Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Vadrevu Ranganayakamma v. *Vadrevu Bulli Ramaiya, from the High Court of Judicature at Madras; delivered 5th July* 1879.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from a decree of the High Court in a suit in which the Respondent was the Plaintiff, and which he instituted against the Appellant, for the recovery of the zemindary of Vegayanimapet in the district of Cocanada. It is not disputed that the zemindary, according to an ancient custom, was impartible, and that though it was part of the family property it had for many years prior to and including the time of Somappa, whom it will be convenient to call Somappa the first, been held and enjoyed by the eldest male member in the direct line. Somappa the first had five sons, Sundarappa, who may in like manner be called Sundarappa the first, Umapati, Jogiraju, Bhunasunkarudu, and Narasimulu. Sundarappa the first, the eldest son, died in the lifetime of his father, leaving a son, Somappa the second, who was at the time of his father's death about three months old. He came of age about the year 1826. Somappa the second died leaving a son, Sundarappa the second, who died without issue on the 18th December 1865, leaving a widow who was the Defendant in the suit. There can be no doubt that if the family had continued joint, and the zemindary had con-

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tinued to be part of the joint family estate, the widow could not have inherited from her husband; but it is contended that a partition took place, that the family became divided, and that the zemindary was allotted to Somappa the second as his separate share of the joint family property. If that were so, according to the decision in the case of *Periasami and others* v. *Periasami and others*, in the 5th Law Reports, Indian Appeals, p. 61, the estate upon the death of Sundarappa the second descended to the Defendant, his widow. It is said that the partition was effected by a sunnud or samakhia which was entered into on the 29th June 1809. It was at one time contended that this document was not a genuine document, but the Subordinate Judge found that it was genuine, and the High Court acted upon it as a genuine document. Their Lordships see no reason, after the finding of the two Courts that this was a genuine document, to distrust that finding or to hold that it was not genuine. It must therefore be treated as a genuine document executed by the four brothers of Sundarappa the first, who were the surviving sons of the first Somappa. It was not an arrangement which was then for the first time come to, but an arrangement which had been come to by them in conjunction with their father the first Somappa, who at that time constituted the head of the family. The object of the sunnud is thus recited in it: "In " order to prevent any dispute arising among " us in future in respect of our ancestral " acquisition, namely,"—then specifying the zemindary in question, and other joint property of the family, the sunnud proceeds, " our " father Somappa made certain arrangements " with us, four brothers, and Somappa the " elder brother's son. This we have thought it " proper to reduce to writing as follows. As the

" Vegayanimapet Mutta zemindari,"—that is, the zemindari in dispute, should be held by Somappa, son of the eldest Sundarappa, " Umapati "—that is, the second brother—" should take care of the " said zemindary until Somappa attains proper " age, and deliver the same to him on his attain- " ing his age of discretion. Besides, Somappa " should enjoy the inam lands in the village " of Rajavaram." It was contended that this arrangement was not that Somappa the second should take the zemindary as his separate share upon a partition, but that it was still to remain the joint family property, to be held and enjoyed according to the ancient custom. But it appears to their Lordships that it was the intention to effect a partition, and that Somappa the second should take the zemindary and the inam lands as his share of the joint family property, in accordance with the arrangement made with his grandfather, the first Somappa. Somappa the second was a child 15 months old at that time. The document then proceeds to specify certain other portions of the joint family property which were to be held and enjoyed by each of the four brothers respectively. It then proceeds: " Somappa and we four also should take in equal " shares the inam lands, gardens, &c., standing " in Umapati's name in the villages attached to " Vegayammapet Mutta." It was contended at one time that the object of this was that the sons should take certain portions of the joint family property, not as a separate estate upon partition, but in lieu of maintenance which would otherwise have been allowed by the member of the family who took the zemindary under the custom. But it is evident that that could not be so, because each of the four brothers was agreeing with the others that each should hold the estates allotted to them respectively. Besides, the last clause—" Somappa and we four should take in

equal shares the inam lands"—shows that the document was not providing for maintenance, for Somappa the second would not provide maintenance for himself by dividing the inam lands in equal shares with his uncles. That clause also tends to show that the document was intended to carry into effect a partition which had been made with the consent of the father. Then it goes on, "Until Somappa attains his proper age, "we all should jointly manage the affairs of "the said mutta." That is a little inconsistent with the previous clause, which says that, until Somappa should attain his age of discretion, Umapati should take care of, and manage the zemindary. The inconsistency does not seem to be very important, but the words undoubtedly are: "Until Somappa attains his "proper age, we all should jointly manage "the affairs of the said mutta, discharge the "debt of about Rupees 20,000, due up to date, "and perform Somappa's marriage and Upana-"yanam, and the auspicious ceremonies relating "to us four. After Somappa attains his proper "age, the Vegayammapet Mutta zemindari "and the inam lands allotted to him should be "delivered over to him, and each should confine "himself to the share allotted to him." Now it may be doubtful whether the words "allotted to him" refer to the inam lands only or also to the zemindary. There is nothing to show that they did not apply to the zemindary. The words are: "After Somappa attains his proper age, the "zemindary and the inam lands allotted to him "should be delivered over to him, and each should "confine himself to the share allotted to him," thereby treating the allotment to Somappa the second in the same manner as the other portions of the joint family estate had been allotted to the other four brothers respectively. Then having partitioned the lands, they next pro-

ceed to partition the jewels. That is inconsistent with the supposition that the document was intended merely to provide allotments in lieu of maintenance. The document proceeds thus: "Each should take to himself the jewels "and silver articles in his possession. Sunda-"rappa's jewels and silver articles, &c., as per "list prepared by Umapati on Wednesday the "29th June 1808, should be in Umapati's pos-"session until Somappa attains his proper age, "and should thereafter be delivered to Somappa," —the word "should" being used instead of "shall."

It was intended that when Somappa the second should attain his full age the zemindary was to be held by him. He was also to enjoy the inam lands which were allotted to him, and they were to be delivered over to him, together with the jewels which, according to the terms of the agreement, were to be his separate property. "The above terms should be acted up to. "Except under these stipulations, no claim what-"ever can be urged by one against another in "any manner. To this effect is this samakhia "sunnud (deed of arrangements) entered into "by us four of our own accord."

It is said that Somappa the second did not ratify this agreement, but the grandfather was the person who made the arrangement with his four surviving sons, and, in fact, it was ratified by Sundarappa the second who set it up, and claimed the benefit of it in the answer which he put in in a suit instituted against him by the widow of one of the members of the family for maintenance, and which will be afterwards referred to. Furthermore, if the document did not effect a partition, Somappa the second, the grandson, and Sundarappa the second, his son, were entitled to a share in the other portions of the joint family property. But they have never

had it. The other brothers and their descendants have retained the property which was allotted to them. The sunnud was executed by the four brothers, they have acted under it, and had the benefit of it. Sundarappa the second set it up in his defence in the suit as a document binding on all the parties. So far then as assent is concerned, their Lordships are of opinion that the document was assented to by Sundarappa the second, who was then representing his father's share in the estate which had descended to him after the death of his father.

The Subordinate Judge held that by means of this document a partition was effected of the joint estate, and that the zemindary fell to the share of Somappa the second. The High Court held, upon appeal, that the parties had no intention of relinquishing their rights in the zemindary, or to make it separate property. One of the issues raised in the suit was whether the family is divided. The Subordinate Judge entered into a very careful and minute consideration of all the evidence which had been adduced on that issue, and he also examined all the subsequent acts and conduct of the parties; having heard the witnesses of the Plaintiff, who were called to prove that the family continued joint and was never divided, he disbelieved them, and came to the conclusion that the family was a divided family. Unfortunately the High Court has expressed no opinion upon that point, nor did they allude to the several acts of the parties upon which the Subordinate Judge relied in support of his view that the family was divided, and that it was the intention of the parties to allot the zemindary to Somappa the second as his separate share of the joint family estate. No members of the family were called by the Plaintiff, but members of the family were called by the Defendant, and the learned Judge believed

them. According to the terms of the sunnud Umapati or the four brothers—it matters not which—were to manage the zemindary until Somappa should attain his full age. He did attain his full age in 1826. This must now be treated as a genuine document, and Umapati ought, when Somappa the second arrived at age, according to the terms of the agreement, to have handed him over the estate free from the debt of Rs. 20,000, which were to be discharged out of the profits of the estate during the minority. He ought also to have handed him over the jewels; but either he or the four brothers remained in possession during the whole of Somappa the second's minority, and when he arrived at age Umapati did not deliver over the estate. In 1833 Somappa the second was obliged to bring an action against Umapati to recover it. It is probable that Somappa the second at that time did not know of the sunnud. It is not likely that when Umapati was fraudulently keeping the estate which by the very terms of the deed he was to hand over to him, he would inform him of the sunnud, which showed that he was to hand over the estate to him on his attaining proper age. The probability is that Umapati, who was so dishonest as to retain this young man's estate after he came of age, did not show him or inform him of the deed. Somappa the second commenced his suit in 1833, and he then relied upon the family custom, by which the zemindary was to be held and enjoyed by the eldest male member of the family in the direct line of succession. He said, "My grandfather sent a "petition sealed and signed by him and "attested by witnesses, under date the 29th "September 1798, in which it is clearly stated "that, according to the custom obtaining from "generation to generation in our family, the

" eldest line inherits the zemindary, that the " other members of the family receive main- " tenance; that this was the case for the seven " generations past; that after his death his " eldest son and my father Sundarappa should, " according to the custom, succeed to the zemin- " dari." It is said that that is a strong argument against him with reference to the construction of the sunnud,—that he claimed not by virtue of the sunnud, but by virtue of succession, according to the custom. The suit was defended, and the Defendant in his answer stated, "The custom " of the family has been for the eldest surviving " son to succeed to the zemindary, and for the " other members of the family to receive an " allowance; that Defendant's grandfather had " six sons. The eldest was Veukata Jogi. He " died before his father; and the second son, " Somappa, Defendant's father, succeeded on " his father's death, and paid an allowance to " Veukata Jogi's son as long as he lived; that " Defendant, being the eldest surviving son at " the time of his father's death, he succeeded, and " his father executed a sunnud appointing Defen- " dant his successor, and fixed an allowance of " 70 pagodas a year to be paid to his other sons." So that he set up that according to the custom the estate had descended to him, knowing that he had executed the document in which he had admitted that the estate was to go to Somappa the second, and that he was to hold the estate for him during his minority, and hand it over to him upon his coming of age. After retaining the estate for five years and more after the young man had become of age, he set up the defence that it never was his, and that it descended to him Umapati himself. The Provincial Court of Appeal decided that the Plaintiff, Somappa the second, was entitled to the estate according to the family custom. The

decree was as follows : "The Acting First Judge, " on the above grounds, decrees that the Plaintiff " is the legal heir of his grandfather, that the " zemindari of Vegayammapet should be placed " in his possession when the attachment by the " Collector is removed;" and then he awarded to the Plaintiff damages Rs. 6,208, the net produce of the zemindari during the five years that Umapati had improperly retained it in his possession. Their Lordships are of opinion that the young man Somappa the second, at the time when he commenced the suit, had been kept by Umapati in ignorance of the sunnud which afterwards came to his knowledge; and there is nothing to show that he knew of the sunnud when he presented the petition of the 4th September 1845, at page 27 of the Record, in which he relied upon the family custom.

In 1864, Suramma, the widow of Mritianjayudu, a son of Bhimasankaradu, the third brother, sued Sundarappa the second for maintenance (page 63 of the Record), and the Defendant in the suit set up the sunnud as a defence (pages 30-31). In his answer he said: "During the minority of my father " Somappa, son of Sundarappa, who was the " eldest of the five sons of my great grand- " father Somappa, a samakhia sunnud or deed " of arrangement was entered into, and on the " strength thereof my zemindari passed to my " father for his share under the revised decree " passed in Suit No. 47 of 1834 on the file of the " late Provincial Court." This is the defence by which, as has already been observed, Sundarappa the second ratified the sunnud. He set up the sunnud, and stated—not quite accurately, certainly—that the father had recovered the zemindary on the strength of it. The father had not recovered the zemindary on the strength of it, although he had recovered the estate.

At page 63 of the Record there is the judgment of the District Munsif's Court, in which the District Munsif says: "It appears clearly from the "evidence for the Defendant and from the "samakhia (deed of arrangement) that the "Pasupalli Mokhassa and the lands in Sarpa-"varam, and other villages, came to the share "of the Plaintiff's father-in-law. As the "Plaintiff has failed *in toto* to prove the first "and third points, *i.e.*, as to division;"—(it means as to there having been no division of the estate)—"and as to the possession of property, "it is not necessary to record with reference to "them any reasons other than those given "above." That decision was afterwards upheld on appeal by the Court of the Principal Sudder Ameen, who held that the widow was not entitled to maintenance, upon, amongst other grounds, that her husband had admitted that the families were divided.

Another document relied upon by the Subordinate Judge was one which showed that Sundarappa the second had mortgaged the zemindary, from which the Judge inferred that he had treated it as his separate and distinct property, and not a portion of the joint property which he was holding separately by virtue of the custom. Their Lordships are of opinion that no great importance can be attached to the mortgage, because even if Sundarappa the second had held the estate by virtue of the family custom separately from the other co-members of the joint family, he would have been entitled to mortgage it during his life, although it would not have been binding upon the other members of the family after his death. Their Lordships, therefore, do not attach that importance to this document which the Subordinate Judge appears to have done.

The document No. 10 of the 4th February 1873 has next to be considered. It is a document by

which some of the brothers sold a portion of land to the widow; it is not important so far as the sale is concerned, except that it shows that they were treating themselves as separate and not as members of a joint family; but it is important as showing that in the document itself the Defendant is described as the Zemindarni of this zemindary. She is described as "the widow of the late Sundarappa, and Zemindarni" of the particular zemindary, and that document is attested by the Plantiff himself. It is not always that a witness to a document knows what the contents of the document are, or how the parties have been described, but it frequently occurs in native documents that a man signs as a witness to show that he is acknowledging the instrument to be correct; but whether this is so or not, it appears that she was described as the owner of the zemindary, and that the Plaintiff attested the document as a witness. No very great importance, however, can be attached to this document, because it appears that it was entered into on the 4th February 1873, after the date of the kararnama of the 11th June, from which it appears that the Plaintiff was about to commence his suit, and in which he agreed with other members of the family that if they would advance the money they were to have a share in the estate, if he recovered it. It is hardly likely that he would intend to admit this lady to be entitled to the zemindary, although as she was then in possession she might be described as the Zemindarni. On the other hand, their Lordships do not think that the kararnama of the 11th June 1870 is any evidence against the Defendant. It was executed by members of the family in the absence of the Defendant who was no party to it, and consequently anything that they might say in it

would not be evidence against her. But it does bear upon the case, in so far as it shows that the parties to it were dealing with each other, not as members of a joint family, but as persons entitled to separate estates.

Looking therefore to the terms of the sunnud itself, and to the subsequent conduct and acts of the parties, their Lordships have come to the conclusion that the Subordinate Judge was right in his construction of it, and that the document amounted to an agreement by which the joint family estate was divided among the several members of the joint family, and that the zemindary in dispute fell to the lot of Somappa the second as his separate property.

Another observation is to be made, viz., that after the death of the husband of the Defendant the widow was recognised by the Government as the owner of the zemindary. It was known that she took possession of the zemindary, and that she was recognized by the Government as the owner of it, and yet no suit was brought by the Plaintiff to recover possession until 1876, about 11 years after the death of Sundarappa the second, the husband of the Defendant, during the whole of which time the Defendant had been in the quiet and undisturbed possession of the zemindary. That delay, after the parties must have known that the widow was in possession, is very strong evidence in support of the construction which the Subordinate Judge put upon the sunnud, and as showing that the parties considered that by that document Somappa the second took the zemindary as a portion of his separate estate upon partition.

As the zemindary became the separate property of Somappa the second and descended to his son Sundarappa the second, it is clear that the widow was entitled to succeed upon the death of her husband. It therefore becomes wholly immaterial

to decide who would have been entitled to succeed under the custom if the estate had remained a part of the joint family property. Very learned arguments have been adduced on both sides upon that question, but their Lordships think it unnecessary to decide the point, and do not think it right to express any opinion now which might affect the interests of persons hereafter upon the death of the widow.

Under these circumstances their Lordships are of opinion that the judgment of the Subordinate Judge was correct, and that the High Court were in error in overruling that judgment. Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the Subordinate Court be affirmed, and that it be ordered that the Respondent do pay the costs incurred in the High Court. Further, their Lordships order that the Respondent do pay the costs of this Appeal.