Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Raja Yarlagadda Mallikarjuna Prasada Nayudu v. *Raja Yarlagadda Durga Prasada Nayudu and Raja Yarlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yarlagadda Venkata Ramalingamma* (*Two Appeals and Two Cross Appeals consolidated respectively*), *from the High Court of Judicature at Madras; delivered* 11*th July* 1900.

Present at the Hearing:

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD LINDLEY.

SIR RICHARD COUCH.

SIR HENRY DE VILLIERS.

[*Delivered by Sir Henry de Villiers.*]

These are Appeals and cross Appeals against a decision of the High Court of Madras which modified a decision of the District Court of Kistna. Two separate suits for maintenance had been brought in the lower Court against the Zamindar of Challapalli by his two younger brothers respectively but all the proceedings in the two cases were identical and the observations of their Lordships upon the one case will be equally applicable to the other.

The Appellant, the Defendant in the lower Court, is the eldest son of Ankinidhu, late Zamindar of Challapalli, who died on the 6th of April 1875 leaving three sons viz. the Defendant and the two Plaintiffs. Not long after their father's death quarrels arose between the brothers and in April 1880 one of the younger brothers brought an action for partition against the

present Appellant in the District Court of Kistna. That Court decided that the zamindary estate was impartible but awarded to the then Plaintiff one-third of certain property not forming part of the zamindary estate. That judgment was reversed by the High Court of Madras but, on appeal to Her Majesty in Council, the judgment of the High Court was reversed on the 1st May 1890 and that of the District Court was restored. In April 1891 the two younger brothers instituted the present suits for maintenance. The plaints claimed (1) maintenance at the rate of Rs. 2,000 per month (2) Rs. 5,31,938 for arrears of maintenance (3) Rs. 12,000 towards the marriage expenses of the Plaintiffs' children (4) the provision of suitable houses lands utensils and furniture for the Plaintiffs and (5) an order declaring that the arrears and future maintenance constitute a charge upon the Challipalli estate or such portion thereof as may seem proper to the Court. The District Court by its judgment decreed future maintenance at the rate of Rs. 750 per month and arrears of maintenance for twelve years at the rate of Rs. 500 per month, the whole to be a charge upon the zamindary estate. The District Judge found that the claim for maintenance was not affected by the decree in the partition suit and was not barred by limitation. In regard to the claim for arrears of maintenance, he held that although no demand had been made, maintenance had been practically withheld and could be recovered for a period of twelve years immediately preceding the institution of the suit. Against this judgment the Zamindar appealed while the Plaintiffs filed objections. The Judges of the High Court agreed with the lower Court upon all points except as to arrears of maintenance and as to the maintenance being a charge upon the whole of the zamindary estate. They held that the arrears were not claimable except a

certain sum actually received by the Plaintiffs under a previous order of the High Court and they reduced the amount of arrears from Rs. 56,000 to Rs. 23,000. As to the question whether the maintenance decreed should be a charge upon the whole of the zamindary they say: "We think that the Zamindar is justified "in objecting to the decree as framed by the "District Judge inasmuch as it fetters him "unnecessarily in the disposition of his property. "It is sufficient that the decree should make "the maintenance chargeable on certain "villages." The Defendant now appeals against the judgment of the High Court in so far as it allows any maintenance at all, while on the other hand the Plaintiffs respectively cross appeal against that part of the judgment which refuses further specific relief and reduces the amount of the arrears of maintenance.

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 whatever to the zamindary estate. As to the zamindary 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 (I. L. R. 10 All. 285). 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 recognise.

The only question upon which there has been any serious argument before their Lordships is whether the arrears of maintenance awarded by the lower Court ought to have been reduced by the High Court. The Plaintiffs no longer object to the arrears being limited to the period of twelve years but they claim that for that period at all events they should receive the amount awarded to them. Among their reasons for the view that arrears of maintenance are not claimable the learned Judges of the High Court state the following: "The District Judge has granted "arrears at the rate of Rs. 500 per mensem for "twelve years prior to the institution of the "suit. In this we think he was wrong. The "right to maintenance is primarily a right to "be maintained out of the current income of "the property in the enjoyment of the party "chargeable. The circumstance, however, that "a person entitled to maintenance has not in "fact been maintained by the person chargeable "does not necessarily give him a right of action "for arrears. On proof of failure to maintain, "without more, he cannot be said to become a "creditor of the person in default. It is "incumbent on him to prove that there has "been a wrongful withholding of the main-"tenance to which he is entitled." In support of these views the learned Judges refer to two cases reported in I. L. R. 3 Bom. 207 (*Jivi* v. *Ramji*) and I. L. R. 6 Madras Series 83 (*Sri Maniyam Mahalakshmamma* v. *Sri Maniyam Venkataratnamma*), but these cases by no means support the conclusions at which the High Court has arrived. The first of them, decided by the High Court of Bombay in 1879, was a case in which a Hindu widow sued her late husband's undivided brother for four years' arrears of maintenance. The High Court, reversing the judgment of the District Court,

held that the widow had a legal right, irrespective of demand and refusal, to maintenance and may recover arrears for any period not excluded by the law of limitation. The question raised in the second case, which was decided by the High Court of Madras in 1882, was whether a Hindu widow entitled to maintenance can have the payment thereof secured by a charge on part of the inheritance in the hands of the heir. The question was decided in the affirmative and the learned Judges in the course of their judgment made the following remarks p. 84: "It is argued "that the claim to pass maintenance ought to "have been disallowed, but we are unable to "assent to this view. . . . . Although no "previous express demand is necessary to sustain "a claim to past maintenance, and it is only "evidence of a wrongful withholding of "maintenance, which, as observed by the "Privy Council in I. L. R. 3 Bom. 421 is the "ground of liability--the Subordinate Judge "has also found in this case that demands were "made but not complied with since 1876." The case before this Board to which reference was made in the case last cited was decided in 1879. Three questions were raised before their Lordships, namely, whether the suit of the Plaintiff, a Hindu widow, for maintenance and arrears under a will is barred by limitation on the expiration of twelve years from the testator's death, whether she had disentitled herself to maintenance by living apart from the son, and whether the suit could be maintained notwithstanding that there had been no demand and refusal of the maintenance. Their Lordships answered the two first questions in the negative and as to the third question they made the following observations:—"It was said that no "action could be maintained because a demand "and refusal had not been proved. There is no

" evidence that a specific demand was made for " the maintenance, but the Subordinate Judge " has found, and the High Court have not dis- " agreed with him, that the maintenance was " refused; and taking all the circumstances of " this family into consideration, their Lordships " do not doubt that there was a withholding " of this maintenance by the son under circum- " stances which would amount to a refusal of " it." Among the circumstances thus taken into consideration was the antecedent litigation which showed the state of hostility between the members of the family and accounted for the withholding of the maintenance. The case is no authority for the proposition that in order to recover arrears of maintenance it is necessary to prove a demand for each year's maintenance as it became payable. On the contrary the fair deduction from this and other cases cited is that, while the learned Judges of the High Court were right in holding that non-payment of maintenance to a person entitled thereto does not necessarily give him a right of action for arrears, it constitutes *primâ facie* proof of wrongful withholding. It is only upon a full consideration of all the circumstances of each particular case that it is possible to decide whether such *primâ facie* proof has been rebutted. The only case which might appear to conflict with this view is that of *Matilal Prannath* v. *Bai Kashi* (I.L.R. 17 Bom. Ser. 45). In that case the learned Judges of the High Court of Bombay admitted that a withholding of maintenance might be proved otherwise than by a demand or refusal, and if they intended moreover to decide that non-payment of maintenance when due does not constitute *primâ facie* proof of such withholding, their Lordships are unable to agree with the decision. In the present case it is said that the claim for

maintenance is inconsistent with the claim for partition in the previous action, and in one sense this may be true, but it by no means follows that the right to arrears of maintenance was forfeited in consequence. It is not alleged that the Plaintiff did not act in perfectly good faith in instituting his suit for partition and the fact that there was considerable diversity of opinion in the different Courts which had successively to decide the case shows that the Plaintiff's claim for partition was not wholly baseless. So long as that action was pending the Plaintiff could not well claim maintenance except as a provisional means of support pending the appeal to Her Majesty in Council. The Defendant, on the other hand, if he had been willing to allow full maintenance in lieu of a partition, might have made an unconditional offer of a reasonable amount of maintenance or he might have set aside a certain sum for the purpose. It is true that, in an affidavit, he made a vague admission of his liability but he never went any further. It is reasonably clear from the proceedings in the present suit that he would not have been willing to provide maintenance at the rate of Rs. 750 per month, if that sum had been demanded in the previous suit instead of a decree for partition. One of the express grounds stated by him for his appeal in the present suit to the High Court was that "even granting that the Plaintiff is entitled to "maintenance the rate of maintenance awarded "to him is excessive." And among his grounds of appeal to Her Majesty in Council are the following: "(4) The High Court failed to notice "that it is for the Plaintiff to set up and prove "any custom entitling him to maintenance and "that he has not done so. (5) The High Court "erred in thinking that there was any admission "by the Defendant of his liability for main-"tenance. (10) The amount of maintenance

" awarded is excessive." After these objections, and in view of the strained relations between the brothers ever since their father's death, it is impossible to believe that the Defendant would have paid maintenance at the rate of Rs. 750 per month or at any other rate if it had been demanded from him in the first instance. He does not allege, in his defence, nor is there any evidence, that he was in any way prejudiced by the form of the previous action. It may well be that, if he had been misled into the belief that the claim for maintenance was abandoned and had in consequence not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present action. But, without some such ground of defence, it is impossible to hold that the younger brothers of the Defendant have forfeited an undoubted right merely because they were in the first instance advised to institute a wrong suit and did not claim their maintenance as it fell due. The District Court, therefore, properly held that the younger brothers were entitled to recover arrears for any period not excluded by the law of limitation.

The result is that, in the opinion of their Lordships, the Defendant's Appeals should be dismissed and the Plaintiffs' cross Appeals allowed to this extent that the judgment of the District Court for arrears be restored and the Defendant ordered to pay the Plaintiffs' costs of appeal to the High Court and their Lordships will humbly advise Her Majesty accordingly. The costs of these Appeals will also be paid by the Defendant, but the Registrar will be directed not to include in such costs any expenses occasioned by the printing of irrelevant or unnecessary matter in the bulky record presented to their Lordships.