

**(1939) 02 MAD CK 0034**

**Madras High Court**

**Case No:** None

His Highness Sri Sri Sri  
Lieut-Col. Sir Rajah  
Velugoti Govinda  
Krishna Yachendra  
Bahadur Varu,  
Panchahazar  
Mansabdar, K.C.I.E.,  
Maharajah Sahib of  
Venkatagiri (dead) and  
Raja Velugoti Sarvagna  
Kumara Krishna  
Yachendra Bahadur  
Varu, Legal  
Representative of the  
deceased

**APPELLANT**

**Vs**

Raja Rajeswara Rao  
and Another

**RESPONDENT**

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**Date of Decision:** Feb. 10, 1939

**Acts Referred:**

- Madras Impartible Estates (Second Amendment) Act, 1934 - Section 15, 9

**Citation:** (1939) 49 LW 717 : (1939) 1 MLJ 831

**Hon'ble Judges:** Alfred Henry Lionel Leach, C.J; Krishnaswami Aiyangar, J

**Bench:** Full Bench

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### **Judgement**

Alfred Henry Lionel Leach, C.J.

This appeal raises the question of right of illegitimate sons of a member of a joint family of the Sudra caste

to maintenance out of the family estate when it is impartible. The suit was filed by the respondents in the Court of the Subordinate Judge of Nellore

to establish their status as illegitimate sons of Venugopal, the paternal uncle of the appellant, the Maharajah of Venkatagiri, and the right which they

claimed to maintenance out of the Venkatagiri zemindari, the succession to which is governed by the law of primogeniture. They averred that they

were entitled under a deed of family settlement, dated the 8th April, 1889, to an allowance of Rs. 1,000 per mensem from the death of their father,

which occurred on the 20th June, 1920, but their claim did not rest on the deed alone. They said that irrespective of the deed they were entitled to

an allowance for maintenance by custom and also under Hindu Law. The appellant refused to recognise the respondents as the illegitimate sons of

his uncle and said that even if they were his sons they were not entitled to be maintained by the estate. The Subordinate Judge held that the

respondents had established their status as illegitimate sons of Venugopal and their claim to maintenance from the estate at the rate of Rs. 1,000

per mensem under the deed of the 8th April, 1889, but found against them in so far as their case was based on custom and Hindu Law. The

Subordinate Judge also held that the respondents were entitled to an allowance from the date of the death of their father and included in the decree

a direction to the appellant to pay the respondents Rs. 1,44,000 as arrears of the allowance. The allowance was made a charge on the estate. The

appellant accepts the finding of the trial Court on the question of status, but challenges the decision that they are entitled to maintenance out of the

estate.

2. The Venkatagiri family belongs to the Velama community, a sub-division of the Sudra caste. In the year 1878, the estate was in the possession

of Rajah Velugoti Kumara Yachama, who had seven sons, three of whom had before that year been given in adoption. The relationship of the

parties will be more readily appreciated if I reproduce the pedigree set out in the judgment of the lower Court:

Raja Velugoti Kumara Yachamma

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Rajagopala Muttukrishna Venkata Venugopal Rama Krishna |

Krishna (died issueless). Krishna | (adopted to Raja|

|| of Pittapur).|

Govinda Krishna Krishna Bahadur | |

(defendant). (adopted son). | |

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Rajeswara Rao Maheswara Rao |

(1st plaintiff). (2nd plaintiff). |

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Seshachelapathi Rangarao Venkatalakshmana Rao

(adopted to the Rajah of (adopted to the Rajah of

Bobbili). Jatprple).

3. In October, 1878, Raja Velugoti Kumara Yachama handed over the estate to his eldest son Rajagopala Krishna. In 1889 Muthukrishna and

Venkatakrishna, the two brothers nearest in age to Rajagopalakrishna, claimed that the Venkatagiri zemindari was partible and that the four

brothers who remained in the family were each entitled to a fourth share in the family properties. As the result of advice given to them by their

father and friends of the family Muttukrishna and Venkatakrishna withdrew the claim to partition and recognised the zemindari to be impartible, but

the settlement involved the payment of large sums of money to the three younger brothers, Muttukrishna, Venkatakrishna and Venugopal.

Venugopal was then a minor. The terms were embodied in the deed of 8th April, 1889, Venugopal being represented by his father. It will be

necessary to refer to certain of the provisions of the deed in detail, but for the purpose of the narrative its terms may be summarised as follows: -

(1) The Venkatagiri estate should be treated as impartible and should descend along the eldest line of descent; (2) Muttukrishna, Venkatakrishna

and Venugopal should each receive a sum of Rs. 5,81,252-11-10; (3) Muttukrishna, Venkatakrishna and Venugopal should also receive a sum of

Rs. 40,000 each for the purpose of purchasing or building a residence; (4) Venkatakrishna and Venugopal being unmarried should each receive

Rs. 15,000 for marriage expenses; (5) Rajagopalakrishna and his successors to the estate should pay to Muttukrishna, Venkatakrishna and

Venugopal a sum of Rs. 1,000 each per mensem for life and on their death, a similar amount to their male descendants by way of maintenance, the

amount payable to each branch being Rs. 1,000 irrespective of the number of descendants. In 1890 a suit was filed on behalf of Venugopal

impeaching the settlement and reiterating the claim that the estate was partible. The suit was filed shortly before Venugopal came of age. On his

attaining majority he withdrew the suit and recognised the validity of the deed of the 8th April, 1889. The settlement therefore became final so far

as the brothers were concerned.

4. Venugopal never married, but by one Saraswathamma he had two sons, the respondents. Saraswathamma was of the Baliya community, also a

sub-division of the Sudra caste. Under Hindu law the illegitimate son of a Sudra by a dasi, that is, a Hindu concubine in his continuous and

exclusive keeping, is entitled not only to maintenance but to a share in the estate of his father, the share being half that of a legitimate son. It is

conceded that Saraswathamma's status was that of a dasi. The first respondent was born on the 24th September, 1907. There is no evidence

when the second respondent was born, but he is the younger of the two. On the 28th August, 1916, Venugopal executed a will under which he left

Rs. 5,000 to a nephew, Rs. 5,000 to a niece, Rs. 5,000 to Saraswathamma for the construction of a house, Rs. 5,000 to one servant, five sums of

Rs. 200 each to other servants, a garden in Venkatagiri to two nephews, and the remainder of his estate to the respondents. Venugopal died on

the 20th June, 1920, and probate of his will was obtained. The record of the probate proceedings shows that the net estate was sworn at Rs.

10,04,518-14-5. Charges of maladministration against one of the executors were made subsequently and it would appear that a large portion of

the property which Venugopal left was lost. The suit out of which this appeal arises was instituted on the 4th July, 1932, just over twelve years

after the death of Venugopal, but it was within time as the period of limitation expired during the Court vacation and the suit was filed on the

reopening day. The reason given for the delay in filing the suit was that the respondents were not aware of their rights until 1930.

5. Two grounds have been urged in support of the appeal. In the first place it is said that the Subordinate Judge erred in holding that the

respondents are entitled to maintenance under the deed. In the second place it is said that even if the deed can be read as conferring a right to

maintenance on the illegitimate sons of Venugopal it is bad because it offends against the first rule laid down in Tagore's Case (1872) 9 B. L.R.

377, in that by limiting the right to maintenance to male descendants it creates an estate unknown to Hindu Law. The respondents, in addition to

denying the validity of the appellant's contentions, say that the trial Court erred in holding that they are not entitled to maintenance by reason of

custom, and maintain their plea that they have a right to maintenance under Hindu Law irrespective of custom. The appeal therefore raises all the

questions raised in the trial Court except that relating to the status of the respondents.

6. The provisions with regard to maintenance are contained in Clause 5 of the deed of settlement. Owing to criticism of the translations of the

document which appear in the printed record the Court had this clause re-translated. The new translation has been accepted by both parties as

being correct and in view of the importance of the clause I will set it out in full:

As the said Venkatagiri Estate is impartible and as the aforesaid Sri Muttukrishna Yachendrulu Varu, Sri Venkatakrishna Yachendrulu Varu, and

Sri Venugopala Krishna Yachendrulu Varu and their purusha santhathi (male issue, progeny or descendants) are entitled to get allowances from the

said Estate, we the aforesaid the Honourable Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E.,

Rajah of Venkatagiri, Sri Muttukrishna Yachendrulu, Sri Venkatakrishna Yachendrulu and on behalf of Sri Venugopala Krishna Yachendrulu, his

father and guardian Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., appointed the Rajah of Bobbili, namely, Sri Rajah Rao

Venkata Swetachalapati Ranga Rao Bahadur Varu, as mediator, to determine the amount of allowance to be given to the said Sri Muttukrishna

Yachendrulu, Sri Venkatakrishna Yachendrulu and Sri Venugopala Krishna Yachendrulu and to their purusha santhathi. The abovenamed

mediator fully taking into consideration the status of all the parties, the condition and respectability of the Estate and all other matters which are fit

to be considered, decided that the said Honourable Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar,

K.C.I.E., Rajah of Venkatagiri, should pay allowances in the manner fixed herein below:

In pursuance of that decision, the said Honourable Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar,

K.C.I.E., Rajah of Venkatagiri, and those that succeed to the rule after him, undertake and accept by means of these documents to pay

allowances every month from the income of that estate, from the 6th April, 1889, in the manner stated below:

Sri Muttukrishna Yachendrulu shall be paid at the rate of Rupees one thousand (Rs. 1,000) per month for the rest of his life; Sri Venkatakrishna

Yachendrulu at the rate of Rupees One thousand (Rs. 1,000) per month for the rest of his life ; and the minor Sri Venugopala Krishna

Yachendrulu, until his minority ceases, by his father and guardian, Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I. ,and, after his

minority ceases, the said Venugopala Krishna Yachendrulu (himself) Rupees One thousand (Rs. 1,000) per month, for the rest of his life ; the said

Hon"ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, and the Rajahs

that rule in Venkatagiri after him, shall, after the lifetime of the said Sri Muttukrishna Yachendrulu, pay his purusha santhathi (male issue, progeny,

or descendants) in perpetuity in the manner aforesaid the same allowance, that is, at the rate of Rupees One thousand (Rs. 1,000) per month, After

the life of the said Sri Venkatakrishna Yachendrulu, his purusha santhathi shall, in perpetuity, be paid the same allowance amount, that is at the rate

of Rupees One thousand (Rs.1,000) per month in the aforesaid manner. After the life of the said Sri Venugopala Krishna Yachendrulu, his purusha

santhathi shall, in perpetuity, be paid the same allowance amount, that is, at the rate of Rupees One thousand (Rs. 1,000) per month, in the

aforesaid manner. But, if, at any time, in any one of the branches of the said Sri Muttukrishna Yachendrulu, Sri Venkatakrishna Yachendrulu and

Sri Venugopala Krishna Yachendrulu, there be more than one male member, such males, and their purusha santhathi shall take the said allowance

amount of Rupees One thousand in proportion to their respective shares, in the same manner as they would respectively take their other properties

separately by way of inheritance according to the Hindu Law. Moreover, if in any of the aforesaid three branches of our family, vis., the branch of

Sri Muttukrishna Yachendrulu, the branch of Venkatakrishna Yachendrulu, and the branch of the minor Sri Venugopala Krishna Yachendrulu, any

male should die without purusha santhathi, either byway of aurasa or by way of adoption, the allowance amount that was being received by the

person who so died without purusha santhathi shall go to the gnatis (agnates) who are nearest to him in his own branch according to Hindu Law.

Should the aforesaid person who dies without purusha santhathi, leave any widow or widows and maintenance have to be paid to them, only the

nearest gnatis who get the allowance of such deceased person in the manner mentioned above, shall be liable therefor. Further, should any of the

said three branches of our family become extinct by the total absence of purusha santhathi either by way of aurasa or by way of adoption, the

allowance being paid to that branch shall be stopped subject to the condition that, if there be then a widow or widows left of the last male who

died in that branch, one-half of the allowance of Rupees One thousand (Rs. 1,000) that was being paid to that male, viz., Rupees Five hundred

(Rs. 500) shall be paid to the widow or widows of the person who so died without purusha santhathi as maintenance for life. But should there be

female santhathi, in that branch, it shall not be paid to such female santhathi, nor shall it be paid to the purusha santhathi of the other two branches

or to either of the branches, or in any other manner. As all the matters regarding the expenses incurred from out of the income of the said

Venkatagiri estate for Sri Rajah Velugoti Kumara Yachama Naidu Bahadur, C.S.I., one of the parties to this document and the father of the other

parties have been settled by the registered Kararnamas entered into mutually on the 17th and 19th of March, 1888, between our father Sri Rajah

Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., and the Hon"ble Rajah Velugoti Sri Raja Gopala Krishna Yachendra Bahadur, Panchahazar,

Mansabdar, K.C.I.E., Rajah of Venkatagiri, those matters relating to the said Rajah Sri Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., are

not referred to in this document. But, as the share and allowance of the minor Sri Venugopala Krishna Yachendralu, have been settled under this

document, the Hon"ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri,

need not pay for the expenses of Sri Venugopala Krishna Yachendrulu mentioned in the Kararnamas aforesaid dated the 17th and 19th March.

1888.

7. The Subordinate Judge was of the opinion that the parties did not contemplate the exclusion of illegitimate offspring and as the words purusha

santhathi were wide enough to cover illegitimate issue he considered that the deed should be so construed. I agree with the Subordinate Judge that

the intention of the signatories to the document must be gathered from the document itself read in the light of the surrounding circumstances, but I

am unable to accept his conclusion.

8. Now what were the surrounding circumstances? The family was an ancient one and of important standing in the Madras Presidency. Its adult

members had all agreed that its estate was impartible and that this should be recognised in a formal deed in which provision should be made for the

maintenance of the younger sons and their descendants. While it is true that under Hindu Law, especially where Sudras are concerned, an

illegitimate son is in a very different position to that occupied by an illegitimate son under English law, it cannot be said that illegitimacy is regarded

with favour in a respectable Hindu family and this much was conceded on behalf of the respondents. In *Subramania Chetti Vs. Mahalakshmi*

*Ammal and Others*, , Krishnan Pandalai, J., stated that the respect for marriage and the social position of legitimate children is no less among Hindu

Sudras than among Brahmins and Englishmen. In this case the Court had to consider a deed of settlement in which the settlor had used the word

santhathi. As he was sitting alone the learned Judge did not decide whether it would cover illegitimate issue of a Sudra but observed that as a mere

question of construction he would hesitate to say that a share of the inheritance being awarded to illegitimate children of Sudras in certain cases

was necessarily conclusive of the meaning of a Sudra donor of property as to what he meant when he talked of his santhathi. In the circumstances

surrounding the execution of the deed in the present case it is not likely that the members of the family who subscribed their names to the document

had any intention of making provision for illegitimate descendants and in my opinion an examination of the document shows a clear intention to

exclude them.

9. As is indicated in the accepted translation of clause 5 of the deed the words purusha santhathi mean ""male issue, progeny or descendants

(purusha male, Santhathi issue, progeny or descendants) and therefore used in their widest sense the words would cover illegitimate descendants.

But it is inconceivable that they should be used in this sense in the first operative clause of the document. This part relates to the succession to the

gaddi and reads as follows:

As this Venkatagiri estate is impartible and should descend along the eldest line of descent, the said estate, the immovable properties connected

therewith and the other immovable properties acquired with the income of the said estate should be enjoyed by the eldest of us, four brothers, and

the heir of the aforesaid Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur C.S.I., namely, the aforesaid the Hon"ble Rajah Velugoti Sri

Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri and after him by his son, son"s son and other

male descendants (purusha santhathi) in the eldest line of descent, that if there be no aurasa or adopted sons in the branch of the said Hon"ble

Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C I.E., Rajah of Venkatagiri, and if that branch should

become extinct without male issue, such near heir in the eldest line as would, according to law and custom, get the family impartible properties and

his descendants should enjoy the same and that as regards all these, namely, the said estate, all the properties connected therewith, rights, powers

and privileges, the Rulers for the time being shall, according to law and custom, completely possess all the privileges and enjoy them, subject only

to the condition of paying allowances to the other members of our family, suitably to their respective status out of the income from the Estate and the properties.

10. Not only is it inconceivable that the members of this ancient family should contemplate an illegitimate son ascending the gaddi but it will be

observed that the direction with regard to the succession in the event of Rajagopala Krishna's branch becoming extinct follows the use of the

words ""if there be no aurasa or adopted sons"". That an illegitimate son can never be aurasa is accepted.

11. Where a word is used in a document in one sense the same meaning must be given to it where it appears elsewhere in the document unless it is

evident from the context that a different meaning should be put upon it. The learned advocate for the respondents had very little to say with regard

to the meaning to be attached to the words purusha santhathi as used in that part of the document which I have just quoted, but urged that the

expression should be given its widest meaning where it appears in Clause 5. There is nothing in the context which warrants the assumption that the

words are used in Clause 5 in a different sense from the sense in which they are used in the first operative clause. On the contrary there is again

clear indication that the intention was to limit the maintenance allowance to legitimate descendants. The fifth clause provides that where a male

member of any of the three branches should die without purusha santhathi, ""either by way of aurasa or by way of adoption"", his allowance should

go to the agnates who are nearest to him in his own branch. The clause further provides that in the event of any branch becoming extinct by the

total absence of purusha santhathi ""either by way of aurasa or adoption,"" the allowance to that branch shall cease altogether, subject to the widow

of the last male member of the branch being entitled to receive half the amount for her lifetime. The express reference to aurasa issue or sons by

adoption leaves no doubt in my mind that the parties only contemplated the right of maintenance being conferred upon legitimate descendants and

that they used the words purusha santhathi in this sense. Accordingly I hold that the respondents are not entitled to maintenance out of the income

of the Venkatagiri estate by reason of the deed of the 8th April, 1889.

12. My learned brother shares the opinion which I have expressed with regard to the effect of the deed and therefore it is not necessary to discuss

the question whether the document is invalid because it creates an estate unknown to Hindu Law. Therefore I will pass on to consider whether the

respondents are entitled to maintenance by reason of custom or the provisions of Hindu Law, and if they are, the amount to be paid to them. The

claim based on custom does not call for much discussion as we concur in the finding of the Subordinate Judge on this question and accept his

reasons. The evidence adduced by the respondents is not sufficient to prove either a family or territorial custom and there is evidence in

contradiction. It would appear that some zamindaries, mostly Oriya, have made provision for the maintenance of illegitimate children of members of

their families, but even if the evidence could be regarded as being sufficient to prove a custom in Oriya zamindaries (these are now for the most

part included in the Province of Orissa) it does not follow that such a custom exists in the Velama Zamindaries, which, as the Subordinate Judge

has pointed out, are numerous in the Kistna, Godavari, Vizagapatam, Nellore and Chittoor districts of the Madras Presidency. In (1876) L.R. 3

I.A. 259 (Privy Council) , Sir Barnes Peacock in delivering the judgment of the Judicial Committee observed that a custom is a rule which in a

particular family or in a particular district has from long usage obtained the force of law. It must be ancient, certain and reasonable and being in

derogation of the general rules of law must be construed strictly. A custom in a Hindu family to grant maintenance to illegitimate sons could not be

regarded as being unreasonable. In fact the custom would only be following Hindu Law. But custom can only be relied on where it is ancient and

certain and the evidence here falls very short of proving this. I have no hesitation in concurring in the finding of the learned Subordinate Judge that a

custom has not been proved in the present case.

13. The question whether an illegitimate son is entitled under the Hindu law to maintenance out of an impartible estate is one of considerable

difficulty as the authorities are not in agreement. The question of the right to maintenance of an illegitimate son of a member of a family owning a

partible estate has in the main been settled by the decision of the Privy Council in *Vellaiyappa Chetty v. Natarajan* (1931) 61 M.L.J. 522 : L.R. 58

IndAp 402 : ILR 55 Mad. 1 . In that case a suit was instituted for past and future maintenance by the illegitimate sons and an illegitimate daughter

of one P.M.A. Muthia Chetty, a Sudra by caste, by a continuous concubine. The father who was joint with his uncles and uncles' sons died leaving

no separate estate, but the joint family possessed considerable properties. The Privy Council held that the illegitimate son of a Sudra by a

continuous concubine has the status of a son and in such circumstances he is entitled as a member of the family to maintenance out of joint property

in the hands of the collaterals. In delivering the judgment of the Privy Council, Sir Dinshah Mulla observed:

On a consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous

concubine has the status of a son, and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of

maintenance, but in recognition of his status as a son ;that where the father has left no separate property and no legitimate son, but was joint with

his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is

entitled as a member of the family to maintenance out of that property ; that his position in this respect is analogous to that of widows and

disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition, and the Court

may, as in their case, award not only future but also past maintenance so far as it is not barred by the law of limitation and may direct the same to

be secured by a charge on the joint family property.

14. The right to maintenance of an illegitimate son of a Sudra was here recognised on the ground that he was a member of the joint family. Their

Lordships, however, expressed no opinion on the question whether an illegitimate son would have a right to maintenance out of joint family property

if the father left separate property or if such property was not sufficient for his maintenance.

15. Until 1888 it was accepted that the Mitakshara did not permit the holder of an ancestral impartible estate to alienate it without regard to the

interests of the joint family, but in that year in the case of *Rani Sartaj Kuari v. Rani Deoraj Kuarri* (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 the

Privy Council held that there was a right of alienation under the Mitakshara where there was a custom of primogeniture. It was said that the eldest

son did not become a co-sharer with his father in the estate. In *Sri Raja Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur v. Court of*

*Wards and Venkata Kumari Mahipathi Surya Rao* (1899) 9 M.L.J. 1 : L.R. 26 IndAp 83 : ILR 22 Mad. 383 , which is known as the first Pittapur

case, and in *Protap Chandra Deo v. Jagadish Chandra Deo* (1927) 53 M.L.J. 30 : L.R. 54 IndAp 289 : ILR 54 Cal. 955 the Privy Council held

that the holder of an impartible Zemindari had the right to alienate it by will in the absence of a custom to the contrary. The first Pittapur case

(1888) L.R. 15 IndAp 51 : ILR 10 All. 272 resulted in the passing of an Act called the Madras Impartible Estates Act, 1902, to restrict the

powers of alienation. This Act was replaced by the Madras Impartible Estates Act, 1904, which declares certain estates in this Presidency to be

impartible - the Venkatagiri estate is one of them - and provides that the proprietor of an impartible estate shall be incapable of alienating it or

binding it by his debts beyond his own lifetime, 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 the grandfather of the other coparceners, to make an alienation of the joint

property or incur a debt binding on the shares of the other coparceners independently of their consent. The Act also declares what are permissible

alienations. It is not necessary to consider the provisions of the Act in this respect. All that need be said is that the decisions in Sartaj Kuari's case

and the first Pittapur cases are no longer effective in this Province so far as the estates mentioned in the Act are concerned. By the Madras

Impartible Estates Second Amendment Act, 1934, Sections 9 to 15 were added to the Act of 1904. Section 9 mentions the persons who are

entitled to maintenance out of an impartible estate governed by the Act. The respondents do not come within the section, but Section 12 declares

that nothing contained in the Act shall affect the right to maintenance out of an impartible estate and the income thereof, of any other relations of the

proprietor or any previous proprietor under any law or custom for the time being in force. Therefore the Act leaves untouched any rights which the

respondents may have under Hindu law. In fact no contention to the contrary has been raised.

16. In *Rama Rao v. Rajah of Pittapur* (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 which is known as the second Pittapur

case, the Judicial Committee considered the right to maintenance out of an impartible estate. The plaintiff had been adopted by the previous holder

of the Pittapur zamindari. The late Rajah died leaving a will under which he bequeathed the estate to the defendant who claimed to be his aurasa

son. The plaintiff did not admit that the respondent was the son of the late Rajah and averred that the estate had been the joint property of himself,

his father and the late Rajah. On this basis he claimed to be maintained out of the estate. His claim was, however, disallowed. Lord Dunedin who

delivered the judgment of their Lordships observed that the right to maintenance out of an impartible estate, so far as founded on or inseparable

from the right of coparcenary began where coparcenary began and ceased where coparcenary ceased. An impartible zamindari was the creature

of custom, and it was of its essence that no coparcenary existed. This being so, the basis of the claim was gone, inasmuch as it was founded on the

consideration that the plaintiff was a person who, if the zamindari were not impartible, would be entitled as of right to maintenance. This proposition

did not negative the doctrine that there were members of the family entitled to maintenance in the case of an impartible zamindari. Just as

impartibility was the creature of custom, so custom might and did affirm a right to maintenance in certain members of the family. The Board

considered that the right of sons to maintenance in an impartible zamindari had been so often recognised that it would not be necessary to prove

the custom in each case and expressly approved of the following passage from the judgment of the Calcutta High Court in Nilmony Singh Deo v.

Hingoo Lall Singh Deo I.L.R.(1879) 5 Cal. 256

We can find no invariable or certain custom that any below the first generation from the last Rajah can claim maintenance as of right.

17. It was not necessary, however, for the purpose of deciding the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41

Mad. 778 to decide whether the right to maintenance of junior members of the family depended upon custom or to what extent custom had been

proved and this was recognised in the next case to which I shall refer.

18. In Baijnath Prashad Singh v. Tej Bali Singh (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 All. 228 which was decided three years after

the second Pittapur cases the Judicial Committee had to consider the question of succession to an ancestral impartible estate in a joint Hindu family

governed by the Mitakshara and it was held that succession followed the ordinary rule, the eldest member of the senior branch succeeding in

preference to the direct lineal descendants of the common ancestor if the latter were more remote in degree. The judgment was delivered by Lord

Dunedin and to use the language of Lord Blanesburgh in the Collector of Gorakhpur v. Ram Sundar Mal (1934) 67 M.L.J. 274 : L.R. 61 IndAp

286 : ILR 56 All. 468 it definitely negated the view that the decision in Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 and the

first Pittapur case (1899) 9 M.L.J. 1 : L.R. 26 IndAp 83 : ILR 22 Mad. 383 were destructive of the doctrine that an impartible estate could be in

any sense joint family property, a view apparently implied in these cases. It was recognised that an impartible zamindari could be the ancestral

property of the joint family, but the person ""to occupy the Gaddi"" was the eldest of the senior branch. In the course of his judgment Lord Dunedin

referred to the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778

Turning next to Rama Rao v. Rajah of Pittapur (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 it must be always remembered that

the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a member, but against the donee,

who on the claimant's own allegation was a stranger to the family. It obviously could not, therefore, succeed unless it was of the nature of a real

right. Now, it could only be of the nature of a real right, no proceedings having taken place before the estate got into the hands of the donee, if the

maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations which go to

the question of maintenance apart from the question of real right may be treated as obiter dicta.

19. There is here a statement by Lord Dunedin himself that his observations in the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp

148 : ILR 41 Mad. 778 which go to the question of maintenance ""apart from the question of real right"" might be treated as obiter dicta. Lord

Dunedin in the course of his judgment referred to the right of junior members of a joint family ruled by the Mitakshara law down to three

generations from the head of the family to maintenance until partition takes place. He also referred to those persons who by reason of personal

disqualification are not allowed to inherit but are given maintenance in lieu - the idiot, the blind from birth, and the mad man - and to the class which

is entitled to maintenance on the ground of personal relationship, namely, the widow, the parent and the infant child. It would appear that in using

the words ""apart from the question of real right"" Lord Dunedin had in mind such rights as these. The judgment clearly recognised that an impartible

zamindari could be regarded as the ancestral property of the joint family and therefore negated the statement in the second Pittapur case (1918)

35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 , that it was of the essence of an impartible zamindari that no coparcenary existed.

20. The question of the right to maintenance out of an impartible estate was raised in Pratap Chandra Deo v. Jagadish Chandra Deo (1927) 53

M.L.J. 30 : L.R. 54 IndAp 289 : ILR 54 Cal. 955 . In this case the respondent brought a suit against the appellant claiming an estate known as the

Dalbhum Raj and mesne profits, the claim being made under the will of the last holder. The family was undivided and governed by the Mitakshara.

The estate was impartible and there was a custom of lineal primogeniture. The trial Court and the Calcutta High Court on appeal declared the

respondent's title under the will, but held that the appellant who was a member of a junior branch of the family was entitled to maintenance out of

the estate at the rate of Rs. 1,200 per mensem. Both parties appealed to the Privy Council which dismissed the appeal by the appellant, but

allowed the respondent's appeal on two grounds, first on the ground that the maintenance of the appellant and his family was already provided for

by a Khorposh (maintenance) grant of certain villages to his predecessors, which villages were still in his possession; and secondly on the ground

that he had failed to establish a right to maintenance by custom or relationship or in any other way. The second ground was based on the remarks

of Lord Dunedin in the second Pittapur case, without reference to what was said in Baijnath Prashad Singh's case. The question was also

referred to in Shiba Prasad Singh v. Prayag Kumari Debi (1932) 63 M.L.J. 196 : L.R. 59 IndAp 331 : ILR 59 Cal. 1399 , where Sir Dinshah

Mulla in delivering the judgment of the Board said that in the case of ordinary joint family property the members of the family had : (1) the right of

partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of

survivorship. The first of these rights could not exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The

second was incompatible with the custom of impartibility, as laid down in Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 (P.C.),

and the first Pittapur case; and ""so also the third, as held in the second Pittapur case"". To this extent the general law of the Mitakshara had been

superseded, and the impartible estate, though ancestral, was clothed with the incidents of self-acquired and separate property, but the right of

survivorship was not inconsistent with the custom of impartibility, and still remained. Here again the second Pittapur case was followed without

discussion.

21. If the question whether the respondents are entitled to maintenance under Hindu law is to be governed by the judgments in the second Pittapur

case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 , Protap Chandra Deo v. Jagadish Chandra Deo (1927) 53 M.L.J. 30 : L.R.

54 IndAp 289 : ILR 54 Cal. 955 and Shiba Prasad Singh v. Prayag Kumari Debi (1932) 63 M.L.J. 196 : L.R. 59 IndAp 331 : ILR 59 Cal. 1399

, the answer must be adverse to them, but it is said that in its judgment in Collector of Gorakhpur v. Ram Sundar Mal (1934) 67 M.L.J. 274 : L.R.

61 IndAp 286 : ILR 56 All. 468 , the Privy Council has re-stated the law with regard to maintenance and that the earlier cases which I have just

mentioned are no longer binding on the Court in this connection. This statement appears to be well founded. In Collector of Gorakhpur v. Ram

Sundar Mal (1934) 67 M.L.J. 274 : L.R. 61 IndAp 286 : ILR 56 All. 468 , Lord Blanesburgh, after stating that the judgment of Lord Dunedin in

Baijnath Prasad Singh's case (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 All. 228 (P.C.), had definitely negated the view that the

decisions of the Board in Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 and the first Pittapur case (1899) 9 M.L.J. 1 : L.R. 26

IndAp 83 : ILR 22 Mad. 383 were destructive of the doctrine that an impartible zamindari could be in any sense family property, went on to

observe (page 302):

One result is at length clearly shown to be that there is no reason why the earlier judgments of the Board should not be followed, such as, for

instance, the Chellapalli case (1900) 10 M.L.J. 294 : L.R. 27 I.A. 151 : ILR 24 Mad. 147 , which regarded their right to maintenance, however

limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, with the result that these members

holding zamindari lands for maintenance could still be considered as joint in estate with the zamindar in possession.

22. Later in the judgment (page 303) Lord Blanesburgh said:

The recent decisions of the Board constitute a further land mark in the judicial exposition of the question at issue here. While the power of the

holder of an impartible raj to dispose of the same by deed Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 or by will the first

Pittapur case (1899) 9 M.L.J. Supp. 1 : L.R. 26 IndAp 83 : ILR 22 Mad. 383 , Protap Chandra Deo v. Jagadish Chandra Deo (1927) 53 M.L.J.

30 : L.R. 54 IndAp 289 : ILR 54 Cal. 955 remains definitely established, the right of the junior branch to succeed by survivorship to the raj on the

extinction of the senior branch has also been definitely and emphatically reaffirmed. Nor must this right be whittled away. It cannot be regarded as

merely visionary. As pointed out in Baijnath Prasad Singh's case I.L.R.(1916) 38 All. 590, when before the Allahabad High Court the junior

members of a great zamindari enjoy a high degree of consideration being known as babus, the different branches holding babuana grants out of the

zamindari. Their enjoyment of these grants is attributable to their membership of the joint family, and until the decisions above referred to beginning

in 1888 supervened, they had no reason to believe that their right of succession were being imperilled by their estrangement from the zamindar in

possession. Great caution must therefore be exercised in attributing any special consequences to conduct only significant in the light of these

decisions now explained.

23. I read Lord Blanesburgh's judgment in this way. It recognises that the power of the holder of an impartible estate to dispose of it by deed or

will has been definitely established, but at the same time it recognises that an impartible estate can be regarded as joint family property, giving the

members of the family a right to maintenance and a right in the junior branch to succeed by survivorship to the estate on the extinction of the senior

branch and it leaves the way open to the Court to follow the decisions of the Board earlier than the second Pittapur case (1918) 35 M.L.J. 392 :

L.R. 45 I.A 148. : ILR 41 Mad. 778 on questions relating to maintenance.

24. The reference by Lord Blanesburgh to the Chellapalli case (1900) 10 M.L.J. 294 : L.R. 27 IndAp 151 : ILR 24 Mad. 147 , is particularly

significant. This was a consolidated appeal arising out of two separate suits for maintenance filed in the District Court of Kistna against the

zamindar of Chellapalli by his two younger brothers respectively. The District Judge held that they were entitled to maintenance and to recover

arrears for a period of 12 years. This Court on appeal agreed with the District Judge except as regards the arrears of maintenance. It held that the

arrears were not claimable, except a certain, sum received by the plaintiffs under a previous order of the Court and reduced the amount of arrears

from Rs. 56,000 to Rs. 23,000. In delivering the judgment of the Judicial Committee Sir Henry De Villiers said:

Their Lordships fully agree with the High Court that the family of the parties to the present action has not become a divided one in consequence of

the proceedings in the previous suit to which reference has already been made. It is true that in that suit a decree was made for the partition of a

portion of the family property, but it was a very inconsiderable portion, and had no relation whatsoever to the zamindari estate. As to the zamindari

estate, this Board held that it was impartible, and the consequence is that the plaintiffs, as the younger brothers of the zamindar retain such right and

interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir. See Sartaj Kuari

v. Deoraj Kuari L.R. 15 IndAp 51 : ILR 10 All. 272 , In regard to the amount of maintenance, the Judges of the High Court very properly refused

to disturb the finding of the District Judge whose experience in the district they fully recognize.

25. The reference to maintenance to be found at page 62 of the report of Sartaj Kuari's case in 15 Indian Appeals consists of a quotation from the

judgment in (1878) L.R. 5 I.A. 61 (Privy Council) , where mention is made of younger brothers ""taking such right and interests in respect of

maintenance and possible rights of succession as belong to the junior members of a raj or other impartible estate descendible to a single heir."" The

Board held that the plaintiffs had a right to maintenance and restored the finding of the District Judge that they were entitled to payment of the

amount of arrears for twelve years. There is no reference to custom in the judgment and the decision can only be regarded as being based on the

principles of Hindu Law.

26. The judgment in the Collector of Gorakhpur v. Ram Sundar Mal (1934) 67 M.L.J. 274 : L.R. 61 IndAp 286 : ILR 56 All. 468 , is definite in

regarding the right to maintenance of junior members of the family as being based upon joint ownership of the estate. But what significance is to be

attached to the words ""however limited"" which Lord Blanesburgh used in conjunction with the right to maintenance? Where the Hindu Law gives a

right to maintenance the right can only be affected by custom and I do not regard these words as recognising any limitation in principle, but only a

possible limitation in a particular case.

27. Impartibility arises out of custom, but with the greatest respect to what has been said to the contrary I do not regard a custom of impartibility

as in itself destroying the right of the junior members of the family to maintenance out of the family estate while it remains in the family. The fact that

a family from generation to generation has agreed that the ancestral estate shall be held according to the law of primogeniture and thereby has

allowed a custom of impartibility to arise does not in itself imply the abandonment by the junior members of their right to maintenance out of the

estate. There is a vast difference in the giving up of a right to partition from the giving up of a right to maintenance. Impartibility may lead to

enhancement of the prestige of the family and the preservation of the ancestral estate, but loyalty to the family does not demand the giving up of a

right to maintenance. To deprive junior members of a joint Hindu family whether partible or impartible of the right to maintenance there must, it

seems to me, be a custom to that effect. Of course if the estate lawfully passes into the hands of strangers the right to maintenance out of the estate

will necessarily cease.

28. There is here no custom depriving junior members of the Venkatagiri family of the right to maintenance and it cannot be denied that the

respondents are members of the family. The decision in *Vellaiyappa Chetty v. Natarajan* (1931) 61 M.L.J. 522 : L.R. 58 IndAp 402 : ILR 55

Mad. 1 definitely establishes this. In these circumstances I consider that the respondents are entitled under Hindu Law to maintenance out of the

estate, if provision has not already been made for them. Has provision then been made for them? In my opinion it has not. It is true that under the

deed of the 8th April, 1889, their father received large sums of money, but these were not paid to him for his maintenance or the maintenance of

his family, nor has it been so suggested. Provision was made for maintenance in another part of the document but the provision was limited to him

and his legitimate descendants.

29. It is next to be considered whether the fact that their father left a large estate makes any difference to the respondents' claim. In deciding

Vellaiyappa Chetty v. Natarajan (1931) 61 M.L.J. 522 : L.R. 58 IndAp 402 : ILR 55 Mad. 1, the Judicial Committee left this question open and

no Indian authority has been quoted to us on the subject. The question must then be decided on principle. If a person is entitled in law to be

maintained out of an ancestral estate the possession of private property cannot destroy his right. The fact that he has private means may have

bearing on the amount to be paid out of the estate, especially if the estate is a poor one, but that is all. The parties to the deed of the 8th April,

1889, in fact recognized this as in addition to the large sums which the younger brothers received under the deed separate provision was made in it

for their maintenance. Accordingly I hold that the fact that their father left them a large fortune does not deprive the respondents of their right to

maintenance out of the Venkatagiri Estate.

30. It remains to be considered what allowance should be granted to the respondents and whether they are entitled to be paid arrears. The

Subordinate Judge considered that if maintenance were payable to the respondents under Hindu Law a fitting allowance would be Rs. 250 a

month each, being half the amount they would have received had they been legitimate. The decisions of this Court in Ananthayya v. Vishnu I.L.R.

(1893) 17 Mad. 160 and Rathinasabapathi Odayar v. Gopala Odayar (1928) 56 M.L.J. 673 to which the Subordinate Judge has referred in my

opinion correctly state the basis for the assessment of the amount. It is not a matter of granting a compassionate allowance. The amount must be

fixed with regard to the position of the family. An illegitimate son will not in the ordinary course occupy so prominent a position as a legitimate son

and the rule that an illegitimate son of a Sudra is only entitled to half of what a legitimate son is entitled to in his father's estate may be taken as a

guide in fixing the amount of his allowance for maintenance. I see no reason why the conclusion of the Subordinate Judge should not be accepted

and therefore I concur in his finding that a reasonable allowance is Rs. 250 per mensem for each of the respondents.

31. I also agree with the Subordinate Judge that the respondents are entitled to an allowance for maintenance from the date of their father's death.

That date is within the period of limitation and the fact that they were ignorant of their rights - it has not been suggested that their explanation of the

delay in the filing of the suit should not be accepted - is not sufficient reason for depriving them of what has accrued. In the Chellapalli case (1900)

10 M.L.J. 294 : L.R. 27 IndAp 151 : ILR 24 Mad. 147 , it was observed that if the defendant had been misled into the belief that the claim for

maintenance had been abandoned and had in consequence not set aside any portion of his annual income to meet the claim he might have had a

good defence to the action, but without some such ground of defence it was impossible to hold that the younger brothers had forfeited an

undoubted right merely because they had in the first instance been advised to file a wrong suit and had not claimed maintenance as it fell due. In the

present case the appellant does not say that he has been misled by the delay and the defence has been confined to denying the right of the

respondents to claim maintenance.

32. It follows that in my opinion the decree of the trial Court should be varied by the reduction of the aggregate monthly allowance from Rs. 1,000

per mensem to Rs. 500 per mensem and that the arrears should be calculated at the rate of Rs. 500 and not Rs. 1,000 per mensem. It is conceded

that if the respondents are entitled to a decree they are entitled to have the amounts payable to them charged upon the estate, and an order to this

effect will be embodied in the decree.

33. I consider that the respondents are entitled to costs in the lower Court and in this Court based on the amount awarded to them under the

decree of this Court, they having succeeded on the Hindu Law issue. The appellant has succeeded on the issue with regard to the deed and the

appeal has resulted in a substantial reduction of the amount payable. In these circumstances I hold that he is entitled to costs in this Court based on

the difference in the amount payable under the decree of the trial Court and the amount payable under the decree of this Court.

Krishnaswami Aiyangar, J.

34. I concur in the judgment just now pronounced by my Lord the Chief Justice, which I have had the advantage of reading before hand. In view

however of the importance of the questions raised, I would, with respect, add a separate judgment of my own, embodying my reasons for agreeing

with the conclusions arrived at by my Lord. Of the points raised in the appeal, two alone appear to my mind to be the most material, and to them

accordingly I shall confine my observations.

35. The first of them is the correct interpretation of the deed of settlement. The whole controversy on this point turns on the meaning of the

expression purusha santhathi, occurring in that part of the deed where provision is made for payment of a maintenance allowance to the

descendants of Sri Venugopal. The respondents are his Dasi putras, that is, illegitimate sons according to Hindu Law. The controversial sentence is

as follows:

After the life of the said Sri Venugopala Krishna Yachendrulu, his purusha santhathi, shall, in perpetuity, be paid the same allowance amount, that

is, at the rate of Rupees One Thousand (Rs, 1,000) per month in the above manner.

36. Purusha santhathi is a Sanskrit expression, but commonly used in its original sense in most of the vernaculars of the Presidency. It is a

compound of two words, purusha meaning male, and santhathi meaning issue, progeny or descendants. The expression may accordingly be

rendered into "male descendants" or "male issue". So far, both sides agree; but they vitally differ on the question whether the expression

comprehends legitimate issue only, or whether, as held by the learned Subordinate judge, it includes both legitimate and illegitimate issue. In spite of

the somewhat emphatic language in which the Subordinate Judge has expressed himself we have been obliged on a careful consideration of the

document in the light of the surrounding circumstances, to differ from him. It is complained, and I think rightly, that the learned Judge has paid

undue and unjustifiable attention to the heirship of illegitimate sons under Hindu Law, instead of regarding it as one only of the several

circumstances to be taken into account for ascertaining the intention. The true office of all construction is to discover the intention of the parties, as

expressed by the words used. Where those words are not sufficiently clear in themselves to fix the intention, the circumstances that surrounded the

transaction, may and ought to be resorted to, to see if what is not apparent in the document in itself, is made clear by a knowledge of those

circumstances. The law by which the parties are governed may afford a guidance, as with its aid, it may be possible to ascertain what the executant

was aiming at. But caution is necessary in its use, in order to avoid over emphasising what is after all but one of the several factors to be

considered. One may even say that by itself, it is not of much value. In fact its significance, where it is of value, lies in the light it sheds on the

motives and objects, the aims and purposes which prompted the execution of the document, or the choice of the objects of the executant's bounty.

As observed by the Privy Council in the case of (1874) L.R. 2 I.A. 7 (Privy Council) :

In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with

respect to the devolution of property.

37. A knowledge of the law is valuable because it may afford a knowledge of the notions and wishes and through them lead to a discovery of the

intention of the parties. In an early decision of the Board Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick (1857) 6 M.L.J. 526 : 4 W.R.

114, it was observed:

In determining that construction, what we must look to, is the intention of the testator. The Hindu Law, no less than the English Law, points to the

intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there

any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are

to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding

circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the

law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular

meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to

that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption.

38. That it is wrong to lay too much emphasis on the law as such is conveyed clearly enough in the language used by their Lordships in the

Balarampur case *Sher Bahadur Singh v. Ganga Bakhsh Singh* (1913) 26 M.L.J. 291 : L.R. 41 I.A. 1 : ILR 36 All. 101 , where again their

Lordships observe:

The matter for decision in this case being in the construction of a codicil to the Maharaja's will, the point is not what is the strict rule of the Hindu

religion, or the strict rule of the Chhatti caste," (and if I may with respect add, the strict rule of the Hindu Law either) "but this, namely, what were

the wishes and intentions of the testator as revealed by the language of that instrument, viewed through the light of surrounding circumstances.

39. It may happen that the executant in a particular case was anxious to perpetuate a rule of succession according to a particular system of law,

and where this is the case, the rules of that law may assume paramount importance. This is exactly what occurred in the case cited as the following

further observations make it clear

The testator must have had in mind some law or rule which would apply to fix the succession. What law could this high caste Hindu possibly have

had in mind for such a purpose other than the Hindu Law?

40. The italics are mine. The rule of Hindu Law which excludes illegitimate sons from heirship in the case of twice-born Hindus was held in this

case to determine the meaning of the word aulad (= issue) in a gift to an illegitimate son and his aulad. Their Lordships explain the reason for their

decision as follows:

It would be strange indeed if the man who had made it his special care to treat this son of his as a Hindu"" (he was in fact an illegitimate son by a

Mahomedan mistress) ""and had succeeded in marrying him to two high caste women, should intend or desire, whatever might be the strict letter of

the law to place the offspring of these unions on the same level as the illegitimate children of his son's Mahomedan mistress and make them all

equally the objects of his bounty.

41. From first to last, and all throughout, the quest is to be for the intention behind the language, whatever the aids resorted to. In fact, even in the

Balarampur case itself the testator was conducting himself in a way contrary to the injunctions of the Hindu Law in that he treated and wanted

others to treat, his illegitimate son by a Mahomedan mistress as if he were a legitimately born Hindu, and it was this conduct which primarily

disclosed his true intention.

42. Can it be said that the Hindu Law of illegitimate succession furnishes in this case a clue to the intention behind the use of the expression purusha

santhathi? Where Hindu Law and Hindu sentiment coincide, the law would of course be of help. Where they diverge however, it is the Hindu

sentiment that will rule even to exclusion of the law. The truth of the matter is that there can be little room for doubt that the ordinary notions of a

Hindu towards irregular unions and the issue of such unions are not different from those of any other community. There is no denying it that the

Hindu religion does not countenance extra-marital relations, and the Hindu Law itself looks down with disfavour on illegitimate children, assigning

to them only a subordinate rank among the Sudras, and denying heirship altogether among the superior castes. It is therefore to the sentiments

generally prevalent in the society to which the executant belongs, more than to the law that regard should be had in questions of this kind. Illicit

relations are, until callousness overtakes the parties, carried on on the sly and rarely if ever owned, much less paraded in the public eye. The higher

the social rank, the greater the care with which the veil is thrown over them. It is one thing to provide for the issue of a lapse that has occurred.

Duty and honour may dictate it. Love and affection, more especially if there be no legitimate children may even prompt it. But I refuse to believe

that a member of the Hindu community, nobleman or commoner, would contemplate with equanimity the possibility of future lapses either in himself

or in his descendants and sit down on a solemn occasion to enact a scheme of succession admitting future illegitimate issue to its benefit. Yet, this is

in effect the logical consequence of the view taken by the learned Subordinate Judge. He sums up the position in these words:

The position therefore to my mind seems incontrovertible that the term santhathi when it is used in a document to which Sudras are parties

intending to create thereby rights in favour of their santhathi, within that expression are comprehended both legitimate and illegitimate santhathi. In

other words purusha santhathi of Raja Venugopal would include his illegitimate sons, viz., the plaintiffs.

43. The vice of the argument lies in attributing to the members of this proud ancient family of hereditary noblemen, an intention out of keeping with

their lineage and social standing, and out of joint with the solemnity of what was in all probability the first occasion when they were recording a

family usage of impartibility at a family council at which all members of the family including the old and respected father Sri Kurnara Yachama were

present. I must positively decline to accept the proposition of the Subordinate Judge that so far as the generic term santhathi is concerned, which

means issue, children or descendants, it must be held when used by Sudras to include children both legitimate and illegitimate. It would be almost

grotesque to imagine that the executants of this settlement foresaw the likelihood of illegitimate issue being begotten not only by the adult brothers,

one of whom was yet unmarried but also by Raja Venugopal who was at the time a boy of but tender years. It is satisfactory however to note that

this suggestion was not advanced either in the Court below or here.

44. As I have said, the occasion was scarcely of a kind at which a question of illegitimate succession is likely to have been thought of or provided

for. It is perhaps worthwhile in this connection to mention a circumstance not wholly devoid of significance. Sri Kumara Yachama, it is said, had

illegitimate offspring, but the document is entirely silent about them. If a provision for their maintenance had been made, it must have been made

privately, and if not it must have been reserved for private settlement later. Delicate personal affairs of the kind would scarcely be dragged into

public view, or dealt with at a general settlement of family matters. It is also not without significance that marriage portions suitable to their

condition in life have been separately provided for in the settlement deed for the two brothers, Sri Rajah Venkata Krishna and Sri Rajah

Venugopal, who were yet young and unmarried, with a view to their entering into lawful wedlock in due time. If I may say so with respect, I fully

endorse the opinion expressed by Krishnan Pandalai, J., in Subramania Chetti Vs. Mahalakshmi Ammal and Others, , which I think furnishes the

basis for a correct approach to the question. I may add that the views expressed by that learned Judge are so much in accordance with prevailing

sentiment, that they merited better consideration at the hands of the learned Subordinate Judge than he has chosen to give them.

45. Even apart from these considerations, I agree with the learned Chief Justice that there is sufficient in the language of the document itself, to hold

that the words purusha santhathi which are by no means to be regarded as terms of technical legal import, were not intended to be used in a

comprehensive sense so as to include both legitimate and illegitimate children as held by the Subordinate Judge. The Subordinate Judge seems to

suggest that there is a distinction in the mode of construction between a will and a settlement. If I understand him aright, he seems to be of the

opinion that the deed has to be scrutinised not from the background of approach proper for a gift or a will, but rather on the footing that it

evidences a recognition by the eldest brother of pre-existing rights in the younger in consideration of the latter in their turn conceding the

impartibility of the estate; in other words, they are not to be regarded as mere volunteers but rather as persons possessing definite rights which the

eldest, brother was bound to respect. Assuming this to be right, I still fail, to understand how this aspect of the matter provides "a definite point

from which we have to start". It is unfortunate that the learned Judge has not been more explicit, and we are consequently obliged to labour more

or less in the dark as to the precise nature and effect of the distinction which he seems to have had in mind, and the manner in which that distinction

has influenced his judgment. For myself, I cannot see why the younger brothers should be regarded as having made a great concession, as it is

improbable to a degree, that they or any of them could have seriously believed in the partibility of the estate. In fact, as the deed itself shows, they

meekly acknowledged the impartibility of the estate receiving only a share in the cash and jewels, a sum of money for the purchase of a residential

house, an inconsiderable marriage provision and a moderate maintenance allowance. I am unable to see how the fact that it is a deed of settlement

and not a will or a gift advances the case of the respondents. I do not know, I can only suspect it, if the learned Judge by his reference to rights and

obligations in this context is laying a foundation for the view that the brothers were in a position to extract and did in fact extract from the Raja a

recognition of a heritable right in the allowance, similar in character and descendibility, to ordinary heritable property and capable therefore of

being taken by issue legitimate as well as illegitimate. If so, I am afraid he must have carried a second error into the construction of the document.

46. Now, coming to the words *purusha santhathi* themselves. The word *santhathi* would ordinarily denote legitimate progeny only. If a sufficient

expression of intention to the contrary is contained in the document, or is capable of being otherwise collected from it, the word will not by itself

exclude the possibility of illegitimate issue coming in, as there is nothing in its etymological sense against such an extension. In current language

however, when a person, be he *Sudra* or a twice born, uses the word he would rarely indeed intend it to denote illegitimate issue. The *prima facie*

meaning of *santhathi* as of "children" being legitimate children that meaning is the one to be attached to it in the spoken as well as in the written

word. Where however the word is used as a word of limitation, heirs in general would be indicated by it, and an illegitimate son where he happens

to be an heir will no doubt come in. In other words, law will bring in the illegitimate son as an heir, if a party is found to have left the law to regulate

the succession, and does not trouble to regulate it himself.

47. The decisions noticed by the learned Subordinate Judge in this context are of little value as in those cases the word has only been held to

include collaterals or heirs in general, though *santhathi* in its literal sense may refer to lineal descendants. No decision has been cited in support of

the contention that *santhathi* includes illegitimate descendants in the absence of something definite in the deed or in the surrounding circumstances

showing that it was the intention of the executant to use the term in that special sense. In other words the *prima facie* meaning cannot be made to

yield to and make way for another and a possible meaning in the absence of an overriding context or of surrounding circumstances of sufficient

strength. But that is not the case here. On the contrary it is the primary meaning that I think holds the field to the end. So much for the meaning of

the words without reference to the context.

48. A consideration of the language of certain of the clauses of the deed also leads to the same conclusion. In the first place, in no part of the

document is there anything against the natural prima facie meaning of the word. What there is, tends only to support it. In the operative portion of

Clause 2 of the deed, the words purusha santhathi are used to indicate the devolution of the estate after the eldest brother Sri Raja Rajagopala, his

son and son's son, and it is in the highest degree unlikely that any but legitimate issue would have been here envisaged or meant. As I have said it is

difficult to imagine that the members of this family would have contemplated the possibility of the failure of legitimate issue in all the four branches. If

in this clause purusha santhathi bears the meaning of legitimate issue, as I think it did, the same meaning should be attributed to the expression in

other parts of the deed as well. It would be wrong to give different meanings to the same expression in different parts of the same document, unless

the context demands it. It will be seen however that the contrary intention is plainly shown by two other clauses to be found later in the document.

49. In referring to the events on the happening of which, the estate is to devolve on the next senior line, it is worthy of note, that the devolution is

made conditional on the absence of the aurasa or the adopted son only, suggesting that the existence of an illegitimate son would not make a

difference; whereas if the respondents' argument is right, the collaterals cannot succeed to the estate if there is in existence an illegitimate son. The

learned Judge considers that the use of the word "members" in the clause "subject only to the condition of paying allowance to the other members

of our family suitably to their respective status" suggests the inclusion of illegitimate children. Illegitimate sons may be members of the family

according to the law, but there does not appear anything in the context to suggest that the word "members" was consciously used or could have

been used in the document so as to include illegitimate sons. Here again the learned Judge is obsessed with the membership of the illegitimate son

under the law, and has failed to address himself sufficiently to the question of what the intention of the parties is likely to have been. It is doubtful if

they were cognizant of the membership theory at all which does not appear to have been clearly grasped even by the Courts at the date of the

document. Neither party has suggested that the assistance of a trained lawyer was requisitioned for the preparation of the document and there is no

reason to think that the word "members" while it may include females, was intended to bring in illegitimate offspring. It is equally profitless to regard

the reference to the rules of Hindu Law in certain passages as lending support to the contention that except in regard to his amount, the allowance

was to follow the line of descent laid down by that law. This is merely to give effect again to the law, and not to the intention.

50. It is with the portion of Clause 5 extracted in the beginning of this judgment that we are directly concerned. On that clause the respondents

almost solely found their case in support of a construction favourable to them. After setting out correctly the rule governing the construction of

documents, the Subordinate Judge asks himself the question ""whether there is so strong a probability of intention to exclude or not to include, the

illegitimate sons of the junior brothers, or that a contrary intention cannot be supposed, because we are now discussing the question on the footing

that the expression "purusha santhathi" prima facie connotes both legitimate and illegitimate children."" The italics are mine. He thus starts with a

wrong premise, for as I have endeavoured to explain," this is neither the prima facie meaning of the expression as ordinarily spoken or understood,

nor do the surrounding circumstances so far as I can see point to this being the sense in which the parties could be deemed to have used it. In fact

he assumes that the words include illegitimate children, and proceeds to examine the language of the document for the purpose of seeing if there is

anything in it against such a pre-determined meaning. On account of this wrong approach, the judgment loses a great deal of the value that would

otherwise belong to it.

51. What appears to be a decisive argument against the Subordinate Judge's view is contained in two other clauses of the deed, where the words

purusha santhathi is followed by the expression either by way of aurasa, or by way of adoption: In the one, it is provided that on the death of any

male member in any of the three branches without purusha santhathi either by way of aurasa or by way of adoption, the allowance should go to the

gnatis nearest to him in his own branch according to Hindu Law. By the second, it is directed that on the extinction of any of the three branches by

the total absence (that is, completely) of purusha santhathi either by way of aurasa or by adoption, the allowance which was being paid to that

branch should be stopped to the extent of a half alone, namely, Rs. 500 being payable as maintenance for life to the widow or widows of the last

person in the branch who died without purusha santhathi. The italicized words either by way of aurasa or by way of adoption in those clauses do

seem to explain when according to the deed a person is to be regarded as dying without purusha santhathi. That event in the language of the parties

themselves happens, when he should die without male issue either by way of aurasa or by way of adoption. In aurasa we have once again a word

whose strict etymological import is perhaps wider than its ordinary or even legal meaning. The etymological meaning is ""produced from the breast,

born of oneself, or legitimate."" But whatever its literal meaning, it is clear that both Manu and Yagnyavalkya define the word as denoting the son

born of lawful wedlock only. According to Manu, Chap. IX, 166:

Los{ks=s laLd`rk;ka rq Lo;eqRikn;sf) ;e~A

rekSjla fotkuh;kr~ iq=a izFkedfYire~AA

Chapter II, 128:

vkSjlks /keZiRuht% rRle% iqf=dklqr%A\*

Whoever is begotten by a man himself on a lawfully married (purified by marriage) wife of his own, he should be known as an aurasa son regarded

as the foremost among sons.

52. Yagnavalkya is still more explicit. An aurasa (son) is he who is produced by a Dharma Patni (lawfully wedded wife). This is in fact how the

word is also commonly understood, Sadu v. Baiza and Genu I.L.R. (1878) 4 Bom. 37 ( and Subramania Aiyar v. Rathnavelu Chetty (1916) 33

M.L.J. 224 : ILR 41 Mad. 44 . All doubt is completely dispelled by the use of the word along with and in contrast to, an adopted son in the

phrase "by way of aurasa or by way of adoption." In this collocation, aurasa can only mean legitimate son, and this is not disputed. If this view is

correct, it would necessarily follow that the existence of an illegitimate son notwithstanding, the allowance would, in the one case, pass over to the

nearest collaterals (gnatis) in the branch, and in the other be partially stopped, if there be neither a legitimate nor an adopted son. The illegitimate

son is thus left out of account, and the whole scheme of devolution is built up, it seems to me, by taking into account legitimate descendants only. In

the light to this explanation which is found in the document itself, it is not permissible to overlook the meaning suggested by it in favour of any other

meaning. The learned Judge does not deal with this point directly but goes on to consider the meaning of the word gnatis occurring in the first of

these clauses which word, according to him, includes illegitimate sons also. He then goes on to hold that on failure of the legitimate or adopted son,

the gnatis including the illegitimate son would take the allowance, and thus the illegitimate son is left in after the aurasa and the adopted sons by the

use of the word gnati. Here again the learned Judge has not taken the ordinary colloquial meaning of a word in constant use. Gnati is rendered as

agnate, which term again the official interpreter rightly explained as referring to collateral agnatic relations. It is unusual to refer to a brother as a

gnati in a joint family though again in Sanskrit the word does include a brother also. The question in reality is not whether an illegitimate brother is a

gnati or not for purposes of succession, but whether the word is used in that unusual sense in the deed. Before us, however the argument mainly

was that this clause has no application, as the case is governed by the earlier clause referred to already, but we are unable to shut our eyes to an interpretation which the document itself furnishes.

53. As regards the second of the clauses above referred to the extinction of the branch takes place by the total cessation of male descendants

either by way of aurasa or by adoption, and, it is to be noted, in spite of the possible existence of illegitimate sons as in the previous clause. On this

clause two answers are attempted in the judgment of the Subordinate Judge, both of which however appear to be laboured and unconvincing. He

thinks that the use of the word "completely" which is the same as the word "total" in the official translation, shows that the use of the words

"aurasa" or "adopted" were merely illustrative and so they do not exclude the illegitimate issue. He also goes back to the first clause, where the

expression by way of aurasa or by adoption does not accompany the word purusha santhathi and says, "Mr. Srinivasa Aiyangar, plaintiff's

counsel, further argued that if the intention was to restrict the applicability of the term purusha santhathi only to legitimate progeny, either born or

adopted in the first clause itself which contains the disposition to purusha santhathi of Raja Venugopal the qualifying words aurasa or adopted

would have been used in that clause alone. This certainly is an argument, the force of which it is difficult to minimise." For my part I am unable to

see much force in that argument. Indeed in the light of the knowledge gained by a consideration of the later clauses, it is easy to understand the true

meaning of the words purusha santhathi wherever they occur, even if they are not accompanied by the phrase aurasa or adopted son. The earlier

clause would thus receive a meaning to which no reasonable exception could be taken. I may perhaps in this connection refer to the rule of

construction under the English Law stated by Cotton, L.J., in *Megson v. Hindle* (1880) 15 Ch. D. 198, specially appropriate even to

another and a different system which unlike that system, recognises a limited right of heirship in the illegitimate son. He says:

To take a case out of the common rule that only legitimate children can take under a gift to "children" there must be on the face of the will such a

strong probability of the testator's intending to include illegitimate children that a contrary intention cannot be imputed to him.

54. If we substitute purusha santhathi for "children" in this passage, we have a statement of the law which eminently fits into this case. I do not

understand the Privy Council as laying down the law differently in the Balrampur case, *Sher Bahadur v. Ganga Bakhsh* (1913) 26 M.L.J. 291 :

L.R. 41 IndAp 1 : ILR 36All. 101 (P.C.), where they meant, I think, merely to illustrate the proposition that the presence of special circumstances

may lead to a different conclusion. Section 100 of the Succession Act may also be remembered in this connection.

55. I regret I am unable to attach weight to most of the considerations which have weighed with the learned Subordinate Judge in his construction

of the deed of settlement, and accordingly feel constrained to differ from him. The deed does not, and I think, was not intended to, confer rights on

illegitimate sons, whose rights if any must be sought elsewhere, namely, the Hindu Law.

56. The second contention urged by the learned Counsel for the respondents is that under the Hindu Law and apart from the deed of settlement,

the respondents who are the illegitimate sons of Sri Raja Venugopal are entitled to maintenance out of the impartible estate. The learned

Subordinate Judge did not accede to this contention. But as we are of a different opinion, it is necessary to go into this question in some detail. The

subject is one of considerable complexity and difficulty on account of the vicissitudes which have attended the course of decisions regarding the

basic principles of the law relating to impartible estates. It is only fair to say that we would have had a great deal of difficulty in arriving at the

conclusion at which we have arrived but for the latest pronouncement of the Judicial Committee in *The Collector of Gorakhpur v. Ram Sundar Mal*

(1934) 67 M.L.J. 274 : L.R. 61 IndAp 286 : ILR 56 All. 468 . The clear light which this decision has thrown on the subject has dispelled all

doubts as to the law that we are bound to apply to the decision of this case.

57. The paternity of the respondents is not now disputed. Nor is it disputed that they fulfil the description of Dasi Putras in Hindu Law, capable of

inheriting to their, putative father Raja Venugopal. The Venkatagiri family of which Raja Venugopal was a member belong to the Velama

community, a subdivision of the Sudra caste amongst Hindus. The estate is by custom impartible and descendible to the eldest representative in the

eldest line according to the rules of lineal primogeniture. The appellant has conceded that it is held as joint family property, a concession which has

been recorded by the learned Judge and not questioned in the appeal. His contention is that under the Hindu Law the junior members in a joint

family of which the senior member alone is the sole holder of an impartible estate have no right apart from custom to be maintained out of the estate

or its income. Proof of the custom would not, of course, be insisted if the claimant were a brother or son, as in such a case the custom has been so

often judicially noticed that it is no longer necessary to adduce proof of it. *Rama Rao v. Rajah of Pittapur* (1918) 35 M.L.J. 392 : L.R. 45 IndAp

148 : ILR 41 Mad. 778 . But if the claimant is a more distant relation, he must, it is argued, make out a custom entitling him to main, tenance,

before he can succeed.

58. The right of illegitimate sons to maintenance out of the partible assets of the joint family to which he belongs has now been finally settled by the

decision of the Privy Council in *Vellaiyappa Chetty v. Natarajan* (1931) 61 M.L.J. 522 : L.R. 58 IndAp 402 : ILR 55 Mad. 1 . The relevant

passage in their Lordships' judgment has been extracted in the judgment of my Lord. That passage, if I may say so with respect, is clear and

telling, and has finally set at rest all controversy regarding the jural basis of an illegitimate son's right of maintenance under the Hindu Law. It is now

established that that right springs out of his membership of the putative father's family, a membership which necessarily carries with it a legal right to

be maintained out of the common assets. Where the family consists of illegitimate and legitimate sons and no collaterals, his rights are higher, but

this aspect of his rights is of rib materiality in this case. As held in *Rama Rao v. Rajah of Pittapur* (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR

41 Mad. 778 , the second Pittapur case the right of coparceners to maintenance out of the coparcenary property is an innerent quality of that

property. What was described in this case as the inherent quality of the coparcenary property as regards a full coparcener, has, it seems to me,

been extended by *Vellaiyappa Chetty's ease* (1931) 61 M.L.J. 522 : L.R. 58 IndAp 402 : ILR 55 Mad. 1 to an illegitimate son by reason of his

membership of the family, though his membership is inferior to that of a legitimately born son.

59. To this extent the right of the illegitimate son is practically conceded. The Subordinate Judge appears to accept the position so far; for he has

said:

If in the present case, the claim for maintenance, let us assume, had been directed against not impartible property, but against partible property,,

then clearly, if the plaintiff's father Raja Venugopal had left no separate property, since he left no legitimate issue (in fact he died unmarried) the

plaintiffs would clearly be entitled, according to *Vellaiyappa Chetty v. Natarajan* (1931) 61 M.L.J. 522 : L.R. 58 IndAp 402 : ILR 55 Mad. 1 to

maintenance from the defendant who is their collateral, in. possession of the joint family property.

60. The qualification mentioned here and having reference to the separate property of the putative father is the matter on which their Lordships did

not and were not called upon to express an opinion. This question does arise for consideration in the present case as admittedly the father has died

leaving considerable separate property which has passed into the hands of the respondents under his will.

61. It is, however, difficult to see how this circumstance can operate to deprive them of their right to be maintained out of the estate, if otherwise

they have the right. They have the right because they are members of the family, and the right will subsist so long as the membership continues.

Neither their status as members nor their right to maintenance which is a consequence of that status can be imperilled by the accident of their

coming into possession of the separate property of the father. What was urged was that even if the right be held to exist, yet the very nature of that

right is such, that effect should not be given to it where the claimant is well supplied in this regard from other sources. In other words there is no

need to maintain persons who are already well maintained by others or from other sources. The correctness of this proposition was examined by

this Court in *Lingayya v. Kanakamma* (1913) 28 M.L.J. 260 : ILR 38 Mad. 153 and *Kodcmdarami Reddi v. Chenchamma* (1929) 59 M.L.J.

531 and the conclusion was reached that it is unsound. Both these cases related to a claim by the widow of a deceased coparcener, but the

decision must be held to govern the present case as the basis of the claim whether it is by a widow or by an illegitimate son, is identical. I may also

mention that on this point the Subordinate Judge has himself come to the same conclusion.

62. The question then is whether there is any difference in the principle to be applied because it is not partible property but an impartible estate

against which the maintenance is claimed, illegitimacy by itself being no longer after *Vellaiyappa Chetty's case* (1931) 61 M.L.J. 522 : L.R. 58

IndAp 402 : ILR 55 Mad. 1 , an obstacle to the recognition of maintenance rights, the question narrows itself to this; is there anything in the nature

or incidents of an impartible estate, anything so special and peculiar that it necessarily displaces the junior member's right to maintenance, which is,

as the Privy Council described it, an inherent quality of common property? The learned Subordinate Judge is of the opinion that the difficulty lies

not in the respondents being of illegitimate descent, but in their being beyond the admissible degree of relationship. The contention of the learned

Counsel for the appellant on this point was almost entirely founded on the decision of the Privy Council in the second Pittapur case (1918) 35

M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 . According to him this decision of the Privy Council concludes the question against the

respondent and in favour of the appellant. On the other hand it is contended for the respondents, that the authority of this case has been greatly

circumscribed, and must now be regarded as confined to the actual decision contained in it and no more.

63. It is therefore necessary to examine the soundness of this argument, and to see whether there is in the later cases an exposition of principle at

variance with what appears to be stated in the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 That case

related to a claim to maintenance by the son of the adopted son of the last holder of the Pittapur estate, an impartible zamindari in the Northern

Circars. The estate was held by a devisee under the will of the last holder, who claimed to be the aurasa son. The sonship had been denied by the

claimants' father and was also denied by the claimant, and the "claim was made to rest on an allegation of co-ownership, with the last holder,

which was not affected, it was urged, by the estate getting into the hands of a stranger under the will. The claim was rejected. The plaintiff did not

attempt to prove that there was any custom affecting this zamindari which enjoined the making of grants to any persons, nor did he put his case on

any claim resting on relationship. It was by reference to the general law, that he attempted to sustain the claim, by suggesting that that law cast a

real, and not a mere personal burden which followed the property into whose soever's hands it passed. This was a patently extravagant

proposition as the burden does not become real, until the estate is charged by act of parties or by decree of Court. In rejecting the claim, their

Lordships held, as the concluding paragraph of the judgment shows, that a claim of the kind not based on relationship must fail, quoting the

following extract from Sankaran Nair, J.'s judgment in the High Court:

The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship.... As there was no community of interest the property is not burdened with his claim in the hands of a donee.

64. This passage does suggest that their Lordships threw out the claim on both grounds, namely, the absence of relationship, and the absence of

co-ownership. In fact the greater part of the judgment is devoted to the discussion of the question whether there was in law a coparcenary in

respect of an impartible estate. At pages 153 and 154 the following observations occur:

It is settled that in an impartible zamindari there is no coparcenary, and consequently no person existed who as coparcener could object to

alienation of the whole subject by the de facto and de jure holder...."" ""It follows that the right to maintenance, so far as founded on or inseparable

from the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases...."" ""An impartible zamindari is the

creature of custom, and it is of its essence that no coparcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the

consideration that the plaintiff is a person who, if the zamindari were not impartible, would be entitled as of right to maintenance.

65. These observations, there can be no doubt, prima facie do touch and govern the principle of the law to be applied in the present case, and they

appear to negative the possibility of a coparcenary in relation to an impartible estate. In fact they embody the logic underlying the decisions of the

Privy Council in Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 and the first Pittapur case (1899) 9 M.L.J. Supp. 1 : L.R. 26

IndAp 83 : ILR 22 Mad. 383 and this Court would have been powerless to pass them by, but for the latter decisions of the Board. Before

referring to them it may not be out of place to remember it was a new interpretation of the law that was ushered in by these decisions. In the

second Pittapur cases itself it was observed:

It is beyond doubt that the decisions in the Madras Courts prior to the case of Sartaj Kuari v. Deoraj Kuari (1888) L.R. 15 IndAp 51 : ILR 10

All. 272 , embodied the theory that there was joint property in an impartible zamindari, which only fell short of coparcenary because, by custom, partition was inadmissible.

66. It is needless to cite or examine the authorities as their Lordships do not apprehend that there is any doubt as to this statement being correct. It

will be sufficient to quote a fragment of the decision of the Court of Appeal in that case itself:

It must be conceded that the complete rights of ordinary coparcenaryship in the other members of the family to the extent of joint enjoyment and

the capacity to demand partition are merged in - or perhaps, to use a more correct term, subordinated to - the title of the individual member to the

incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to

preserve for them a kind of dormant co-ownership.

67. This change is also noticed in Abdul Aziz Khan Sahib v. Appayasami Naicker (1903) L.R. 31 : ILR 27 Mad. 131 , where again their

Lordships observed that

It was the accepted law in Madras that the holder of an impartible zamindari, who was himself a member of an undivided family, could not alienate

or incumber the corpus of the estate so as to bind his coparceners, except for justifiable especial causes. Prior to 1889 there had been a series of

decisions to this effect in Madras Courts ; but in that year, following the judgment of this Committee in the case of Rani Sartaj Kuari v. Rani Deoraj

Kttari (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 , the High Court of Madras overruled those decisions Beresford v. Ramasubba I.L.R.(1889)

13 Mad. 197; and it has recently been held by this Committee in the case of Raja Rao Venkata v. Court of Wards (1899) 9 M.L.J. 1 : L.R. 26

IndAp 83 : ILR 22 Mad. 383 that impartible zamindaris in the Presidency of Madras are not inalienable in the absence of proof of some special

family custom or tenure attaching to the zamindari, and having that effect.

68. In short the change over was from one legal theory to another. According to the earlier, there is nothing incongruous in a joint family holding an

impartible estate though its essential character of impartiality necessarily displaced the right to common enjoyment and partition. But succession and

maintenance in no way impinging on impartibility were not struck at by it. The joint ownership remained as a live though dormant force, active not

only in the matter of succession and maintenance, but also in regard to the restraint on alienation. Such was the view which had been consistently

taken before 1839. Looking at it purely from the standpoint of legal theory, it is difficult to find fault with it. *Naraganti Achammagaru v.*

*Venkatachalapati Nayanivaru* ILR (1881) 4 Mad. 250 . Indeed Lord Dunedin seems tacitly at any rate to concede SJ much, in *Bajinath Prasad*

*Singh's case* (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 All. 228 .

69. According to the other theory of which the *Sartaj Kuari's case* (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 and the second *Pittapur case*

(1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 , are the exponents, there can be no real coparcenary or joint ownership in

impartible property and in strict legal theory, two such conflicting incidents as impartiality and co-ownership cannot co-exist side by side in the

same estate at the same time. The holder must be the full and sole proprietor as he is in fact unrestrained in his enjoyment of the estate and

uncontrolled in his power of disposal over it. Such an extensive right can be understood only if the estate is regarded as his separate or self-

acquired property. True, the successor is to be ascertained by calling into aid the rule of survivorship peculiar to joint property, but that is not

because of an actual, living, unity of title; it is merely a fiction to be imagined for the nonce, a mere survival perhaps from an archaic system which

has perished. *Rajah of Kalahasti v. Achigadu* (1907) 17 M.L.J. 367 : ILR 30 Mad. 454.

70. On the former of these two theories the claim to maintenance could be sustained; the latter would negative it. A choice has therefore to be

made between these opposite theories, a choice, which has been rendered easy by the decision of the Board in Baijnath Prasad Singh's case

(1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 All. 228 and in the Collector of Gorakhpur's case (1934) 67 M.L.J. 274 : L.R. 61 IndAp

286 : ILR 56 All. 468 . In them, the Privy Council appear to have unmistakeably made the choice themselves. It would not therefore be right for us

to refuse to follow the interpretation given in these later decisions, whatever our view might have been in the absence of these decisions.

71. As will be shown presently the authority of Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 , and the others which had

accepted the school of thought reflected in it holds good only insofar as the power of absolute disposal recognised in them is concerned. It is an

anomaly no doubt that there could be a co-ownership which is at the same time capable of being destroyed by a unilateral and capricious disposal

of the property by the head of the family. But law can scarcely be logical, where it is moulded and modified to give effect to intruding custom. It is

not the function of this Court for that reason to cavil at an established principle if it has the support of the Judicial Committee. Its illogic, if any, has

to be mended only by resort to legislation. In fact that is what happened in Madras. Soon after the decision of the Privy Council in the first Pittapur

case (1899) 9 M.L.J. 1 : L.R. 26 IndAp 83 : ILR 22 Mad. 383 , when this Presidency awoke to the new interpretation of the law, the Local

Legislature effected by Statute a restoration of the law to what it was all along understood to have been. The Madras Impartible Estates Act, Acts

II of 1902 and II of 1904 both contain provisions enacted for the purpose of replacing on the holder for the time being, the restraint on alienation,

which had been displaced as a result of Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 . More recently by an amending Act (XII

of 1934) express provision has been made recognising a right of maintenance in favour of descendants up to the third degree, while in regard to

others, the law was left where it was.

72. Baijnath Prasad Singh's case (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 All. 228 is a definite landmark in the evolution of the law

relating to impartible estates. The question there raised related to the succession to an ancient impartible estate, the contest being between the

senior lineal descendant of the common ancestor of the last holder on the one hand, and his uncles who were therefore collaterals one degree

nearer but of a junior branch on the other. The family was undivided. Their Lordships upheld the superior claim of the former, observing

that this zamindari being ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule

of the Mitakshara Law, and that the respondent being the person who in a joint family would, being the eldest of the senior branch, be the head of

the family, is designated in this impartible Raj to occupy the gadi.

73. The entire case-law was most carefully considered by Lord Dunedin who had himself as a member of the Board delivered the judgment in the

second Pittapur case. The argument that impartible estates must be held, to be governed by the ordinary rule of law applicable to separate or self-

acquired property, as the logical and inevitable conclusion to be reached from the Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272

and the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 , was in terms rejected. Lord Dunedin observed:

The question of how to select the head of the family in a joint family is part of the general law. That the custom of impartiality does not touch it is

shown by the long list of authorities above cited, and there is in their Lordships' view no necessary logical deduction from the decisions in Sartaj

Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 and Rama Rao v. Rajah of Pittapur (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR

41 Mad. 778 , which forces them to an opposite conclusion.

74. The first of these cases was distinguished on the ground that what was decided in it was that in an impartible Raj there was no such co-

ownership in the other members as to give them a title to prevent alienation by the holder; and that the right of the other members that was being

considered was a presently existing right and not the chance which each member might have of a succession emerging in his favour in the future

which it was said, was obviously outside the inquiry. As regards the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41

Mad. 778 , it was observed that the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a

member, but against a stranger donee, against whom it could not prevail unless it was of the nature of a real<sup>1</sup> right. Their Lordships added:

Now it could only be of the nature of a real right, no proceedings having taken place before the estate got into the hands of the donee, if the maker

of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations which go to the

question of maintenance apart from the question of real right may be treated as obiter dicta.

75. The italics are mine. The italicised words appear to suggest that there was or might have been an enforceable claim, against the estate so long

as it was in the hands of the previous holder but it failed as against the donee because the claim had not been converted into a charge before the

gift was made. But this construction cannot, I admit, be said to be clear enough for being acted upon more especially on account of the views

expressed in the two later decisions of the Board to which I shall refer presently. It is more pertinent for the present purpose to enquire what in fact

were the observations in the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 , which in their Lordships"

opinion deserved to be treated as-obiter dicta, according to Baijnath Prashad Singh's case (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43

All. 228 . As I understand it, the position taken up by Lord Dunedin was this. The estate had passed into the hands of a stranger who had taken it

absolutely under the will of the previous holder. Being a stranger to the family he cannot be made liable for the maintenance, unless the estate itself

had been, previous to the transfer, subject to a charge. There was no charge for a mere maintenance claim under Hindu Law. In other words it

was not of the nature of a real right. True he was a coparcener; but his coparcenership or co-ownership had been overwhelmed by the custom of

impartibility, to such an extent that it ceased to be a full or actual co-ownership. It was not in fact an actual co-ownership at any time, but it was

less of it, after Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 , which had negated his right even to interdict an unjustifiable

alienation in spite of its resulting in a total destruction of all his right. A discussion of such a limited co-ownership had no bearing on the claim as

against the stranger, as it could not influence the decision in any event one way or the other. So it followed that the observations in the second

Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 regarding the absence of coparcenary rights in an impartible estate

were really unnecessary, and were accordingly to be treated as obiter dicta. Having thus disposed of the theory of a total absence of all

coparcenary right in the junior members, his Lordship felt himself at liberty to examine the question afresh, and came to the conclusion that a limited

coparcenary did exist in an impartible joint family estate and governed the choice of a successor to it. In so far therefore as the second Pittapur

case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 spelt the negation of a coparcenary in such an estate as being incompatible

with impartibility it has ceased to be a binding authority. That is why, it seems to me, Lord Dunedin criticised the use of the words coparcenary and

coparceners as applied to a joint family under the Mitakshara, and said that it is necessary not to fasten the attention on the word "coparcenary"

but rather to inquire what actually was decided in the Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 . That again is the reason

why turning to the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 , they stated that it must be remembered

that the claim put forward was made not against the head of the family of which the claimant was a member, but against a stranger. It is no longer

possible to regard the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 as governing a claim to maintenance,

where the claimant is a coparcener and a member of the joint family and not a mere stranger. Deprived as it undoubtedly was, of some of its

essential attributes, coparcenary still remained, submerged but not destroyed, yet sufficiently alive to regulate succession. Whether it has been left

with sufficient strength to support a claim to maintenance also, is a question which cannot be deemed to have been concluded by this case, but

remains open for future decision. The power of independent disposal recognised by Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All.

272 was however affirmed, with the observation that case had stood too long to be disturbed.

76. The nature of the coparcenary right in relation to an impartible estate once again arose for consideration by the Privy Council in Protap

Chandra Deo's case (1927) 53 M.L.J. 30 : L.R. 54 IndAp 289 : ILR 54 Cal. 955 . The main appeal before the Board was directly concerned

with the validity of a disposition by will by which the last holder had diverted the succession away from the appellant who would have in the

ordinary course taken it by survivorship, as the family was undivided and the estate, ancestral. The will was upheld. No other conclusion could

have been arrived at without overruling the Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 and the cases that followed it which

their Lordships declined to do. The inconsistency between the two lines of cases the one accepting, and the other negating the co-ownership

theory, was again urged, but in vain, as Baijnath Prashad Singh's case (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 All. 228 was

considered fatal to the contention. But of special significance to the present appeal are, it is urged, the observations of the Board made in the cross

appeal of the respondent objecting to the High Court's order regarding the appellant's claim to maintenance. Their Lordships negated it.

Firstly, on the ground that the maintenance of himself or his family was already provided by a Khorposh grant of certain villages to his

predecessors, which villages are still in his possession; and secondly because he has failed to establish a right to maintenance by custom or

relationship or in any other way. See the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 .

77. The express approval of the decision of the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 coupled

with the non-recognition of relationship as a ground of claim in itself, does seem to go far to support the appellant's contention. But as against this it

was argued before us that in view of the finding that the claim had been satisfied by a suitable provision already made, the reference to custom and

relationship as the basis of the claim should not be regarded as a binding decision.

78. In Shiba Prasad Singh v. Prayag Kumari Debi (1932) 63 M.L.J. 196 : L.R. 59 IndAp 331 : ILR 59 Cal. 1399 , the question whether co-

ownership can be said to be an attribute of a joint but an impartible estate, was once again raised and considered. Their Lordships re-affirmed the

principle of Baijnath Prasad Singh's case (1921) 40 M.L.J. 387 : L.R. 48 IndAp 195 : ILR 43 All. 228 , which did not in fact enunciate a new

principle, as again and again pointed out by the Board. The applicability of the Mitakshara joint family law, was once again reiterated, their

Lordships observing that the right of survivorship is not to be regarded as a mere spes successionis, but a right capable of being renounced and

surrendered. Any lingering doubt based on the observation of their Lordships in Baijnath Prasad Singh's cases, where they spoke of co-ownership

as not amounting to a presently existing right, and as giving rise to a mere chance of succession, was dispelled. This of course sounds the death

knell of the view that joint ownership in regard to an impartible estate is a mere myth. But here again observations do occur, regarding maintenance

on which the appellant naturally enough founds himself. Referring to the four incidents which usually come up for consideration when an impartible

estate is claimed as being held by a joint family, their Lordships analysed the legal position and held that out of those incidents, namely, (1) the right

to partition;(2) the right to restrain alienation by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of

survivorship, the first three should be held to have been superseded by custom; and that consequently an impartible estate though ancestral must be

deemed to have become clothed by custom with the incidents of self-acquired and separate property. The meaning of their Lordships"

observations is plain, namely, that the right of maintenance must be regarded as incompatible with impartibility and cannot therefore be

substantiated except by proof of a custom. But it is no disrespect to their Lordships to say that what was said about maintenance in this case was

by way of a reconciliatory statement of differing views as they were, rather than a definite decision that one was right and the other wrong.

79. The Collector of Gorakhpur v. Ram Sundar Mal (1934) 67 M.L.J. 274 : L.R. 61 IndAp 286 : ILR 56 All. 468 , contains the latest exposition

of the law by the Judicial Committee in a way which, in my opinion, leaves no more doubt as to the principle on which this appeal falls to be

decided. Without it, I may frankly admit, the decision of this case must be the other way. It may be that the question of maintenance was not the

question that called for a direct decision in this case either, which in fact related to a question of succession. But that is not a criticism to which this

Court, at any rate, can attach weight. It was Lord Blanesburgh who delivered the judgment but the Board included Sir John Wallis whose intimate

familiarity, if I may say so with respect with the peculiarities of the law relating to impartible estates is so well known, that an added importance

attaches to the general position of the law categorically stated in the shape of seven propositions of which Nos. 1, 2, 3 and 7 are of the utmost

importance for the present purpose. Of these propositions, Nos. 1 and 2 do not call for special notice as they are general in character and refer

only to the error of thinking that a custom of impartibility is destructive of the co-ownership of the junior members of the joint family. But Nos. 3

and 7 are couched in unambiguous language and mark, as I think, a definite restoration of the law such as it was understood to be before Sartaj

Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 . That law, as I understand it, recognised the right of a junior member however remote,

to maintenance out of the joint family estate, as a consequence of his membership alone, without proof of a custom. The words ""at length"" and

now"" used in the third proposition and the observation in the seventh that the recent decisions of the Board constitute a further land mark in the

judicial exposition of the question at issue show that while they were quite conscious of the contrary theories which had found expression in the

second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 and the two other cases cited above, Protap Chandra

Deo's case (1927) 53 M.L.J. 30 : L.R. 54 IndAp 289 ILR 54 Cal. 955 and Shiba Prasad Singh v. Prayag Kumari Debi (1932) 63 M.L.J. 196 :

L.R. 59 IndAp 331 : ILR 59 Cal. 1399 , their Lordships definitely declined to perpetuate them. The true basis of the right of maintenance, namely,

the joint ownership of the junior members according to the Mitakshara law was at last accepted and the Chellapalli case (1900) 10 M.L.J. 294 :

L.R. 27 IndAp 151 : ILR 24 Mad. 147 , which had been decided without reference to custom was cited as illustrative of that view though it had

been understood in a different sense in the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 . The seventh

proposition quite clearly re-affirmed the dethronement of the theory of fictional co-ownership, in far more positive language than even that used in

Protap Chandra Deo's case (1927) 53 M.L.J. 30 : L.R. 54 IndAp 289 : ILR 54 Cal. 955 and proceeded to derive the right to maintenance from

membership of the family as the result from a cause where the family was joint.

80. I regard this case as finally setting at rest all controversy on the subject of impartible estates. The status of the junior members has at long last

been vindicated and with it also the attendant right to maintenance arising out of it, though it might be defeasible by an alienation supervening, unless

made a charge on the estate in the meanwhile. For it is clear that freedom from restraint on alienation whether illogical and incongruous or not

remains supreme, at any rate in those provinces where legislation has not been resorted to. The learned Judge in the Court below is of the opinion

that the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 , still governs the question of maintenance, as on this

point, it had not been departed from in the two later cases referred to above Protap Chandra Deo's cases and Shiba Prasad Singh's case (1927)

53 M.L.J. 30 : L.R. 54 IndAp 289 : ILR 54 Cal. 955 and must be held not to have been departed from even in the last one either. He thinks that

in the use of the qualifying phrase "however limited" in the third proposition of their Lordships in the Collector of Gorakhpur's case (1934) 67

M.L.J. 274 : L.R. 61 IndAp 286 : ILR 56 All. 468 , there is a sufficient expression of intention to leave the right of maintenance to be still regulated

by the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 . In the first place such a construction seems to be

opposed to the general tenor of exposition adopted in the judgment, and attaches no significance to the use of the words "at length" and "now" by

their Lordships; secondly and in view of their Lordships' obvious disinclination to accept the soundness of the several principles enunciated in

second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 and the earlier cases which it purported to follow, a

restatement of the law became necessary, for the purpose of redeeming it from the confusion which had resulted from those cases. This, their

Lordships did in the clearest way possible, so as to avoid misunderstanding in the future. Thirdly, there is no warrant for reading into the words

"however limited" a meaning out of tune with the theme of the judgment. It is quite possible to give full effect to those words by regarding, them as

a reference to the defeasibility of the right by alienation which is a limitation imposed by Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10

All. 272 . Or what is more probable their Lordships might have used the words by way of a necessary caution in view of the possibility of some

limitation existing in the law itself, without deciding, as their Lordships were not called on to decide, whether it in fact existed or not.

81. The learned Subordinate Judge also refers to Ramesam, J.'s judgment in Commissioner of Income Tax v. Zamindar of Chemudu (1934) 67

M.L.J. 306 : ILR 57 Mad. 1023 as also lending support to his view. In that case the question was whether the money received by the uncle of the

holder of an impartible estate was taxable as money received by him as a member of a Hindu undivided family within Section 14(1) of the Income

Tax Act, 1922. The answer was in the affirmative. The decision did not, as it could not, take note of the Collector of Gorakhpur's case (1934) 67

M.L.J. 274 : L.R. 61 IndAp 286 : ILR 56 All. 468 which came later. The right of junior members other than the son of the last owner did not arise

for consideration either, and was not in fact considered. If I may say so with respect, the sentence extracted from his judgment by the learned

Subordinate Judge seems to my mind to lay down the contrary of what he has said about it. I am free to confess that for myself I regard the

reference in the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 to the Chellapalli case (1900) 10 M.L.J.

294 : L.R. 27 IndAp 151 : ILR 24 Mad. 147 as one made for the purpose of explaining that the latter case should be regarded as truly based on

custom and not on law, only that the custom was one which did not require proof on account of its having been frequently acted upon by Courts.

Ramesam, J., however thinks that Lord Dunedin intended to say that the right to maintenance was not the creature of custom, but an incident of the

law which had not yet in that respect been encroached upon by custom. M. Subbayya Thevar, Zamindar of Uttumalai Vs. Sivagnana Marudappa

Pandian, , on this view. This, of course, is the view which has been since expounded in the Collector of Gorakhpur's case (1934) 67 M.L.J. 274 :

L.R. 61 IndAp 286 : ILR 56 All. 468 though I doubt whether Lord Dunedin meant to convey that sense in the following passage:

As to the zamindari estate, the Board held it was impartible, and the consequence is that the plaintiffs as the younger brothers of the zamindar retain

such right and interest in respect of maintenance as belong to the junior members of a Raj or other impartible estate descendible to a single heir.

82. It may be observed in passing that if the right to maintenance is based on the law, no proof except of course of the necessary relationship, need

be given. It is only where the law does not confer the right *Rajah Rup Singh v. Rani Baisni* (1884) L.R. 11 IndAp 149 : ILR 7 All. 468 , a special

custom recognising the right has to be established by the production of the kind of proof *Ramalakshmi Ammal v. Sivanatha Perumal Sethurayar*

(1872) 14 M.I.A. 570 required to establish a custom at variance with the law. In the second *Pittapur* case (1918) 35 M.L.J. 392 : L.R. 45 IndAp

148 : ILR 41 Mad. 778 , which proceeded on a theory which must now be deemed to have been at last exploded, the claim failed as there was no

proof of the custom. Now that the law has been ascertained or to be more correct, re-ascertained, as favouring the recognition of the right of a

member, the only question for consideration is whether the respondents are members of the family, and that, question has to be answered, as

already mentioned, in the affirmative.

83. There are no degrees of relationship to be taken note of for the purpose of maintenance, for in a joint family living in union, every member

however remote has the right to be maintained out of the common property as is even now the case in the Malabar tarwads not subjected to a

division under Madras Act XXII of 1933. The right to maintenance is indeed the mode in which the right of ownership in the tarwad property is

most effectively enforced by the junior members. The incidents of the joint holding of tarwad property approximate closely to those that attached

to an impartible estate according to the decisions prior to the Sartaj Kuans case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 . The karnavan of a

Malabar tarwad occupies a position similar in several respects to that of the holder of an impartible estate. There is so much that is common to the

Mitakshara Joint Family Law and the Marumakkathaya Law that the latter may be regarded without much violence either to principle or legal

history, as representing but a school of Hindu Law as Sundara Aiyar, J., thought, in spite of its being based on the matriarchal instead of the

patriarchal theory of joint family. It is as difficult on principle to limit the right of maintenance to a few only of the members as it is to limit the

membership itself in the one case, as in the other, for, after all maintenance is the necessary resultant of membership. The position would be

different if the family is governed by the Dayabagha or even by the Mitakshara Law if the estate is the separate or the self-acquired property of the

holder.

84. The Privy Council having in their latest pronouncement resuscitated in express terms the principle of the decision in the Chellapalli case (1900)

10 M.L.J. 294 : L.R. 27 IndAp 151 : ILR 24 Mad. 147 , it is desirable to see precisely what the nature and character of that principle is. The

relevant observations have been extracted above, and are not now to be understood as they were sought to be interpreted in the second Pittapur

case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 . On the contrary, they have now to be taken as a statement of the law

according to which junior members have a right to maintenance by law and there is no need any longer to prove a custom to make it out. Emphasis

is not to be placed on the claim being a claim by younger brothers, which of course was the fact in the particular case, but on the right under law

admitted to inhere in the junior members.

85. Some of the earlier cases may now be noticed as they show that Lord Blanesburgh's exposition is in accord with the law regarding

maintenance as understood before Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 . The Hunsapur case (1867) 12 M.I.A. 1 was

decided on the finding that the estate was the separate and self-acquired property, of the last holder. The successful heir was a grandson by the

eldest son in whose favour the last holder had also executed a will. The decision apparently proceeded on the footing that the Mitakshara Law was

applicable. The observations at the end of p. 39 of the report to the effect that there are no inchoate rights of inheritance in the junior members of

the family and that they did not by birth acquire community of interest with their grandfather must be understood with reference to the finding that

the estate was the separate estate of<sup>1</sup> the grandfather who was the last holder. At the same time there is in the judgment a reference to the right of

maintenance of junior members, though the estate descended and was held according to the rule of primogeniture. This reference is perhaps

capable of being explained away on the ground that it may be regarded, as an incident established by custom in that case, though there is in fact no

reference in the judgment to any such specific custom. *Stree Rajah Yanumula Venkayammah v. Stree Rajah Yanumula Boochia Venkondora*

(1867) 12 M.I.A. 1, a decision of the Privy Council, applied the rule in the *Sivaganga* case (1870) 13 M.I.A. 333, with this difference that

whereas in the *Sivaganga* case (1863) 9 M.I.A. 539 the estate was found to be the separate property of the last holder, the finding in this case was

that it was the joint estate of the respondent and the appellant's husband. The appellant failed because the respondent took the estate by

survivorship. In this case, there was a grant to the common ancestor of the family, which referred to the provision of *vasaties* (landed gifts) to the

three brothers who were the junior members of the family, by way of maintenance. Referring to this provision, their Lordships made the significant

observation:

These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a joint or impartible estate in favour

of the junior members of the family; who, but for the impartibility would be coparceners with him.

86. In (1878) L.R. 5 I.A. 61 (Privy Council) , referring to the succession of the eldest of three brothers to an impartible estate, the Board

observed that the estate must be taken to have descended to him as ancestral estate and that

he would therefore necessarily be joint in that estate, so far as is consistent with its impartible character, with his two younger brothers, the latter

taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family

in the case of a joint or other impartible estate descendible to a single heir.

87. The observations in the three cases referred to above seem definitely to acknowledge a right of maintenance as inherent in the junior members

of a joint family holding an impartible estate as family property. The matter is further dealt with in *Naraganti Achammagaru v. Venkatachalapathi*

*Nayanivaru I.L.R.(1881) 4 Mad. 250*, where the statement of the law occurs at p. 266:

But where, from the nature of the property, possession is left with one coparcener, the others are not divested of co-ownership. Their necessary

exclusion from possession imposes on the co-owner in possession two obligations to his coparceners in virtue of their co-ownership-the obligation

to provide them with maintenance and the obligation to preserve the corpus of the estate. The rights of possession and maintenance are to this

extent distinct and inconsistent that they cannot co-exist and be enjoyed by the same persons, that the one is a right to the immediate perception of

the fruits of the property, the other a right to an indirect benefit, but both rights have a common origin, unity of ownership.

88. As I have said, there is nothing inherently incongruous in the theory thus expounded. But so far alone as the obligation to preserve the corpus

of the estate for the benefit of the junior members is concerned, it must now be taken that it has been finally negated by the Sartaj Kuari's case,

the first Pittapur case and Protap Chandra Deo's case already referred to. In the Kachi Yuva Oodayar Vs. Kachi Kaliyana Oodayar and Others,

, confirmed by the Privy Council in the Udayarpalayam case (1905) 15 M.L.J. 312 : L.R. 32 IndAp 261 : ILR 28 Mad. 505 and in Venkatachala

Reddiar v. Venkatachala Reddiar (1909) 20 M.L.J. 394, the nephew of the last zamindar that is a member beyond the first degree, was held

entitled to maintenance out of the estate as a junior member. In the second of these cases, the decision of the Privy Council in the Chellapalli case

(1900) 10 M.L.J. 294 : L.R. 27 IndAp 151 : ILR 24 Mad. 147 was referred to as recognising the legal right to maintenance of the junior members

of a raj or other impartible estate, the learned Judges one of whom Mr. Justice Wallis, as he then was, observing that so far as their knowledge

extended, the claim was in accordance with the usage prevailing in Southern India. In the next decision of the Madras High Court in Sir Abhinava

Purna Priya Vedaji Bhaskar Thirumal Rao Saheb. Vs. Arni Rangadani Rao Saheb, , a claim for maintenance was successfully advanced by a

person, who was more than three degrees removed from the common ancestor but who was still a member of the joint family along with the

holder. A great portion of the elaborate judgment delivered in this case was taken up with a discussion of the effect of Sartaj Kuari's case (1888)

L.R. 15 IndAp 51 : ILR 10 All. 272 and a conclusion was reached almost parallel to that reached later by the Privy Council. The remoteness of

the plaintiff's relationship which was without success made the ground of attack was not however the remoteness beyond the first degree

mentioned in the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 , but a remoteness of more than three

degrees which it was contended dissipated the coparcenary right even in an ordinary Hindu joint family. The contention was negated but what is

of interest for the present purpose is that even so remote a collateral as a claimant beyond the third degree was recognised as entitled to

maintenance. This decision was followed in a later case in *Kachi Yuva Rangappa Kalakka Vs. Kulandai Ayal*, , where the proposition that the

junior members of a joint family holding an impartible estate are entitled to maintenance out of the impartible property was accepted and extended

to the case of the widow of such a member.

89. As I understand these cases, it appears to me that there is no warrant for holding that a junior member, though he may be neither a brother nor

a son is to be regarded as disentitled to maintenance out of the impartible estate when it is held by a family of which he is a member. If the estate

does not belong to a joint family but is the separate or self-acquired property of the holder, the rule is of course different. *M. Subbayya Thevar,*

*Zamindar of Uttumalai Vs. Sivagnana Marudappa Pandian*, . In such a case, any junior member irrespective of the degree of relationship must, if

he can, make out his right only by proof of a custom. It may be that if he is a brother or a son, a custom in his favour will be presumed on account

of the rule mentioned at the bottom of page 154 in the second *Pittapur* case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 ,

namely:

When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country,

the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case.

90. Indeed, where the law itself favours the claim there is no necessity for relying upon a custom, which, if it did exist would coincide with it.

91. In conclusion I may also mention that it is a matter of some satisfaction that our decision on the question of Hindu Law is in accordance with

what the members of this family seem themselves to have; thought right. In the deed of settlement, there is not the slightest indication that junior

members beyond the first degree were regarded as not entitled to maintenance out of the estate. The deed was as is quite apparent, primarily

brought about for settling a claim to partition put forward by two of the four brothers and not for the purpose of resolving a disputed question of

maintenance,. It recited the Rulers for the time being shall:

according to Jaw and custom completely possess all the privileges and enjoy them, subject only to the condition" of paying allowance to the other

members of our family suitably to their respective status, out of the income from the estate and the properties.

92. And again in Clause 5, it is stated:

As the said Venkatagiri estate is impartible and as the aforesaid Sri Muttukrishna Yachendrulu Varu, Sri Venkatakrishna Yachendrulu Varu and

Sri Venugopala Krishna Yachendrulu Vara and their male descendants are entitled to get allowances from the said estate, we appointed the Rajah

of Bobbili, as mediator, to determine the amount of allowance to be given to the said Sri Muttukrishna Yachendrulu Sri Venkata Krishna

Yachendrulu and Sri Venugopala Krishna Yachendrulu and to their male descendants.

93. These two extracts from the deed, show that the parties to it and their advisers, namely, Sri1 Kumara Yachama and the Maharaja of Bobbili

understood the law and custom to be that other members of the family in general and not merely the sons and brothers of the holder were entitled

to be maintained. A further significance arises out ;of the fact that the deed was also the result of a consultation with the father Sri Kumara

Yachama which preceded, the settlement, who, as the document states it, knew everything and who had considerable experience.

94. Another circumstance on which some point was made for the respondents was that the deed is dated 8th April, 1889. It was said that the

effect of Sartaj Kuari"s case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 , though anterior in date was not realised in Madras till October of the

following year when alone, it became known by reason of the decision in Beresford v. Ramasubba ILR (1889) 13 Mad. 197. So it was contended

that it must be held that the parties acted on the view of the law as it was understood prior to the Sartaj Kuari's case (1888) L.R. 15 IndAp 51 :

ILR 10 All. 272 and effect should accordingly be given to it. There is authority for this proposition, it was urged in 8 CWN 186 (Privy Council) .

Whether there is any substance in this argument or not, I do not think it necessary on the view I have taken, to discuss this aspect of the matter, as

independently of it the claim of the respondents seems sufficiently well-founded.

95. The result of the case-law on the question of maintenance of junior member may now be summed up thus. Till the decision of the Sartaj

Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 , his right to maintenance by reason of his membership of the family, was open to no

doubt in spite of the family property being impartible. That case recognised in the holder for the first time a power of unrestrained disposal over the

estate in derogation of the rights of the other members of the family which were held not to exist, as there could be no right by birth where there is

no right to partition. The latter cases have not interfered with the power of absolute disposal recognised by this case, but on the contrary have

affirmed it. In so far as the question of succession is concerned, the Privy Council have clearly and unambiguously re-asserted the existence of a

real and not merely a visionary coparcenary in the members of the family. In regard to maintenance which is an ordinary incident of partible

property, there are no decisions which can now be treated as ruling the point. There have been two cases in which the question of maintenance

arose for decision, namely, the second Pittapur case (1918) 35 M.L.J. 392 : L.R. 45 IndAp 148 : ILR 41 Mad. 778 and Pro tap Chandra Deo's

case (1927) 53 M.L.J. 30 : L.R. 54 IndAp 289 : ILR 54 Cal. 955 . The first of these cases though a direct decision must now be regarded as

having proceeded on the entire absence of relationship between the parties and is not therefore to be regarded as authority in a case where a

relationship and membership is set up and found, the present being such a case. The observations in the second of the cases though clear in

themselves and may and ought to be treated as binding, have been counteracted and neutralized by the latest pronouncement of their Lordships in

the Collector of Gorakhpur's case (1934) 67 M.L.J. 274 : L.R. 61 IndAp 286 : ILR 56 All. 468 which has cleared the way for the application of

the rule in force before the advent of the doctrine propounded by the Sartaj Kuari's case (1888) L.R. 15 IndAp 51 : ILR 10 All. 272 and the

other cases including the Jaipur cases, which followed it, and which spelt the absence of co-ownership in the junior members of a family holding an

impartible estate, We are therefore bound to give effect to the principle of the latest decision of the Privy Council, and so doing, we must uphold

the respondents' claim.

96. For the reasons explained above, I am of opinion that the respondents are under the Hindu Law, entitled to maintenance from the impartible

estate in the hands of the appellant. On the other points that arise in the case, I have nothing to add to the judgment of my Lord the Chief Justice.

97. This appeal having been set down for being "'spoken to'" this day, the Court made the following

#### ORDER

98. By consent the monthly allowance will be payable on the 15th of the succeeding month.