Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. *The Court of Wards and Venkata Kumari Mahipati Surya Rao, from the High Court of Judicature at Madras; delivered 24th February* 1899.

Present:

THE LORD CHANCELLOR.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The suit in this Appeal was brought by the adopted son of the late Raja of Pittapur against the Court of Wards and the second Respondent, who is the minor son of the late Raja. The plaint stated that the second Respondent was not the son of the late Raja or of his wife; it also disputed his title to succeed under any wills left by the late Raja and alleged that a will said to have been made by him in favour of that Defendant as his natural born son contravened the contract made at adoption; that the will was void by law and custom; and that the properties dealt with by it were inalienable and could not pass by it. The plaint prayed for a declaration that the second Respondent was not the son of the late Raja and that the will was invalid. The Court of Wards in its answer denied that the Plaintiff had a cause of action

against it, and said that it was not liable to be sued. The second Respondent admitted the adoption, asserted that he was the begotten son of the late Raja, that the will was absolute and unconditional, that certain property left by the Raja was impartible descending to the begotten son alone, and that the Plaintiff as the adopted son was entitled only to one-fifth share of the self-acquired property. The suit was tried by the District Judge of Godaveri who made a decree which declared that the second Respondent was not the son of the late Raja and that the will in his favour was wholly ineffectual and invalid. The Defendants appealed to the High Court which reversed the decree of the District Court and dismissed the suit. The present Appeal is from that decision. The conclusions which the High Court came to in favour of the Appellant on the other questions in the appeal to it made it unnecessary for it to decide the issue whether the second Respondent was the son of the late Raja, and that question was not determined by the Court.

As to the contention that there was a contract which prevented the Raja from making a will which would defeat the rights vested in the Appellant by the adoption, their Lordships do not feel any difficulty. The agreement relied upon (Rec. p. 44) after stating that the Raja had adopted the Appellant and given him the name which he now has and constituted him heir to his Zemindari of Pittapur &c. and to all other properties moveable and immoveable says "I (the "Raja) agree in compliance with your request to "your retaining with my adopted son the thirty "servants you have been retaining and changing "them from time to time and to permit you or any "one of your family to see him whenever you or "they may come to see him." There is nothing about the Raja not exercising any power which he

might have by law of making a will. Saying he had constituted the Appellant heir to his property means only that he had given him the same right of inheritance as a natural son would have. Mr. Mayne's argument, if their Lordships rightly understood it, that there was an implied contract not to make a will the consideration for it being the giving of the son by the natural father is a novel one and without any authority to support it. If it were right an adopted son would be in a higher position than a natural son. A Hindu would be unable to adopt a son without depriving himself of any power which he might have by law of alienating his property or at least of disposing of it by a will.

Another contention for the Appellant was that the will could not have effect in favour of a person who was not the natural son of the Raja. On the 16th February 1889 he made two wills one in the Telugu language and the other in English. The difference between the translation in the record of the former and the English will is of no importance and the former may be used. Its terms are "Though it is not specially neces-
"sary according to Hindu law that (property)
"should be passed to the *Aurasa* son by means
"of a will I have written this will to declare my
"opinion to all people that I have according to
"Hindu law passed the property to my *Aurasa*
"son without (property) being disturbed. It is
"hereby settled that my entire property should
"go to my *Aurasa* son Kumara Mahipati Ven-
"kata Surya Rao and that cash (allowance)
"settled already to be paid to my adopted son
"Venkata Mahipati Surya Rama Krishna Rao the
"second son of the Raja Venkatagiri according
"to his desire should continue to be paid." On the 7th September 1889 the Raja made another will by which after saying it had been his intention to give all his moveable and immoveable property

to his *Aurasa* son (again naming him) he gave him his self-acquired properties and other immoveable property which he had got in pursuance of the will of his paternal aunt and also the whole of his moveable property. On the 17th March 1890 he made another will by which he confirmed the gifts to his *Aurasa* son and the allowance to the adopted son. As the District Court decided that the second Respondent was not the natural son of the Raja, and the High Court deemed it unnecessary to determine this issue, it must for the present purpose be assumed that he is not. Their Lordships are of opinion that there is a gift by the will to the second Respondent and that the false description which must at present be assumed does not vitiate it. The case of *Fanindra Deb Raikat* v. *Rajeswar Das* 12 I.A. 72 which was referred to in the argument for the Appellant is distinguishable. The words of the angikarpatra upon which the decision was given are stated at p. 89 and differ materially from the words in the Raja's will.

The third and really important question in the Appeal is whether the Raja had power to alienate the impartible estate. It is stated in the Case for the Appellant that for the purposes of this Appeal the Appellant admits that the property was not inalienable by virtue of any special family custom or tenure attaching to the Zemindari.

In *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* 15 I.A. 51, a suit was brought by the Respondent to set aside a deed of gift which the Raja Appellant had executed of 17 villages part of an ancestral impartible raj descendible to a single heir by the rule of primogeniture, in favour of his younger wife on the ground that, according to the provisions of Hindu law and the prescriptive and recognised usage, the Raja had no right under any circumstances except to enjoy the estate during his lifetime and use its

income leaving the whole estate at his death to his successor. The Respondent was the mother and guardian of the minor son of the Raja. The Courts below held that the estates of the raj though impartible were in the nature of joint family property, and were therefore, according to the law of the Mitakshara, inalienable except for necessary objects, that the evidence did not establish the customary right alleged by the Raja of alienating and consequently the alienation in question was void and must be set aside. Whether the alienation would be valid during the lifetime of the Raja does not appear to have been considered. It was held to be wholly void. The Defendant appealed to Her Majesty in Council. In the judgment given in the Appeal their Lordships after referring to the passages quoted by the Judges of the High Court in support of their view referred to other decisions of this Committee on the same subject and also to a case in 13 Bengal L. R. 445 where the Plaintiff alleged that the descent of the estate was governed by Mitakshara law, that the estate was impartible and descendible according to the law of primogeniture to the male heirs of the original grantee, and it was held that the estate was not on the case stated shown to be inalienable. They then held this to be the correct view and that where the Mitakshara law prevails and there is the custom of primogeniture the eldest son "does not become a co-sharer with his father "in the estate, the inalienability of the estate "depends upon custom which must be proved "or it may be in some cases upon the nature "of the tenure."

Mr. Mayne in his able argument for the Appellant that this decision should not be held to be binding in the Madras Presidency contended that there was a custom co-extensive with the province of Madras with regard to every

impartible zemindari, and that a long course of decisions in the Courts of that province, not resting on the Mitakshara law, had established a custom of inalienability. It is therefore necessary to examine these decisions.

The earliest reported case is a judgment of the Sudder Adawlut in the note 3 Knapp 29. The marginal note to it is "A grant made by a "zemindar in 1804 of part of his zemindary "which he held at that time under an eight "years' lease and which was afterwards con- "firmed to him upon the permanent settlement "is valid as against himself. *Semble* such a "grant would not be valid against his successors "or against Government." The judgment is founded on Section 8 of Regulation XXV. of 1802. It says "Section 8 provides for the "payment of the public assessment on all "separated portions of a zemindary by a grantee "if the transfer be regularly made and, if "otherwise by the grantor, and as a protection "to the heirs the validity of the transfer is made "to depend on its being conformable to the law "of the parties and the Regulations of the "Government;" and by Section 12 zemindars are declared absolutely incompetent without the previous consent of Government to make any appropriations intended for the purpose of effecting a permanent reduction of the permanent assessment on their zemindaries. It is then said by the Court "The clear and obvious "intent of the restriction in question as well as "of the corresponding legislative enactments "being to defeat improper alienations to the "prejudice of the rights of the Government or "of the successor to the estate it follows by a "common rule of construction that such aliena- "tions are voidable on the determination of the "interest of the person who makes them." This is right if it applies only to alienations, which are

not " conformable to the law of the parties or " the Regulations of the Government or not made " with its consent." If it goes beyond that it is in their Lordships' opinion erroneous and not justified by the sections referred to, the object of the Regulation being apparently to keep the assessment permanent. There is no rule of construction which authorises it. This judgment was given in 1822. The next was in 1849. It is in the Decisions of the Madras Sudder Adawlut in that year p. 51. It was in a special appeal from a decision of the Civil Judge of Nellore, heard by one Judge of the Sudder Court. The claim in the suit was for the recovery of an allowance under two grants originally made by the Defendant's grandfather and subsequently renewed by the succeeding inheritors. The Civil Judge had reversed the decision of the Munsiff in the Plaintiffs' favour and the Sudder Court confirmed his decision saying " In a somewhat similar " claim "—which appears from the note in the margin to be the case before noticed— " to the one under consideration in which the " same principle was involved the Court of " Sudder Udalut decided that as the obvious " intent of the laws in force was to defeat " improper alienations of land or the produce of " land to the prejudice of the rights of the " Government or of the successor to the estate " it follows by a common rule of construction " that such alienations are voidable on the " determination of the interest of the person " who makes them." There is a similar decision in the Sudder Reports Madras in 1861. In 1862 the question came before the High Court of Madras in a special appeal 1 Madras H.C.R. 141. The Court after considering Sections 8 and 12 decided it in the same way saying that this construction of the Regulations was supported

by the observations of the Court in the case No. 6 of 1821 (3 Knapp 29) in giving judgment on the point for decision in that case which was different from the present. There are two other cases in the same volume pp. 349 and 455 in which the decision was followed the whole appearing to rest upon the supposed rule of construction. The next case is in 2 Madras H.C.R. 128. In that it was held by the High Court of Madras that the *ratio decidendi* of all the cases down to the two latest clearly was that a zemindar under the permanent settlement had really an estate analogous to an estate tail as it originally stood upon the statute *de donis*. This was introducing into the law of the Madras Province what is said in *Tagore* v. *Tagore* (I. A. Sup. Vol. p. 74) to be " a novel mode of inheritance, inconsistent with " the Hindu law." In the next case (3 Madras H.C.R. 5) it was held (Holloway J. *dissentiente*) that where a zemindar alienated a part of the zemindary and the terms of Regulation XXV. of 1802 Section 8 were not complied with the alienation was invalid against his grandson. Mr. Justice Holloway said with reference to the decisions of Sadr Court that they professed to be based upon the decision of 1821 (1822 ?) and that the Court held the settlement to be in the zemindar for his life with remainder to his heirs and successors in perpetuity. "They held " the words heirs and successors as an English " property lawyer would say to be words of " purchase and not of limitation." The next case referred to by Mr. Mayne (4 Madras H.C.R. 463) was a case of self-acquired property, and has no application to the present. After this the doctrine of the estate tail seems to have been abandoned, for in the next case decided in 1867 (6 Madras H.C.R. 93) the High Court held that it was clearly the law that the usage of succession to zemindaries in the Presidency of

Madras by a single heir by primogenitureship did "not interfere with the general rules of "succession further than to vest the possession "and enjoyment of the corpus of the whole "estate in a single member of the family subject "to the legal incidents attached to it as the "heritage of an undivided family—that being all "that the purpose of the usage namely the preser- "vation of the estate as an impartible Raj renders "necessary. The unity of the family right to "the heritage is not dissevered any more than by "the succession of co-parceners to partible pro- "perty but the mode of its beneficial enjoyment "is different." This was taking a very different ground from what was taken in the previous cases. According to it, the holder of the zemindary has not a life estate in it, the zemindary although he is in sole possession of it being by a kind of legal fiction the property of the family and each member of it having a share in the property although he can do no act as proprietor. The next case is in 8 Madras H. C. R. 157, where a similar opinion is stated. It is said (p. 177) of the holder of an impartible estate descending to a single heir who was a member of an undivided family subject to the law of the Mitakshara, that the estate held by him although subject to the peculiar incidents of such an estate and possessed by him free from co-parcenary rights in others was not entirely at his disposal; that "he should be regarded as "possessing only the qualified powers of dis- "position of a member of a joint family with "such further powers or it may be with such "restrictions as spring from the peculiar "character of his ownership and that these "powers fall short of a right of absolute alienation "of the estate." It is to be noticed that here the estate is said to be possessed free from co-parcenary rights in others. This is not consistent with the view in the former case that the estate whilst in

the possession and enjoyment of one person, is still the property of the family in which each member of it has a share. There is a remarkable divergence of views in these judgments which their Lordships think deprives them of much authority. In the case of *Beresford* v. *Ramasubba* Ind. L. R., 13 Madras 197, the alienability of an impartible zemindary came again before the Madras High Court on appeal from the decision of a judge sitting on the original side. He had followed the decisions in 4 and 6 Madras H. C. R. and made a decree declaring a mining lease by the owner of an impartible zemindary void. The two Judges of the Appellate Division of the High Court held that they were bound by the decisions of this Committee in *Raja Udaya Aditya Deb* v. *Jedab Lal Aditya Deb* 8 I. A. 248, and *Sartaj Kuari* v. *Deoraj Kuari* 15 I. A. 51, and remanded the case to try whether by family custom the zemindary was inalienable for purposes other than those warranted by the Mitakshara law. This decision was in 1889. In the present case the High Court has said it is bound to act upon the doctrine laid down by the Judicial Committee and refers to the distinction made by the Judicial Committee between a matter of succession by inheritance and a question of alienability. It is not necessary now to dwell upon this as in the argument of this appeal an entirely new view of the question was taken. Mr. Mayne said that there was a custom co-extensive with the province of Madras with regard to every impartible zemindary, that a course of decisions had established a custom, a long series of decisions not resting upon the Mitakshara law. Their Lordships have felt a difficulty in appreciating this argument. It assumes that throughout the province of Madras the law laid down in those decisions which, until they were reversed by the higher authority were

the law of Madras, was obeyed. The supposed custom followed the law. Their Lordships were referred to 14 Moore I. A. 585 as showing what was a valid custom. There it is said in the judgment with reference to long established usages existing in particular districts and families in India that it is of the essence of special usages modifying the law of succession that they should be ancient and invariable. This custom now relied upon did not modify the law. It had no force independently of the law. There is no proof here of any custom or usage against alienation, which the Courts in India should recognise as having the force of law.

One more question remains. It was argued that the decision in *Sartaj Kuari* v. *Deoraj Kuari* did not extend to a will and a case in 8 Madras H. C. R. 6 was referred to. That was a case of an admitted co-parcenary between the maker of the will and his adopted son and the latter would take as the surviving co-parcener a title which was held to be a prior title to that by devise. It is not applicable here where co-parcenary between the Raja and the adopted son is not admitted but the contrary is held. In the present case according to the decision in *Sartaj Kuari* v. *Deoraj Kuari* the Appellant did not become a co-parcener with the Raja. If the Raja had power to alienate he might do it by will and the title by the will would have priority to the title by succesion. In the case in 17 I. A. 128 referred to by Mr. Branson it was a question of succession by an illegitimate son to the legitimate son of his father. There was no question of the power of alienation. The language used was intended to apply only to the succession to the estate. It is true that prior to 1889 there was a series of decisions in the Madras Courts beginning as far as appears in 1822 but the reasons given for them are not consistent. At first they were made to depend upon the construction of

Regulation XXV. of 1802, afterwards upon the rights of the members of an undivided family under the Mitakshara law. In 1889 the Madras High Court held itself to be bound by the decision of this Committee, and overruled those decisions. The contention for the Appellant now is that the decision of the High Court in 1889 should be overruled and it should be held that the decision in *Sartaj Kuari* v. *Deoraj Kuari* should not be held to be the law in the Province of Madras. In their Lordships' opinion this is not a case to which they should apply the doctrine that where there is a long course of decisions they ought not to be reversed and the law be thus altered. The argument for the Appellant has failed to convince them that the judgment appealed from ought not to be affirmed and they will humbly advise Her Majesty to affirm it and to dismiss the Appeal. The Appellant will pay the costs of the second Respondent the Court of Wards not asking for their costs.