprietary rights of K, Kotilinga, who had greatly angered his father by a marriage of which the father disapproved.

18. The wife of the settlor one Thanga Pandichi gave birth to a male child Meenakshisundara. She then died. The settlor married again. That wife gave birth to the first defendant who seized the zemindari on the death of Meenakshisundara. The widow of Meenakshisundara now claims. She succeeds if, Thanga Pandichi's son took the property as self-acquired property disentangled from all joint family rights for he is then the "stock of descent and his brother has no interest (subject to a doubt which is derived, from the Mitakshara when dealing with gifts by father to son of the father's self-acquired property). The plaintiff loses if Thanga Pandichi's son took the property as successor to his father the settlor, or in any way that attracted to the property the joint family rights in that property that were attached to it at the time of the settlement.

19. The matter was presented along two lines;

(1) It is said that it is to be inferred from the terms of the settlement and generally that the settlor did not intend to give to Meenakshisundara this estate as self-acquired property;

(2) It is said in the alternative that the settlor could not in law give to Meenakshisundara alternatively did not give to Meenakshisundara this estate as self-acquired property but that the estate began as ancestral and remained ancestral while in the hands of Meenakshisundara and after his death passed to the person entitled to succeed to the joint family estates i.e., to the Defendant.

20. As to the settlor's intention I agree with my learned brother and have nothing to add.

21. As to the alternative line of argument I agree but have to express my reasons slightly differently.

22. The exact position occupied in Hindu law by impartible estates of this type the history of this zamindari is reviewed in *Ramalakshmi Ammal v. Sivanatha Perumal Sethurayar* (1872) 14 M.I.A. 570 has been considered at length by Lord Dunedin in AIR 1921 62 (Privy Council) by my learned brother in *Annadana Jadaya Gounder v. Konammal* (1922) 17 L.W. 107 p. 114 and by Lord Blanesburgh in (1934) L.R. 61 I.A. 286 (Privy Council). From the authorities there cited it is clear that up to *Sartaj Kuari v. Deoraj Kaur* (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 (P.C.) apart from *Deb Burmono v. B. Thakoor* (1869) 12 M.I.A. 523 (a case under the Dayabhaga System) the following propositions had been consistently adhered to so far as Madras is concerned;

(1) Impartiality does not make the raj separate or self-acquired property,

(2) an impartible raj may be self-acquired or may be joint.

(3) If the raj be joint succession will go to that class to whom it would go under the ordinary Hindu law but it will then become necessary to choose from that class one who will possess for himself alone.

(4) Though the person chosen will possess for himself alone the joint family will have rights, viz., (a) a right to have the heirs, failing direct descendants, chosen from it, and it alone, according to the Mitakshara scheme of succession as modified by the nature of impartiality, (b) a right of maintenance.

23. By *Sartaj Kuari v. Deoraj Kuari* (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 (P.C.) an important change was made. That decision has been criticised in India and elsewhere. It is, however, not merely binding on us but, as was stated in (1934) L.R. 61 I.A. 286 (Privy Council) has been in force so long that it cannot now be disturbed. *Sartaj*'s case decided directly that the holder of the zamin can alienate the impartible property to a stranger without necessity and the alienation cannot be challenged by a member of the family. The foundation of that decision appears to be that in an impartible zamin there is no right to

partition i.e., the junior members cannot as in the case of an ordinary hindu family, demand a division of property. The inalienability (save for proper cause) of joint family property is founded on the interest in the property possessed at all times by junior members, an interest which crystallizes out into possession on partition, which partition the junior members can always demand. If there is no power to demand a partition this reason for inalienability disappears and therefore in the case of an impartible property the holder of the zamin can alienate at any time.

24. It might, of course, have been thought this inroad upon the normal right to partition created by custom in the case of impartible estates was not merely in the interest of the holder of the zamin but was derived from the very nature of the case which imposed an equal obstacle in the way of the holder of the zamin compelling separation by unilateral act.

25. To make Clear this point it is necessary to observe that the quality of impartibility is derived, at least in this case, from family custom. The custom arose in order to keep in tact, in olden days for military or other reasons, the family estates. Had the general law applied, untrammelled by custom, as the years passed the estates would have been broken up either on succession or by partition. Custom stopped this in the case of succession by selecting one only out of the class entitled, by the general law, all equally to succeed. In the case of partition it was avoided (1) by saying to the zamindar:

You may not by giving notice cause a partition for to permit you, who solely enjoy, to give such a notice, and thereby effect a separation, would be to allow you, by your unilateral act, to destroy those rights of succession and of maintenance which the junior members of this joint family have or may hereafter have.

(2) by saying to the junior members:

You may not demand partition of the holder for it is the custom, that he alone shall enjoy the whole and this custom would be broken if at any moment you could claim a share in the enjoyment.

26. But though the law prevented either side from compelling a separation or a partition, partition or separation was never impossible. Some of the cases where it can happen are stated by my learned brother in *Annadana Jadaya Gounder v. Konammal* (1922) 17 L.W. 107. Family arrangement is one such case, renunciation is another.

27. Thus though it would appear that the inroad undoubtedly made by the custom of impartibility into the ordinary right to claim severance or partition was made in order to maintain intact on one hand the estate without in any way destroying the rights of the joint family, this restriction on the right to claim partition was made in *Satraj Kuari v. Deoraj Kuari* I.L.R.(1888) 10 All. 272 : L.R. 15 IndAp 51 (P.C.) the premises that led to the conclusion that the zamindar

could alienate the whole estate to a stranger. The effect was to empower the holder by his unilateral act to effect a partition not of the family, which remained joint, but of the family property, which became wholly free from the rights hitherto possessed by the joint family (apart from statutory provisions such as Section 39 of the Transfer of Property Act). For those rights did not, as regards maintenance, avail against a stranger second Pittapur case, (1918) L.R. 45 I.A. 148 (Privy Council) and as regards succession, did not continue effectively to exist, for the family had now no impartible property to which to succeed. For all practical purposes it is said *Sartaj Kuari v. Deoraj Kuari* (1888) ILR 10 All. 272 : L.R. 15 IndAp 51 (P.C.) enables the holder to do everything he could do had he been allowed to give a unilateral notice of separation. That would have enabled him to go away from the family carrying the estates with him; alienation to a stranger does not enable him to go away from the family but it takes all the property away from the family.

28. Subsequent to *Sartaj Kuari v. Deoraj Kuari* ILR 10 All. 272 : 1888 L.R. 15 IndAp 51 (P.C.) and the cases following that case a new chain of cases commences with AIR 1921 62 (Privy Council) . That decision makes it clear that, despite *Satraj Kuari v. Deoraj Kuari* I.L.R.(1888) 10 All. 272 : L.R. 15 IndAp 51 (P.C.) the position is now as follows:

(1) No partition can be demanded by the junior members, on the other hand, no separation can be compelled by the holder,

(2) the right of the junior branch to succeed by survivorship to the raj on the extinction of the senior branch has been definitely and emphatically reaffirmed in (1934) L.R. 61 I.A. 286 (Privy Council) . The above, I believe, correctly represent the major points that emerge from the line of cases exhaustively enumerated in *Annadhana Jadaya Goundar v. Konammal* (1922) 17 L.W. 107 et seq., and in the most recent decision of the Privy Council, *Collector of Gorakhpur v. Ram Sundar Mal* I.L.R.(1935) 56 A. 468 et seq (P.C.).

29. What is fresh in this case is this; What is the position when the holder alienates not to a stranger but to a member of the joint family?

30. Before I endeavour to resolve that question I will mention a point urged by the appellant-defendant in order to put it on one side.

31. It is said that (without conceding that the settlor here is in the position, as regards the impartible property, of a person holding property as self-acquired) assuming the settlor is in the position of a person holding self-acquired property even then, under the *Mitakshara*, property given to a son (as here),, would in the hands of the son, pass as ancestral property; for the gift is to the detriment of the family estate.

32. The foundation of, and the answer to this argument will be discovered by turning to *Muddungopal Thakoor v. Ram Baksh Pandey* (1863) 6 W.R. 71 . Having quoted from the texts the learned Judges there observe:

It means no more than that property so acquired is exempt from partition amongst the brethren.

33. That is, in this case had Meenakshisundara had a son or sons it might be a question whether between Meenakshisundara and his son or sons it was ancestral. If so as between them it would not be exempt from partition (impartibility apart). Even that is a matter for doubt. See *Lal Ram Singh v. Deputy Commissioner of Partabgarh* (1923) 47 M.L.J. 260 : 1923 L.R. 50 IndAp 265 : ILR 45 All. 596 (P.C.). But here the defendant is not the son of Meenakshisundara but a brother. It follows that even accepting *Muddungopal Thakoor v. Ram Baksh Pandey* (1863) 6 W.R. 71 the property would under the Mitakshara (impartibility apart) have been exempt from partition as regards the defendant. That is the defendant could not have claimed a partition (impartibility apart) in respect of it, i.e., as against the defendant. Meenakshisundara could have claimed it as self-acquired property not affected by joint family incidents save the incidents attaching to the joint family made up of Meenakshisundara and his sons.

34. Thus the defendant would fail if the impartible property in the hands of the settlor were treated as self-acquired property. A line of authorities was cited to show that it was self-acquired property, e.g. *Katama Nachiar v. B.G. Taver* (1863) 9 M.I.A. 539 (P.C.), *Baboo Beer Pertab Sahee v. Maharaj Rajendar Pertab Sahee* (1867) 12 M.I.A. 1 (P.C.), (1902) L.R. 29 I.A. 178 (Privy Council) and 2 CWN 273 (Privy Council) . But these are cases where the raj had been confiscated and regranted. The grantee in such a case starts the line afresh, as though there had never been a raj before, whether he is a member of the same family or even the same person as the former holder. See *Stree Rajah Yanumala Venkayama v. Sree Rajah Yanumala Boochia Venkondora* (1870) 13 M.I.A. 333 (P.C.).

35. It appears to me that in this case this settlor held this impartible estate not as self-acquired property but as ancestral property subject to the custom attaching impartibility. That left at least two rights in the family which would not have been there had his position been that of a person who holds self-acquired property, viz., the right of the joint family (including the holder's collaterals) to succeed by survivorship and the right of junior members of the joint family to claim maintenance.

36. Because a gift by a father of self-acquired property to a son would shut out of the donee's brother it does not follow that a gift by a Zamindar of an impartible ancestral Zamin to a son shuts out the donee's brother.

37. That result, however, will follow directly if an alienation to a stranger and an alienation to a member of the family stand on the same footing so as to make the property in the hands of the alienee self-acquired property in both cases.

38. As Mr. Sastri pointed out a passage in AIR 1921 62 (Privy Council) beginning with the words "turning next to the second Pittapur case", suggests that a different result would have been arrived at in that case if the claimant had

accepted the donee as the father-donor's son, and that he would have had a right to maintenance. If that be so then there would appear to be a difference according as the alienation is to a stranger or to a member of the family. In 31 CWN 943 (Privy Council) however the same position was taken up as in the second Pittapur case though there was relationship.

39. It is urged that the problem can be resolved along the following lines;

40. Alienation is a matter of property transfer. The making or non-making of an alienation does not affect the family status, it merely affects the family wealth. If all the property is transferred to a stranger the right to succeed exists but there is nothing to which to succeed. The right to maintenance continues but there is nothing out of which the maintenance can be paid (I am regarding claims against the alien and put aside Section 39 of the Transfer of Property Act). There can be no partition but there can be by alienation a complete divesting of the family of property by alienating to a stranger. If the alienation is not to a stranger, still, as in the case of an alienation to a stranger, the family remains undivided; the rights of maintenance and succession remain unaffected. There is, however a difference arising from the nature of the case. The family has not been divested of its property. One member, the member to whom the property is transferred, has got it. The fact that he and he alone has got it raises no inference that the family has no part in it. This is the common case with impartible property that one man has the sole right of enjoyment.

41. The fact that this settlement would have the effect had certain events occurred, of first alienating to a member of the family then alienating to a stranger, then alienating to a member of the family does not it is said affect the matter. The destruction of the rights of the other members of the family is not within the powers of the holder. *Satraj Kuari v. Deoraj Kuari* (1888) L.R. 15 IndAp 51 : ILR 10 All. (P.C.), decides he can alienate. If he alienates to a stranger then from the very nature of the case, he removes from the family the property the existence of which in the family, makes the rights of succession and maintenance of some value to the family. He does not thereby destroy the right. The right lives on. The property to which it attaches goes. It goes because the right is a right of succession, and a right to require a relative to maintain, i.e., right dependent on relationship. If the relations have got no property it is a valueless right but still a right. It does not exist, it never did exist, against a stranger. If the appropriate relation has got the property then the right which was never destroyed and could not be destroyed by the holder becomes valuable once more because there is something to succeed to.

42. The answer to the above is, I think, to be found in the question; "To whom is the person claiming succession claiming to succeed. The alienor or the alienee?" When the property is alienated to a stranger the right of succession is lost because the succession is to the alienor. It clearly can make no difference if the alienation is to a member of the family. The right of succession is in that case also a right to succeed to the alienor, not to the alienee. But the alienor has

divested himself. There is nothing to succeed to. Thus whether the alienation is to a stranger or to a member of the family a person claiming a right to succeed to the alienor is claiming a right of no value once it is established (a) that the alienor had a right to alienate the property and (b) he did in fact alienate.

43. That the settlor here intended to alienate to Meenakshisundara so that Meenakshisundaram held the property as the new stock of descent I have no doubt for the reasons given by my learned brother; that he had the power so to alienate I regard as settled by *Sartaj Kuari v. Deoraj Kuari* (1888) L.R. 15 IndAp 51 : ILR 10 All 272 (P.C.); that the property in Meenakshisundaram's hands became self-acquired and not ancestral as against collaterals - whatever may be the position as regards sons - I think follows from the reasons above given when considering *Muddungopal Thakoor v. Ram Baksh Pandey* (1868) 6 W.R. 71 .

44. On the other hand, cases like (1927) L.R. 55 I.A. 114 (Privy Council) do not really assist, Those are cases where the family succession is changed yet the right of the family remains. It is said that that is what has occurred here and, by parity of reasoning, here also the family rights should remain attached to the estate. But if (1927) L.R. 55 I.A. 114 (Privy Council) or *Naraganti Achamagaru v. Nayanivaru* I.L.R.(1881) 4 Mad. 250, a similar case, is examined it will be found that the change is not due to an alienation effected by the holder but by an arrangement come to between the members of the family affected being of sound mind and adult. In such cases there is no attempt being made by the holder to defeat the family by his unilateral act; there is merely an alteration effected within the family by bilateral act, the holder on the one side, and the junior members on the other hand agreeing. In (1927) L.R. 55 I.A. 114 (Privy Council) the Palaiyam (or Raj) was transferred by the Poligar (or Raj) to his second son. This was in accordance with the arrangement come to between the Poligar and adult members of his family. Its purpose was to pass over a son of weak intellect and his son a child of tender years. The difference between that case and this is that there the other members of the family agreed to the alienation of the estate from the Poligar to his second son. It was, by consent of the family, a substitution of one Poligar by another. The family incidents remained throughout attached. But where the property is alienated under the power declared to be possessed by the holder by *Sartaj Kuari v. Deoraj Kuari* does not the alienation break the connection between property and family so that the alienee, though in the family, as alienee is in the position of a stranger receiving the property as self-acquired property to which the family rights of other members of the family can no longer attach?

45. Again cases like *Vadrevu Ranganayakamma v. Vadrevu Bulli Ratnayya* (1879) 5 C.L.R. 439 *Sivagnana Tevar v. Periasami* (1878) 5 I.A. 61 : 1 Mad. 312 (P.C.), 19 CWN 1119 (Privy Council) and *Gurusami Pandiyan v. Pandia Chinna Thambiar* (1921) 39 M.L.J. 529 : ILR 44 Mad. 1 being cases where the family by family agreement or otherwise have become divided are not in point. No one doubts that in such cases the joint family has been broken up. In such cases the old

joint family incidents including succession, cease. The result in such cases is, that, as in *Vadrevu Ranganayakamma v. Vadrevu Bulli Ramayya* (1879) 5 C.L.R. 439 a woman, the widow of the last Zamindar might succeed.

46. In *Shibaprasad Singh v. Prayag Kumaree Debee* (1931) 63 M.L.J. 196 : L.R. 59 IndAp 331 : ILR 59 Cal. 1399 (P.C.) the Privy Council observe:

To this extent (i.e., as regards partition, alienability, maintenance) the general law of the Mitakshara has been superseded by custom and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right therefore still remains...To this extent the estate still retains its character of joint family property...Nor is this right a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right, which is capable of being renounced and surrendered. It follows that in order to establish that a family governed by the Mitakshara, in which there is an ancestral impartible estate, has ceased to be joint, it is necessary to prove an intention express or implied on the part of the junior members of the family to renounce their right of succession to the estate.

47. In that case, it will be observed that the family was assumed still to have an ancestral impartible estate. That is the whole point here. This is not a case where the family has become divided. In my opinion in the case of impartible estates partition cannot be brought about by alienation by the holder. This is a case where the property has been alienated. It is a case where despite the alienation the defendant claims as successor not of the alienee basing his claim on relationship, but of the alienor, basing his claim on succession as a member of a joint family. It appears to me however, that even if the defendant established (1) the fact that the family remained joint, (2) the right of the family to succeed, (3) the fact that the last holder on behalf of the family was the settlor, (4) the conclusion that the defendant had the right therefor to succeed - he would fail. He would fail because the settlor has parted with the property and there is nothing left to succeed to. For the defendant to succeed he must show a right to succeed to Meenakshisundara and this in my opinion he has failed to.