held, on the aforesaid circumstances and other evidence; that Accused-10 was an active participant in the conspiracy. In our view, there is ample material to justify it. In the result Criminal Appeal No. 67 of 1959 is dismissed.

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Sardul Singh Caveeshar v. State of Maharashtra

Subba Rao J.

Cr. A. No. 82 of 1962 dismissed. Sentence modified.
Cr. A. No. 83 of 1962 dismissed. Sentence modified.
Cr. A. No. 136 of 1959 dismissed.
Cr. A. No. 172 of 1959 dismissed.
Cr. A. No. 67 of 1959 dismissed.

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March 19

MIRZA RAJA SHRI PUSHAVATHI VIZIARAM GAJAPATHI RAJ MANNE SULTAN BAHADUR & ORS.

v.

SHRI PUSHAVATHI VISWESWAR GAJAPATHI RAJ & ORS.

(P. B. GAJENDRAGADKAR, M. HIDAYATULLAH and J. C. SHAH JJ.)

Hindu Law—Joint family—Partition—Impartible estate—Incidents of—Rule of incorporation—If applicable both to immovable and movable property—Family custom of impartibility of movables—Alienation, power of holder—Statute abolishing estate, Buildings incorporated in impartible estate, if become partible—Madras Impartible Estates Acts, (Mad. II of 1902), (Mad. II of 1903) and (Mad. II of 1904)—Madras Estates (Abolition and conversion into Ryotwari) Act, 1948 (Mad. 26 of 1948), s. 18 (4).

The Vizianagram family was a joint Hindu family. It owned a very large estate which was impartible and devolved by primogeniture. At various times the holder of the estate

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acquired other properties, moveable as well as immovable, some of which were incorporated in the impartible estate. In 1948, the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 was enacted and the Vizianagram estate was taken over by the State. The holder of the estate filed a suit for partition of the joint family properties, claiming as impartible the estate as originally granted to the ancestors of the party together with certain immovable properties subsequently acquired and incorporated in the original estate and certain jewels described as regalia. The suit was contested, *inter alia*, on the grounds that the subsequently acquired immovable properties were not impartible, that the theory of incorportion could not apply to movables and that even if the buildings had been incorporated in the estate by virtue of s. 18 (4) of the Act they became partible.

Held that the immovable property subsequently acquired which had been incorporated in the estate originally granted was also impartible. An ancestral estate to which the holder has succeeded by the custom of primogeniture is part of the joint estate of the undivided Hindu family. Though the other rights enjoyed by member of a joint Hindu family are inconsistant in the case of an impartible estate the right of survivorship still exists. Unless the power is excluded by statute or custom, the holder of customary impartible estate, by a declaration of his intention, can incorporate with the estate his self-acquired immovable property and thereupon the said property accrues to the estate and is impressed with all its incidents including a custom of descent by primogeniture. In all such cases the crucial test is one of intention. A holder of an impartible estate can alienate the estate by gift *inter vivos*, or even by a will, though the family is undivided; the only limitation on this power could be by a family custom to the contrary or the conditions of the tenure which have the same effect. The Madras Impartible Estates Acts, 1902-1904 have expressly made impartible estates inalienable; this inalienability attaches not only to the estate as originally granted but also to the properties incorporated in it.

Shiba Prasad Singh v. *Rani Prayag Kumari Devi* (1932) L. R. 59 I. A. 331, *Rani Sartaj Kuari* v. *Deoraj Kuari* (1888) L. R. 15 I. A. 51, *Venkata Surya* v. *Court of Wards*, (1888) L.R. 26 I. A. 83—*Ram Rao* v. *Raja of Pittapur*, (1918) L. R. 45 I. A. 148 and *Collector of Madras* v. *Mootoo Ramalinga Sathupathy*, (1868) 12, Moo. I. A. 397, referred to.

The theory of incorporation does not apply to movable property. But if a family custom is proved that a ceartain

category of movable property is recognised by the family as impartible, that custom would be recognised. A family custom, like any other special custom should be ancient and invariable and must be proved by clear and unambiguous evidence. In the case of a family custom, instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory or to a community. In dealing with family customs, the consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them, their statements and their conduct would all be relevant. The evidence in the present case established that there was a family custom under which some of the ceremonial jewels were treated as forming part of the regalia which belonged to the holder of the estate.

Ramalakshmi Ammal v. *Sivanantha Perumal Sethurayar*, (1872) 14 Moo. I. A. 570 and *Abdul Hussein Khan* v. *Bibi Sona* (1917) L. R. 45 I. A. 10, referred to.

The buildings which had been incorporated in the impartible estate were not made partible by s. 18 (4) of the abolition Act. The buildings falling within s. 18 (4) were vested in "the person who owned them immediately before the vesting". The expression "the person who owned" refers only to the landholder and not to other persons. The fact that the word "landholder" was not used in s. 18 (4) made no difference.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 170—177 of 1961.

Appeals from the judgment and decree dated March 30, 1956 of the former Andhra Pradesh Court in O. S. A. Nos. 129 and 131 of 1954 and 3 and 34 of 1955.

G. S. Pathak, P. Ram Reddy, V. V. Raghavan, K. S. Reddy and *A. V. V. Nair*, for the appellant (in C. A. Nos. 170 and 171 of 1961) and respondent No. 1 (in C. A. Nos. 172 to 177 of 1961).

M. C. Setalvad, C. K. Daphtary, Solicitor-General of India, S. Mohan Kumragamangalam, G. Ramakrishna, S. Mohan, T. Suryanarayana

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Murthy and *T. V. R. Tatachari*, for the appellant (in C. As. Nos. 172 and 173 of 1961) and respondent No. 1 (in C. A. Nos. 170 and 171 of 1961) and respondent No. 2 (in C. As. Nos. 174 to 177 of 1961).

A. V. Viswanatha Sastri, *D. V. Sastri* and *R. Gopalakrishnan* for the appellants (in C. As. Nos. 174 and 175 of 1961) and respondents Nos. 3 and 4 (in C. As. Nos. 170 to 173 of 1961) and respondents Nos. 4 and 5 (in C. As. Nos. 170-177 of 1961).

C. B. Agarwala and *K. K. Jain*, for the appellant (in C. As. Nos. 176 and 177 of 1961) and respondent No. 4 (in C. As. Nos. 174-175 of 1961).

1963. March 19. The Judgment of the Court was delivered by

Gajendragadkar J.

GAJENDRAGADKAR J.—This group of eight appeals which has been brought to this Court with a certificate issued by the Andhra Pradesh High Court, arises out of a partition suit filed by the plaintiff Viziaram Gajapathi Raj II against his younger brother Viswcswar Gajapathi Raj, defendent No. 1, his mother Vidyavathi Devi, defendant No. 2, his uncle Sir Vijayanand Gajapathi Raj, defendant No. 3, and his grand-mother Lalitha Kumari Devi, defendant No. 4. The parties to this litigation are members of the Vizianagram family which owns a very large estate. This estate is impartible and devolves by primogeniture. The relevant genealogy of the family which is set out at the end of this judgment clearly brings out the relationship between the parties, and shows at a glance how the Vizianagram Estate was held by different holders from time to time. Narayana Gajapathi Raj may be regarded as the founder of the family. His son who succeeded to the estate on the death of his father in 1845 can claim to be the real maker of the fortunes of this family. He managed the estate from 1845 to 1879 and during the course of his management he bought

a large amount of property, movable and immovable including a large estate in and around Banaras. At his death he left behind him his only son Ananda Gajapathi Raj and his daughter Appala Kondayamba I. Appala Kondayamba I subsequently became the Maharani of Rewa. Ananda Gajapathi Raj died issueless on May 23, 1897. Before his death, he had executed a will bequeathing all his properties to his maternal uncle's son Chitti Babu. Later, on December 18, 1897, Ananda Gajapathi Raj's mother Alak Rajeswari I adopted Chitti Babu to her husband so that as a result of his adoption, Chitti Babu became the adoptive brother of Ananda Gajapathi Raj who had executed a will in his favour before his death. It appears that Chitti Babu had been brought up in the Vizianagram family and when Ananda Gajapathi Raj executed his will, it was anticipated that Chitti Babu would, in due course, be adopted by Alak Rajeswari I. Alak Rajeswari I died in 1901 after executing a will by which she gave a life estate in her properties to her daughter, the Maharani of Rewa, and the remainder to the Children of Chitti Babu. On October 28, 1912, Chitti Babu executed a Trust Deed in favour of a trustee for the benefit of his minor son Alak Narayana, subject to payment of maintenance to maintenance holders and payments due to his creditors. On December 14, 1912, the Maharani of Rewa died, but before her death, she had executed a will bequeathing all her properties to Chitti Babu for life and the remainder in equal shares to Alak Narayana and his younger brother Vijayananda Gajapathi Raj. During Chitti Babu's life-time the Impartible Estate Acts passed by the Madras Legislature in 1902, 1903 and 1904 came into force. Chitti Babu died on September, 11, 1922. On his death, Alak Narayana succeeded to the estate.

In 1935, the Vizianagram Estate and the other properties belonging to Alak Narayana went under

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the management of the Court of Wards and continued to be in such management till they were handed over to Alak Narayana's son Viziaram Gajapathi Raj, the present plaintiff, in 1946, Alak Narayana having died on October 25, 1937. During the time that the estate was being managed by the Court of Wards, Vijayananda Gajapathi Raj, defendant No. 3, made a claim before the Court of Wards for his half share in all the properties of Chitti Babu, except the impartible estate. The Court of Wards referred this claim to Sir D' Arcy Reilly, a retired Judge of the Madras High Court for enquiry. Sir D' Arcy accordingly held an enquiry and submitted his report to the Court of Wards. Thereafter the claim of defendant No. 3 was settled by compromise and on October 9, 1944, defendant No. 3 executed a deed of release in favour of the plaintiff and Visweswar Gajapathi Raj, defendant No. 1 who were then represented by the Court of Wards. Under the terms of this release deed, defendant No. 3 received a payment of a sum of Rs. 10,00,000/-and a further sum of Rs. 54,193/-and, in turn, relinquished all his claims to any share in the movable and immovable properties of Chitti Babu including properties which he had alleged were joint family properties. That is how the dispute between the plaintiff and defendant No. 2 on the one hand and their uncle, defendant No. 3 was amicably resolved.

In 1948, the Madras Legislature passed the Madras Estates (Abolition and Conversion into (Ryotwari) Act, 1948 Mad. 26 of 1948) (hereinafter called the Act), and pursuant to the material provisions of the said Act, a notification was published in August, 1949 by which the Vizianagram Estate was taken over by the State as from September 7, 1949. Since the taking over of the estate by the State was apprehended to lead to disputes between the parties, the plaintiff chose to file the present suit No. 495/1949 on the file of the High Court of Madras for partition

of the joint family properties. In this suit, he claimed that large number of immovable properties and a substantial number of jewels were impartible, whereas the other properties, both movable and immovable, were partible. The High Court of Madras passed a preliminary decree for partition in this suit on September 11, 1950. This preliminary decree declared that the plaintiff, defendant No. 1 and defendant No. 2 were each entitled to 1/3rd share in the partible properties of the joint family of which they were members along with the deceased Alak Narayana. As the law then stood, defendant No. 2 was not entitled to any share in the agricultural properties of the family, and so, in the said properties plaintiff and defendant No. 1 were held entitled to 1/2 share each.

After the preliminary decree was passed, parties put in lists of properties and made their respective claims in regard to them. It appeared that 106 items of immovable properties were in suit and about 581 jewels were also involved in the controversy. As we have already indicated, the plaintiff claimed that in addition to the properties originally granted by the Sanad to the ancestors of the parties, certain immovable properties which had been subsequently acquired had been incorporated in the original estate by the holder for the time being, and so, they, along with the original estate, must be held to be impartible; similarly, he alleged that out of 581 jewels, 141 were items which can be conveniently described as items of regalia which were not partible and as such, defendants 1 and 2 had no share in them. This claim was resisted by defendants 1 and 2 and that dispute naturally raised questions both of law and fact.

At this stage, defendant No. 4 also actively joined the dispute by filing an application (No. 4830/1950). By this application, she claimed that some of the items in the Toshakhana which

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had been included in the suit constituted her 'stridhan' and were, therefore, not available for partition between the plaintiff and defendants 1 and 2. According to defendant No. 4, the number of jewels to which she was thus entitled was 95. She filed a list of those ornaments; 76 of these which were shown in Appendix A were, according to her case, given to her by her husband, and 19 which were shown in Appendix B were given to her by her parents. Defendant No. 2 similarly set up a claim to 55 items of the jewellery as her 'stridhan', whereas the plaintiff wanted to exclude 140 items of the jewellery on the ground that they constituted the regalia of the Zamindar and were impartible.

On these pleadings, 15 issues were framed by the learned trial Judge before passing a final decree. In support of their respective contentions, the parties were content to rely mainly on documentary evidence; except for defendant No. 4, none of them has stepped into the witness box. Defendant No. 4 was, however, examined on commission and she gave oral evidence in support of her claim.

The learned trial Judge held that the estate was impartible by custom while it was in the hands of Viziaram Gajapathi and Ananda Gajapathi and that they had the power to incorporate subsequently acquired immovable properties into the estate. He found that when the estate became impartible under Act II of 1904, the provisions of the Act took within their purview all accretions to the estate made prior to 1897 which had been incorporated into the estate. The question as to whether any of the subsequently acquired properties had been incorporated in the estate was then tried by him as a question of fact and in doing so, he placed the onus to prove incorporation on the plaintiff. He also found that whatever was an integral part of the impartible zamindari of Vizianagram before the notified date within the

meaning of the Act, including lands and buildings which had been incorporated with the zamindari, would be governed by the provisions of the Act; the apportionment of lands would be governed by ss. 12 and 47 of the Act, whereas the buildings incorporated with the zamindari prior to the Act would vest in the plaintiff after the notified date and they would not be partible. In the result, the learned trial Judge recorded his findings on the several issues and passed a final decree. It is unnecessary to refer to all the details of the decree. It would be enough merely to state the broad items allotted to the parties which are in dispute before us. In regard to the claim made by the plaintiff that 140 jewels constituted regalia, the learned Judge recognised his claim in respect of 36 jewels only. Those jewels were items 1 to 19, 23, 24, 26, 27, 46, 56, 57, 79, 80, 108, 116, 124, 125, 126, 127 and 128 of Appendix A. Through oversight, the learned Judge had also included item No. 25 in this list, but it is conceded that that is an error. As to the plaintiff's claim that subsequently acquired properties had been incorporated in the estate, the learned Judge upheld his claim in respect of the Prince of Wales Market at Vizianagram, permanent lease-hold rights in respect of nine villages, and the Admirality House at Madras, Waltair House and Elk House at Ooty. Defendant No. 4's claim was partly recognised by the learned Judge who passed a decree in her favour in respect of 15 items of jewels claimed by her. These were items 20, 45, 49, 54, 186, 203, 230, 348, 349, two of the gold anklets in items 364, and 535 and items 136, 138, 141, and 297. The reference to the items is according to the list made by Mr. Sathianathan (Ext. P-157). It is conceded before us that this list included three items in Appendix B filed by defendant No. 4, and since defendant No. 4 had conceded the right of defendant No. 2 in respect of all the ornaments in appendix B, the inclusion of these three items was erroneous. In

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other words, defendant No, 4's claim should be treated as valid only in respect of 12 jewels under the decree passed by the trial Court.

This decree gave rise to four appeals by the respective parties. Plaintiff's appeal was No. 34/1955, defendant No. 1's 3/1955, defendant No. 2's No. 129/1954 and defendant No. 4's No. 131/1954. It appears that the last appeal was allowed to be withdrawn and instead, defendant No. 4 was permitted to file cross-objections in regard to her claim. These appeals were, in due course, transferred to the High Court of Andhra because as a result of the reorganisation of Andhra State, it is the High Court of Andhra Pradesh that assumed jurisdiction over the subject-matter of the dispute in these appeals. Before the High Court, parties argued the same questions of fact and law and pressed their respective claims. The High Court has held that the trial Court was right in coming to the conclusion that the Prince of Wales Market and the permanent lease-hold rights in respect of nine villages had been incorporated in the impartible estate. It has also held that the trial Court was right in rejecting the plaintiff's contention that the Bungalow at Ootacamund known, as 'Shoreham' as well as the Bungalow at Coonoor known as 'Highlands' had been incorporated in the estate and were impartible. The High Court, however, differed from the trial Court in respect of three Bungalows, Admirality House, Waltair House and Elk House, and it came to the conclusion that the plaintiff had failed to prove that these properties had been incorporated. That means that these three properties like the bungalow 'Shoreham' at Ootacamund and the Highlands at Coonoor were, according to the Appeal Court, partible between the plaintiff and defendants 1 & 2. In other words, the plaintiff lost in respect of the said three properties before the Appeal Court. In regard to jewels, the Appeal Court has taken the views that items 129 and 360, in

addition to the 36 items covered by the trial Court's decree, should be held to constitute the regalia of the zamindar. That means that the plaintiff's claim in that behalf succeeded to the extent of 38 jewels. In regard to the claim made by defendant No. 4, the Court of Appeal considered her evidence and was not inclined to accept her testimony at all. In the result, the decree passed by the trial Court in her favour has been set aside. Thus, the plaintiff and defendants 1 and 2 partly succeeded before the Court of Appeal whereas, defendant No. 4 wholly lost her case.

This decision of the Appeal Court has given rise to the present group of eight appeals. Civil Appeals Nos. 170 & 171/1961 are by the plaintiff, C. A. Nos. 172 & 173/1961 are by defendant No. 1, C. A. Nos. 174 & 175/1961 are by defendant No. 2 and C. A. Nos. 176 & 177 of 1961 are by defendant No. 4. In his appeals, the plaintiff contends that the Appeal Court should have recognised his claim to treat the five buildings which are situated outside the limits of Vizianagram Zamindari as impartible; these buildings are : the Admirality House, the Waltair House, the Elk House, the Little Shoreham and the Highlands. He also argued that the Appeal Court should have granted his claim in respect of 102 items of jewels which he alleged constituted regalia. In respect of this latter claim, Mr. Pathak for the plaintiff stated before us that he would confine his claim to 83 items of jewels and even as to that, he did not press his case. The plaintiff's case was therefore, substantially confined to these five house properties.

In their appeals, defendants 1 and 2 challenged the correctness of the decision of the Courts below that the Prince of Wales Market was impartible and that the permanant lease-hold rights in respect of nine villages were also not partible. They also contended that the Courts below were in error in holding

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that any jewels could be treated as regalia of the Zamindar and as such impartible. According to them, none of the 38 jewels should have been held to be impartible. Defendant No. 4 contends that the Court of Appeal was in error in reversing the decisions of the trial Court particularly when the conclusions recorded by the trial Court in her favour were based mainly on the appreciation of her oral evidence. That, in brief, is the nature of the dispute before us in this group of 8 appeals.

Before dealing with the dispute between the plaintiff and defendants 1 & 2, it may be convenient to deal with the claim of defendant No. 4. She is the widow of Chitti Babu and the grandmother of the plaintiff and defendant No. 1. Parties have agreed before us that her claim which was allowed by the trial Court should be decreed in her favour subject to the modification that the items in appendix B in respect of which defendant No. 4 made a concession in favour of defendant No. 2 should be excluded; in other words, her claim should be confined only to 12 of the items decreed by the trial Court in list A. This concession has been made unconditionally by the plaintiff and defendant No. 2 and conditionally by defendant No. 1. Mr. Kumaramangalam for defendant No. 1 stated that his client was agreeable to have the decree passed in favour of defendant No. 4 restored subject to the modification just indicated, only if defendant No. 4 allows him to take his 1/4th share in the jewels allotted to her by this compromise arrangement. This can be conveniently arranged, says Mr. Kumaramangalam, if defendant No. 4 gets the jewels allotted to her share valued by proper valuers and defendant No. 1 is then given an option to choose the jewels whose value would be 1/4th of the total of the jewels of defendant No. 4's share. If this 1/4th valuation cannot be worked out with mathematical accuracy, adjustment can be made by payment of

cash by one party to the other as may be found necessary. Mr. Aggarwal who has appeared for defendant No. 4 expressly agrees to this condition. Therefore, by consent, we set aside the order passed by the Court of Appeal and restore the trial Court's decree passed in favour of defendant No. 4, subject to the modifications and conditions just specified. This compromise arrangement disposes of defendant No. 4's appeals Nos. 176 & 177 of 1961.

We would now revert to the dispute between the plaintiff and defendants 1 & 2. In dealing with this dispute, it is necessary to consider some points of law which have been argued before us. The first point which must be examined is in regard to the character of an impartible estate such as that which the Vizianagram family owns. Since the decision of the Privy Council in *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi* (1), it must be taken to be well-settled that an estate which is impartible by custom cannot be said to be the separate or exclusive property of the holder of the estate. If the holder has got the estate as an ancestral estate and he has succeeded to it by primogeniture, it will be a part of the joint estate of the undivided Hindu family. In the illuminating judgment delivered by Sir Dinshah Mulla for the Board, the relevant previous decisions bearing on the subject have been carefully examined and the position of law clearly stated. In the case of an ordinary joint family property, the members of the family can claim four rights ; (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. It is obvious that from the very nature of the property which is impartible the first of these rights cannot exist. The second is also incompatible with the custom of impartibility as was laid down by the Privy Council in the case of *Rani Sartaj Kuari* v. *Deoraj Kuari* (2), and the *First Pittapur case—Venkata Suryā*

(1) (1932) 1 .R. 99 I.A. 331. (2) (1888) L.R. 15 I.A. 51 : 10 All. 272.

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v. *Court of Wards*(1). Even the right of maintenance as a matter of right is not applicable as laid down in the *Second Pittapur Case—Ram Rao* v. *Raja of Pittapur* (2). The 4th right *viz.*, the right of survivorship, however, still remains and it is by reference to this right that the property, though impartible, has, in the eyes of law, to be regarded as joint family property. The right of survivorship which can be claimed by the members of the undivided family which owns the impartible estate should not be confused with a mere *spes successionis*. Unlike *spes successionis*, the right of survivorship can be renounced or surrendered.

It also follows from the decision in *Shiba Prasad Singh's case* (3), that unless the power is excluded by statute or custom, the holder of customary impartible estate, by a declaration of his intention can incorporate with the estate self-acquired immovable property and thereupon, the property accrues to the estate and is impressed with all its incidents, including a custom of descent by primogeniture. It may be otherwise in the case of an estate granted by the Crown subject to descent by primogeniture. As Sir Dinshah Mulla has pointed out, questions of incorporation have been dealt with in several decisions of the Board as well as decisions of Indian High Courts, but the competency of incorporation was not challenged in any of them. It is clear that incorporation is a matter of intention and it is only where evidence has been adduced to show the intention of the acquirer to incorporate the property acquired by him with the impartible estate of which he is a holder that an inference can be drawn about such incorporation. In all such cases, the crucial test is one of intention. It would be noticed that the effect of incorporation in such cases is the reverse of the effect of blending self-acquired property with the joint family property. In the latter category of cases where a person

(1) (1889) L.R. 26 I.A. 83: 22 Mad. 383.
(2) (1918) L.R. 45 I.A. 148: 41 Mad. 778. (3) (1932) L.R. 59 I.A. 331.

acquires separate property and blends it with the property of the joint family of which he is a co-parcener, the separate property loses its character as a separate acquisition and merges in the joint family property, with the result that devolution in respect of that property is then governed by survivorship and not by succession. On the other hand, if the holder of an impartible estate acquires property and incorporates it with the impartible estate he makes it a part of the impartible estate with the result that the acquisition ceases to be partible and becomes impartible. In both cases, however, the essential test is one of intention and so, wherever intention is proved, either by conduct or otherwise, an inference as to blending or incorporation would be drawn.

It was urged before the Privy Council in the case of *Shiba Prasad Singh* (1), that to allow the operation of the doctrine of incorporation, would really give the holder of impartible estate a right to prescribe a customary rule of succession different from that of the ordinary law, but this argument was rejected on the ground that "under the Hindu system of law, clear proof of usage", even if it be a family usage, "will outweigh the written text of the law, vide *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (2). "The power to incorporate", observed Sir Dinshah Mulla, "being a power inherent in every Hindu owner applies as well to a customary impartible Raj unless it is excluded by statute or custom". It is, of course, true that none of the considerations which are relevant in respect of immovable property, would apply to movable property and so, the theory of incorporation cannot apply to such movable property. That, however, is not to say that by a family custom, movable property cannot be treated as impartible. If a family custom is proved in the manner in which family customs have to be proved that certain

(1) (1932) L.R. 59 I.A. 331. (2) (1868) 12 Moo. I.A. 397, 436.

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category of movable property is treated by the family as impartible, that custom will, no doubt, be recognised. That, broadly stated, is the position of Hindu law in respect of impartible property which has been clearly enunciated in the case of Shiba Prasad Singh.

There is another aspect of this matter to which reference may be made at this stage. Prior to the decision of the Privy Council in the case of *Rani Sartaj Kuari* v. *Deoraj Kuari* (1), it was always assumed that a holder of an ancestral impartible estate cannot transfer or mortgage the said estate beyond his own life-time so as to bind the coparceners, except, of course, for purposes beneficial to the family and not to himself alone. The reason for this view was that in a large number of cases impartible estates were granted on military tenure, and so, if alienations were freely allowed, the purpose of the grant itself would be frustrated if not destroyed. In 1888, however, this view was shaken by the decision of the Privy Council in *Rani Sataj Kuari's case* (1). In that case, the holder of the estate had gifted 17 of the villages of his estate to his junior wife and the validity of this gift was questioned by his son. The son's plea, however, failed because the Privy Council held that "if, as their Lordships are of opinion, the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, 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". This decision was again affirmed by the Privy Council in the First *Pittapur case* (2). As a result of these decisions it must be taken to be settled that a holder of an impartible estate can alienate the estate by gift *inter vivos*, or even by a will, though the family is undivided; the only limitation on this power would flow from a family custom to

(1) (1888) L.R. 15 I.A. 51: 10 All. 272.
(2) 1889 L.R. 26 I.A. 83, 22 Mad. 383.

the contrary or from the condition of the tenure which has the same effect.

Soon after these decisions were pronounced by the Privy Council, the Madras Legislature stepped in because those decisions very rudely disturbed the view held in Madras about the limitations on the powers of holders of impartible estates in the matter of making alienations of the said estates. That led to the passing of the Madras Impartible Estates Acts II/1902, II/1903 and II/1904. The Legislature took the precaution of making necessary enquiries in regard to impartible estates within the State and made what the legislature thought were necessary provisions in respect of the terms and conditions on which the said estates were held. It may be stated at this stage that the result of the relevant provisions of the Madras Acts is that the question of inalienability of impartible estates does not depend in Madras on the family custom, but is expressly provided for by the relevant provisions of the statutes.

We have already observed that the principle of incorporation does not apply to movables and we have noticed in that connection that it is only by proving a family custom that a class of movables belonging to a family may be treated as impartible. The law in regard to the proof of customs is not in doubt. As observed by the Privy Council in the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1), "it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unamibiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." In dealing with a

(1) 14 Moo. I.A. 570.

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family custom, the same principal will have to be applied, though, of course, in the case of a family custom, instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs, the consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them, their statements, and their conduct would all be relevant and it is only where the relevant evidence of such a character appears to the Court to be sufficient that a specific family custom pleaded in a particular case would be held to be proved, *vide Abdul Hussain Khan* v. *Bibi Sona Daro* (1). It is in the light of these principles that we must now proceed to examine the rival contentions urged before us in the present appeals.

On behalf of defendants 1 & 2 it has been argued before us that the effect of the provisions of Act II of 1904 is that the properties covered by the Sanad alone can be held to be impartible. The Sanad which has been produced on the record of this case (Ext. P. 77) and which was issued on October 21, 1803 shows that it confirmed the original grant of 1160 villages to the ancestor of the parties before us and the argument is that the properties acquired by the holders of the Zamindari estate from savings made by them cannot claim to be impartible. We have already seen the genesis of the Madras Act II of 1904. Section 2 (2) of this Act defines an 'impartible estate' as meaning an estate descendible to a single heir and subject to the other incidents of impartible estates in Southern India. Section 2 (3) defines a 'Proprietor of an impartible estate' as meaning the person entitled to possession thereof as single heir under the special custom of the family or locality in which the estate is situated or if there be no such family or local custom under the

(1) (1917) L. R. 45 I. A. 10.

general custom regulating the succession to impartible estates in Southern India. Section 3 is the principal section of this Act and it provides that the estates included in the Schedule shall be deemed to be impartible estates. Section 4 (1) imposes restrictions on alienations of impartible estates, and s. 4 (2) provides for permissible alienations. With the other provisions of this Act we are not concerned. The Schedule enumerates the zamindari estates district-wise. Mr. Setalvad contends that the very fact that the Vizianagram estate is specified under two districts wherein its properties are situated, shows that it is only the property which was granted by the Sanad that is intented to be covered by the Schedule and therefore, governed by section 3 of this Act. If the holders of the estates have made subsquent acquisitions, they cannot claim to be impartible, because they are outside the Vizianagram estate as described in the Schedule. We are not impressed by this argument. The fact that the Vizianagram estate is shown under two districts is obviously referable to the requirements of administrative convenience. There can be no doubt that as a result of the enquiries made in that behalf, the legislature was satisfied that certain estates in the State of Madras were impartible and the legislature was anxious to declare their impartibility and to prescribe restrictions on their alienations. This became necessary as a result of the Privy Council's decisions to which we have already referred. Therefore, it seems clear that the Vizianagram estate included in the Schedule to this Act must be deemed to include all the impartible property constituting the said estate. The principle of incorporation which has been recognised by the customary law has had its operation after the Sanad was granted and before the Act of 1904 was passed, and if by the operation of the said principle subsequently acquired properties had, in fact, been incorporated by the holder of the zamindari for the time being with the impartible estate, that would

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have formed an integral part of the estate and would be included in the Vizianagram estate as described in the Schedule to this Act. Whether or not any particular property not included in the sanad but subsequently acquired has been incorporated is a question of fact and it will have to be decided on its own merits. But it would not be right to contend that even if certain immovable properties had been incorporated before this Act was passed, they would not be included in the estate as described in the Schedule and would, therefore, be outside the purview of this Act. Therefore, the argument that the effect of Act II of 1904 is to prevent the plaintiff from making any claim that subsequently acquired properties have been incorporated, cannot be sustained.

The next question which has been strenuously urged by Mr. Setalvad is in regard to the buildings which have been found to have been incorporated with the imparible estate. Mr. Setalvad contends that as a result of the provisions of s. 18 (4) of the Act, defendants 1 & 2 are entitled to claim a share in the buildings to which the said provision applies. For deciding this question it is necessary to refer to some of the definitions prescribed by s. 2 and other relevant provisions of the Act. Before doing so, however, let us read s. 18. Section 18 (1) deals with buildings situated within the limits of an estate, which immediately before the notified date, belonged to any landholder thereof and was then being used by him as an office in connection with its administration and for no other purpose, and it provides that such buildings shall vest in the Government, free of all encumbrances, with effect on and from the notified date. Section 18(2) deals with buildings which belonged to any such landholder and the whole or principal part whereof was then in the occupation of any religious, educational or charitable institution, and it provides that they

shall also vest in the Government, free of all encumbrances from the same date, There is a proviso to this sub-section which it is unnecessary to consider. Section 18 (3) then deals with buildings which fell either under clause (i) or clause (ii) on July 1, 1947, but which had been sold or otherwise transferred or ceased to be used for the purposes specified in clauses (i) and (ii) between July 1, 1947 and the notified date, and it provides that in respect of such buildings, their value shall be assessed by the Tribunal in such manner as may be prescribed, and the Tribunal shall pay to the Government such value from out of the compensation deposited in its office under s. 41, sub-s. (1). It is common ground that the buildings in respect of which the present argument has been urged fall under s. 18(4). Section 18(4) reads as under :—

> "Every building other than a building referred to in sub-sections (1), (2) and (3) shall, with effect on and from the notified date, vest in the person who owned it immediately before that date; but the Government shall be entitled :
>
> (i) in every case, to levy the appropriate assessment thereon; and
>
> (ii) in the case of a building which vests in a person other than a landholder, also to the payments which such person was liable immediately before the notified date to make to any landholder in respect thereof, whether periodically or not and whether by way of rent or otherwise, in so far as such payments, may accrue due on or after the notified date."

Mr. Setalvad suggests that the buildings falling under s. 18 (4) vest in the person who owned them immediately before that date and that takes in the

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members of the plaintiff's family. He relies on the fact that according to the decision of the Privy Council in Shiba Prasad Singh's case, an impartible estate is joint family property devolution to which is governed by the rule of survivorship and that inevitably makes the members of the family owners of the said property in a theoretical sense. The right of the members of the family to succeed to the property is not *spes successionis*, and so, they can claim to be persons who owned the property along with the plaintiff immediately before the notified date. In support of this argument, Mr. Setalvad has naturally relied on the fact that whereas s. 18, sub-ss. (1) and (2) specifically refer to a landholder, s. 18(4) does not use the word 'landholder' but refers to the person who owned the property, and this departure is intended to cover a larger class of persons than the landholder. *Prima facie*, the argument does appear to be attractive; but when we examine the matter closely in the light of the definitions, it would be clear that the expression "the person who owned" refers only to the landholder and no other person. Section 2 (8) defines a landholder as including (i) a joint Hindu family, where the right to collect the rents of the whole or any portion of the estate vests in such family; and (ii) a darmila inamdar; and s. 2 (12) defines a 'principal landholder' as meaning the person who held the estate immediately before the notified date. Now, if we bear in mindt he definition of the word 'landholder', it would be noticed that the joint Hindu family consisting of the plaintiff and defendants 1 & 2 cannot claim the benefit of s. 18 (4). It is the landholder or the proprietor as defined under the earlier Act of 1904 that is contemplated by the expression "the person who owned" in sub-s. (4) of s. 18. Besides, if we take into account s. 18 (4) (ii) where it is provided that in the case of a building which vests in a person other than a landholder, it would follow that the person who is specified

in s, 18 (4) must be a landholder and no other. It is true that the legislature might well have used that word in s, 18 (4); but the change in the use of the relevant words in s, 18 (4) does not, in our opinion, justify the argument that a larger class of persons is intended to be included within the said clause.

There is also another aspect of this matter which points to the same conclusion. Section 43 of the Act provides for the apportionment of compensation in the case of certain impartible estates, and the class of persons who are entitled to claim apportionment is limited by s, 45 (2) (a) and (b). If the construction for which Mr, Setalvad contends is accepted, it will lead to this anomalous result that whereas the apportionment of compensation can be claimed by the narrower class of persons specified by s, 45, a much larger class of persons would be entitled to claim the benefit of s, 18 (4). That obviously could not have been the intention of the legislature. Therefore, we are satisfied that the Courts below were right in holding that defendants 1 and 2 cannot claim the benefit of s, 18 (4),

That takes us to the question as to whether the Appellate Court was right in its conclusions on the issues raised by the contentions of the respective parties in regard to incorporation of buildings in the impartible estate. In this connection, we will first deal with the pleas raised by defendants 1 & 2. Mr. Setalvad contends that the courts below were in error in holding that the Prince of Wales Market built at Vizianagram forms part of the impartible estate. This market was constructed by Vijayaram Gajapathi in 1876 on a site which admittedly belonged to the estate. It appears from the report submitted by Mr. Sathianathan that when Vijayaram Gajapathi returned from Banaras and assumed charge of the estate from the District Collector, he set out

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to improve the condition of the town. Accordingly, roads were laid, drinking water wells and tanks were constructed and hospitals, schools and colleges were opened. He recognised the need for a proper market, and so, in 1876 the formation of the market had been completed. The whole of the market was sub-divided into four compartments—the grain market, the timber market, the cattle market and the fish market. The Municipal Council approved of the opening of this new market and directed the removal of all the then existing markets to the Prince of Wales Market. Evidence shows that the management of the market was entrusted to the Municipality and was carried on under its supervision. In the courts below, reliance was placed by the plaintiff on several facts to show that this market had been incorporated into the impartible estate by Vijayaram Gajapathi. It was pointed out that the Municipality corresponded with the holders of the Zamindari at all stages that the income of the property was shown in the Ayan accounts, that the accounts maintained a distinction between Ayan accounts which referred to the estate and family accounts, that the market was treated as a unit of administration in the Zamindari for the purpose of management and for collection of fees, that Government also treated the property as that of the Samsthanam, that Mr. Sathianathan in his report also took the view that the property belonged to the Samsthanam, that the occasion for the building was to commemorate the visit of the Prince of Wales to India in 1875, that the object of the building was to provide a public amenity along with others for the town of Vizianagram, the headquarters of the estate; that during the time that the Court of Wards was in its management, it seemed to treat the property as forming part of the impartible estate, and, on the whole, the course of conduct shows that it was always treated as such. Mr. Setalvad has no doubt quarrelled with some of the reasons given by the Appellate Court in support

of its conclusion that the Prince of Wales Market had been incorporated in the impartible estate. It may be conceded that some of the reasons set out in the judgment of the Court of Appeal are inconclusive. But there are two considerations which have weighed in our minds in dealing with this aspect of the matter in the present appeals. The first consideration is that the question as to whether a particular immovable property has been incorporated with the impartible estate or not is ultimately a question of fact; no doubt, the decisive test being one of intention, and both the courts have concurred in holding that the Market must be held to have been incorporated with the impartible estate. Besides, there are two outstanding facts in respect of this Market which cannot be ignored. It has been built on a site admittedly belonging to the estate, and it has been built to afford a public amenity to the citizens of Vizianagram. It is not likely that in 1876 when this Market was built by Vijayaram Gajapathi he could have thought of the market as a profit yielding business; he must have thought of it as a project undertaken by him in his capacity as a zamindar responsible for the well-being of the citizens of Vizianagram and in that sense, at the very time that he thought of building the Market, he must have intended to treat that as part of the impartible estate. That, in substance, is the view taken by the courts below and we see no reason to interfere with it.

The other items of properties in respect of which Mr. Setalvad has challenged the conclusions of the courts below is in regard to permanent leasehold rights in respect of 9 villages. This is item No. 31 in issue No. 3 framed by the trial Court. The villages in question are : Thummapala, Annamrajupeta, Kottavalasa, Abmativalasa, Jammu, Duvvam, Chintapallipeta, Seripeta, Manesam Sudha and Sujjangivalasa. These villages are held under a permanent *Mustajari* lease by Mr. Venkata Reddi. Both

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the courts below have found that this Reddi was only a nominee of the Vizianagram Samsthanam and that the leasehold interest was an accretion to the estate. In our opinion, the conclusion of the courts below is obviously right because a bare recital of the relevant facts which terminated in the acquisition of the said leasehold rights by Mr. Reddi would speak for itself. These nine villages originally formed part of the properties granted to the family by the Sanad. It appears that some time before 1850 these villages were sold for arrears of *peishchush* and they were purchased by the Zamindar of Bobbili. Subsequently, the purchaser filed a suit for establishing his rights in respect of the said villages. Government intervened and brought about an ambicable settlement between the two Zamindars. This settlement (Ext. P-112) provided, *inter alia*, that the said villages should be given on a permanent *mustajari* lease to Mr. Venkata Reddi and that the Zamindar of Vizianagram should execute a guarantee letter in favour of the Agent in respect of the amount payable by the lessee. Pursuant to this term, the Raja of Vizianagram passed a letter to the Agent on January 10, 1857. The purchaser, Raja of Bobbili, also wrote a letter to the Agent agreeing to withdraw the suit, and so, the lease came to be excuted. Under the lease, the *bill mukta* was fixed at Rs. 22,568/- per annum. There is also other correspondence in respect of this transaction which shows that the Raja of Vizianagram treated the leasehold interest as his own and was very actively interested in the transaction. It was presumably thought derogatory to the dignity of the Raja of Vizianagram that he should take a lease from the Raja of Bobbili. The trust deed executed by Chittibabu in 1912 also shows that Chittibabu recognised that the lease-hold rights formed part of the impartible estate and the conduct of the trustee who took up management of the estate supports the same conclusion. A portion of two of the said villages was acquired by the Government

for the construction of a railway crossing between the village of Alamanda and the town of Vizianagram. The proceedings taken for the apportionment of compensation show clearly that the two rival claimants for compensation were the Raja of Bobbili and the Raja of Vizianagram, and that the dispute was settled on the basis that the lands had reverted to the Vizianagram Samsthanam subject to the annual charge of Rs. 22,568/-. It is common ground that all these villages are surrounded by the other estate villages and that the officials in their correspondence have always treated the leasehold rights as forming part of the estate. These facts clearly indicate that the courts below were right in accepting the plaintiff's case that the villages formed part of the impartible estate.

The next point which has been urged before us by Mr. Setalvad as well as Mr. Sastri on behalf of defendants 1 & 2 respectively is that the Court of Appeal was in error in holding that 38 jewels can be created as constituting regalia and as such, impartible between the plaintiff and defendants 1 & 2. It will be recalled that the trial Court had upheld the plaintiff's case in respect of 36 jewels, whereas the Court of Appeal has added two jewels to the said list; and defendants 1 & 2 seriously quarrel with the correctness of this conclusion.

In attacking the correctness of this finding, Mr. Setalvad has argued that it is inappropriate to speak of regalia in connection with the Vizianagram family, because it was not a ruling family, and there could be no occasion for coronation as such. He has also urged that even if there was some justification for installation while the zamindari estate was in existance, after the abolition of the zamindari estate as a result of the Act which was passed in 1948, there could be no occasion for any installation and the plea that certain jewels constituted regalia

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must, therefore, be rejected. It is true that the original Sanad (Ext. P-77) granted to the ancestors of the parties was in the nature of a grant for military service; but it is by no means clear that as zamindars, the family never exercised what may euphemistically be described as power and authority of a ruling family. In the first half of the 19th Century, the Saranjamdars and the Zamindars who received grants from ruling monarchs regarded themselves as petty chieftains or rulers and purported to exercise authority in that behalf over the villages granted to them. In fact, we have it in evidence that an installation ceremony was held in 1922 and it was stated at the Bar that it was also celebrated in 1947 after the plaintiff attained majority. Besides installation, there many be other ceremonial occasions on which jewels described as regalia may be worn by the holder of the Zamindari and his wife. The argument that the abolition of the Zamindari estate must automatically terminate the customary imparti-bility of the jewels which were treated as regalia by the family, overlooks the fact that many times custom outlives the condition of things which gave it birth. As was observed by Lord Atkinson in delivering the opinion of the Board in *Rai Kishore Singh* v. *Mst. Gahenabai* (1), "it is difficult to see why a family should not similarly agree expressly or impliedly to continue to observe a custom necessitated by the condition of things existing in primitive times after that condition had completely altered. Therefore, the principle embodied in the expression 'cessat ratio cessat lex' does not apply where the custom outlives the condition of things which gave it birth." That is why we think, the contention raised on the ground that there was no justification for regalia in early times at all and that if initially there was any justification, it ceased after the abolition of the Zamindari Estates, cannot be upheld.

(1) A.I. R. (1919) P. C. 100.

The main attack against the finding of the Court of Appeal, however, proceeds on the basis that Chittibabu took the whole of the estate as a devisee under the will executed by Ananda Gajapathi Raj and *not as an adopted son of Vijayaram Gajapathi Raj.* We have already noticed that Ananda Gajapathi had executed a will on July 23, 1896 bequeathing the whole of his property to Chittibabu and that Chittibabu was subsequently adopted on December 18, 1897. In other words, the will of Ananda Gajapathi spoke from May 23, 1897 when he died and the argument is that before Chittibabu was adopted by Alak Rajeswari, the property bequeathed by Ananda Gajapathi's will had already vested in him as a devisee legatee under the will. That being so, even if some of the jewels belonging to the Vizianagram family were, by family custom, treated as impartible, the said custom ceased to be operative and the property came in the hands of Chittibabu free from the burden of that custom. It has been emphasised before us that in both the courts below, parties have proceeded to a trial on this basis and it is urged that once the full significance of this important fact is realised, it would be noticed that the proof of custom attaching to the impartibility of the jewels would become very difficult. This aspect of the matter, it is urged, has not been considered by the courts below. It is also contended that Chittibabu was a minor until 1911 and even after he became a major the property seemed to be substantially under the control of the Maharani of Rewa who was a creditor of the estate to a very large extent. Reliance is placed on a statement made in one of the letters of Chittibabu that he had not seen the jewels of the family and it is suggested that the Court would need strong evidence in support of the plea that Chittibabu and those who followed him have by their conduct furnished such satisfactory evidence about the custom of impartibility as to justify the plaintiff's claim in respect of the 38 jewels.

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If at the time when Chittibabu got the estate under the will of Ananda Gajapathi the jewels could not be said to be impressed with any family custom of impartibility, it will be necessary to establish such custom subsequent to the acquisition of the property by Chittibabu and that, it is argued, has not been successfully done in the present case.

On the other hand, though, technically, it may be true that Chittibabu must be deemed to have got the property as a devisee under the will of Ananda Gajapathi we cannot ignore the fact that Chittibabu was brought up in the Vizianagram family and was adopted soon after Ananda Gajapathi died. It is remarkable that when Chittibabu had to face a challenge to his title in suit No. 18 of 1903, he resisted the challenge by setting up his own adoption in support of his title and when the said litigation ended in a compromise decree in appeal No. 114 of 1909 on March 12, 1913, the plaintiffs who had challenged Chittibabu's title fully admitted the validity and the binding character of his adoption by Maharani Alak Rajeswari to her husband. Therefore, it is perfectly clear that when Chittibabu came in possession of the property and had to establish his title to it, he relied more prominently on his adoption than upon the will executed in his favour by Ananda Gajapathi. When the circumstances under which the said will was executed and the adoption of Chittibabu which followed are taken into account, the attitude adopted by Chittibabu can be easily understood and appreciated. He was brought up by Alak Rajeswari from his childhood and even Ananda Gajapathi anticipated that he would be adopted by Alak Rajeswari since Ananda Gajapathi had lost his wife and had no son. The adoption deed executed by Alak Rajeswari clearly shows that Chittibabu was treated as the member of the family from the start. Therefore, after Chittibabu entered the family as the adopted

son, all the members of the family believed that the line continued without interruption and Chittibabu and Maharani of Rewa and all others looked upon the property as belonging to the Vizianagram family which was then held by the adopted member of the family. Even technically, the adoption of Chittibabu would relate back to the date of his adoptive father's death and in that sense a break in the continuity of the line would be avoided. But apart from this technical aspect of the matter, we must have regard to the attitude adopted by the parties and their course of conduct at the relevant time when we are dealing with the question of family custom. The argument urged by defendants 1 & 2 naturally assumes that prior to the death of Ananda Gajapathi there was a custom in the family which treated certain jewels as constituting the regalia of the Zamindar. If that is so, it would not be easy to accept the argument that by the death of Ananda Gajapathi, the past custom was cut as under and the arrival of Chittibabu on the scene as an adopted son made a vital difference to the continuance of the said custom. Chittibabu became a major in 1911, was married, had children, and the family grew in numbers thereafter and yet, throughout this period, as we will presently point out, the parties did not regard Chittibabu as a stranger who had arrived at the scene by virtue of the will executed in his favour by Ananda Gajapathi, but as an adopted son of Vijayaram Gajapathi who continued the line and held the property subject to all the traditions and customs of the family. It is true that in order to uphold the plaintiff's plea in respect of the 38 jewels, the Court will have to be satisfied that there is evidence in regard to the conduct of parties subsequent to Chittibabu's adoption, but if evidence has been adduced by the plaintiff in regard to the conduct of parties subsequent to 1897 and that evidence otherwise appears to be satisfactory and cogent, it would be no answer to the effectiveness of

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the said evidence to contend that Chittibabu got the estate as a devisee and not as an adopted son. In the matter of the proof of family custom, it is not the technicalities of the law that would prevail but the evidence of conduct which unambiguously proves that the parties wanted to continue the old custom, as though Chittibabu who had come into the family by adoption had, in substance, got the property as such adopted son. That is why we think the courts below were right in not attaching undue importance to the effect of the will executed by Anada Gajapathi in favour of Chittibabu.

Let us then consider whether the evidence adduced by the plaintiff is sufficient to prove the custom pleaded by him in regard to the 38 jewels. Some of this evidence is prior to 1897, but the most important piece of evidence is subsequent to 1897. The first document on which the plaintiff relies is the will of Ananda Gajapathi himself (Ext. P-6). In this will, Ananda Gajapathi bequeathed all his movable and immovable property to Chittibabu subject to the other liabilities mentioned in the will. In describing the properties the testator refers to the movable and immovable property of the Samsthanam as well as his personal property together with all rights, titles, privileges, honours and insignias of the family. It would be noticed that the properties of the Samsthanam which are impartible properties are described as both movable and immovable and that shows that the testator recognised the existence of a family custom which treated some movable properties as being impartible since they belonged to the Samsthanam.

The deed of adoption (Ext. P-7) executed in favour of Chittibabu recites the material facts leading to his adoption and refers to the authority conferred on the adoptive mother by her husband to make an adoption, if necessary, Alak Rajeswari

the adoptive mother, executed a will on January 15, 1898, (Ext. P-9). In this will, she bequeathed her properties to her daughter for her life and the remainder to Chittibabu whom she had brought up since his birth in her family and to whom her son Ananda Gajapathi had bequeathed all his properties. On December 14, 1911, the Maharani of Rewa executed a will (Ext. P-10). This document is very important from the plaintiff's point of view. By her will, the Maharani bequeathed all her properties to Chittibabu. Paragraphs 5 & 6 of this will are relevant. They read as under :

> "5. The Vizianagram Samsthanam owes me a sum of about 17 lakhs of rupees out of which 9 lakhs represent the amount of loans which I have made to the Samsthanam and 8 lakhs represent part of the legacy due to me under the will of my deceased brother which sum I have also lent to the Samsthanam. My own jewellery is considerable. It comprises jewels given to me by my father, mother, brother and by my husband as well as those purchased by myself. As regards the state jewellery in my possession such as Sarpesh Nakshatra Joth, Jayamala, Emeralds Bhjuaband, Diamond Bujuaband and emerald and pearl necklace in the central pendant on which is inscribed the name of my mother in several languages, it is part and parcel of the Samsthanam and impartible and inalienable property. The State jewels are Regalia and heirlooms of the family of Vizianagram passing along with and as part of the estate.
>
> 6. I hereby bequeath all my movable and immovable properties subject to the several legacies and directions herein

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contained, to Chittibabu Vizia Ramaraju, Rajah of Vizianagram for his life only on condition that he abides by the provisions of this will and that he does not alienate and keep intact all the State jewellery as well as the following jewels of mine. (1) Necklace of emeralds and diamonds (2) diamond and gold bangles used by me which I wish to be preserved along with state jewels."

These paragraphs show that the Maharani who was the creditor of the Samsthanam for such a large amount of 17 lakhs of rupees, was very much interested in good management of the properties of the Samsthanam and her relations with the Samsthanam and Chittibabu in particular were very cordial. Paragraph 5 shows that as a security for the loan which she had advanced to the Samsthanam, certain jewels had been kept with her. Out of these jewels, she described five jewels as constituting State Regalia; they are Sarpesh Nakshatra Joth, Jayamala, Emerald Bujuaband, Diamond Bujuaband and Emerald and Pearl necklace in the central pendant on which is inscribed the name of her mother in several languages. The first of these five has not been identified but the four others have been identified and these four have been described by the Maharani as forming part and parcel of the Samsthanam and impartible and inalienable property. It is true that by paragraph 6 she purports to impose an obligation on Chittibabu not to alienate the said items of State jewellery as also two jewels of her own which she had specified in the said paragraph. Now, it is clear that at the time when this will was executed by the Maharani of Rewa, there was no dispute pending in regard to the existence of any State jewellery; her relations with Chittibabu were good and the statement that certain jewels formed part of the State jewellery was not in her interest. In fact, she was

disposing of all the property in favour of Chitti Babu, and the statements made by her as to the existence of the State jewels can, without any difficulty, be taken to be the statements *bonafide* made by a person in her position who had ample means of knowing the family traditions and who was, besides, actually supervising the administration of the estate. Both the courts below have naturally relied upon this statement in support of their conclusion that even after Chitti Babu was adopted, the family tradition and custom of treating certain jewels as impartible was adopted and continued.

The deed of trust executed by Chittibabu on October 28, 1912, merely shows that he recognised the existence of two kinds of property, one belonging to the Zamindari which was impartible and the other which was partible. We will have occasion to refer to this document later in dealing with the points raised by the plaintiff in his appeals.

The next important evidence in support of the plaintiff's case is furnished by the conduct of defendant No. 3 when he made a claim for partition before the Court of Wards. In his statement of claims defendant No. 3 clearly admitted the existence of jewellery which was treated as State regalia. The effect of this admission cannot be under-estimated. Defendant No. 3 as the junior member of the generation was asking for his share and since the property in question is of a very large magnitude, it is not possible to assume that defendant No. 3 did not consult his lawyers before he made his claim and yet he expressly admitted the existence of certain jewels which, by the tradition of the family, were treated as State Regalia and, therefore, impartible. We have already seen that he was paid more than Rs. 10 lakhs in satisfaction of his full claims and thereafter he passed a deed of relinquishment in favour of the plaintiff and defendant No. 1.

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During the course of the management of the estate the Court of Wards made a survey of the Vizianagram estate jewellery in 1946 (Ext. P-160). In that behalf the Court of Wards issued instructions pointing out to the existence of the ceremonial jewellery and suggested that the said jewellery should be reduced to the minimum really necessary for ceremonies hereafter according to modern standards. During the course of this survey, defendant No. 2 contended that jewellery intended to be worn on various occasions by the ladies, men or boys of the family formed part of the impartible estate and descended to the holder of it. The survey report also shows that the ornaments which were clamied to be regalia and intended for ceremonial use were, in fact, kept together with the *kiritam* and its *pattam* which are admittedly ceremonial. Therefore, we are satisfied that, on the whole, the courts below were right in coming to the conclusion that both prior to 1897 and subsequent to 1897 when Chittibabu was adopted, the family has always and consistently treated some ceremonial jewels as forming part of the regalia which belonged to the holder of the Zamindari estate.

That naturally raises the question about the identity of these jewels, and the finding recorded by the Appeal Court in this matter rests principally on two documents. The first is the will executed by the Maharani of Rewa and the other is an entry in the list of jewels made by Mr. Fowler which has been signed by Mr. V. T. Krishnamachari and defendant No. 4. We have seen how the Maharani of Rewa referred to five jewels constituting the regalia of the Zamindari Estate. The list signed by Krishnamachari and defendant No. 4 shows that on the occasion of the installation ceremony of Alak Narayana Gajapathi which took place on September 29, 1922, ornaments described as 1 to 19 were taken out. The entry begins thus : "Taken out for the installation ceremony on the 29th September" and then

follows the list. Both the courts below have held that this list shows that the jewels and articles specified in the list were treated as regalia and were intended to be used on ceremonial occasions. That is why treating this list and the will of Maharani of Rewa as the safe basis, the Court of Appeal has come to the conclusion that 38 jewels claimed by the plaintiff must be held to be regalia and not subject to partition. It has been urged before us that it is not shown when the ornaments mentioned in the will of Maharani of Rewa or Krishanamachari's list were actually purchased and it is argued that unless it is shown that these ornaments were purchased long before 1911 or 1922, it would be difficult to impress upon them the character of impartibility. We do not think that this argument is well-founded. The family custom may well be that ornaments which are treated as essential for certain ceremonial occasions like the installation ceremony, or other auspicious ceremony in the family, would be impressed with the character of impartibility and in order that the custom should succeed, it is not always necessary that they must have been purchased long before and must have been used as such for a fairly long time. As the courts below have observed, the character of most of these ornaments is such that they would be needed on ceremonial occasions. Besides, it is not unlikely that these articles which were taken out on September 29, 1922, may have been kept separately together. It is also pointed out that some of the articles mentioned in the list, such as serial Nos. 7, 10 and 11, are now treated as belonging to defendant No. 2, and the same comment is made in respect of ornament No. 5 described in paragraph 5 of the will of Maharani of Rewa. It must, however, be remembered that though certain ornaments may have been treated as regalia and as such impartible, there was nothing to prevent the holder of the estate from making a gift of these ornaments to members of the family. If, for instance, one of the ornaments mentioned in paragraph 5 of

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Maharani's will was gifted to the daughter-in-law in the family, that will not necessarily disprove the recital in the will that the said ornament formed part of the regalia of the Zamindar. We are free to confess that the evidence about the identity of the jewels which can be safely taken to constitute regalia in the present case, does not appear to us to be as satisfactory as it should have been; but we are reluctant to interfere with the conclusion of the Court of Appeal, because in our opinion, the evidence fully establishes the existence of custom in the family even after Chitti Babu was adopted which treated certain ceremonial jewels as constituting regalia. Now, which items of these jewels and ornaments were treated as impartible by custom is a pure question of fact. In regard to 36 out of the 38 jewels, both the courts have held concurrently against defendants 1 & 2 and in favour of the plaintiff, and in respect of the two jewels which have been added to the list by the Court of Appeal, *viz.*, items 129 and 360, the Court of Appeal has proceeded on the basis that the recital in the will of Maharani of Rewa should not have been rejected by the trial Court because there was no corroboration to it. On the whole, we do not think that a case has been made out for our interference with the conclusion thus reached by the Court of Appeal.

The result is, the appeals preferred by defendants 1 and 2 fail and are dismissed.

That leaves the plaintiff's appeals to be considered and in these appeals, Mr. Pathak has confined his arguments to the 5 bungalows owned by the family which are outside the limits of the Vizianagram Zamindari. The trial Court has held that three out of these 5 bungalows had been incorporated into the impartible estate, whereas the Appeal Court has differed on that point. In regard to the two other bungalows, both the courts have found against the plaintiff. The Admirality House was

purchased in 1891 by Ananda Gajapathi for a sum of Rs. 20,000/-. Some other plots forming part of that property were purchased by him later. The bungalow at Waltair was purchased in 1861 by Vijayaram Gajapathi for Rs. 7,000/-, Elk House at Ootacamund was purchased in 1889 for a sum of Rs. 60,000/-, and Shorham at Ooty was purchased in 1892 for Rs.18,000/ whereas the Highlands at Coonoor was purchased in 1896 for Rs. 75,000/-. The Court of Appeal has held that in regard to all these bungalows, the evidence of conduct is wholly ambiguous and there is no circumstance of any significance from which the plaintiff's theory of incorporation can be legitimately inferred. These bungalows are no doubt built outside the Zamindari Estate and they are built in places of importance, such as headquarters of the estate or headquarters of the district or a hill station. It may be that the Zamindar used to reside in these bungalows according to his convenience but it is not suggested that the junior members of the family were not staying along with him and so, the course of conduct in regard to the use of these bungalows can hardly assist the plaintiff's case of incorporation. No doubt, the trial Court had held in favour of the plaintiff in respect of the Admirality House, the Waltair House and the Elk House, but as the Court of Appeal has pointed out, the said conclusion of the trial Court was based more on presumptions than on reliable evidence. In fact, the trial Court had observed that the desire that the Zamindar should own his residence at each of these three places is certainly intelligible, particularly if the problem is considered with reference to the views that should have prevailed among the Zamindars of that class towards the end of the 19th century; and it added that it should even be possible to co-relate the residence of the Zamindar with the use of the building for Zamindari purposes, a test which, if satisfied, would prove incorporation. While proceeding to deal with the question on this

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basis, the trial Court did not think it necessary to require that the plaintiff should have adduced some evidence to show that Zamindari business was transacted at any of these buildings and it concluded with the observation that there was nothing in the evidence on the record to indicate any contrary intention on the part of Ananda Gajapathi or even that of his successors, though the intention of the successors may not be so very material as evidence. It is clear that this approach adopted by the trial Judge of placing the onus partly on the defendants is clearly erroneous. We are, therefore, not inclined to interfere with the conclusion of the Court of Appeal in regard to the three bungalows in question. In regard to the two remaining bungalows, both the courts below have made concurrent findings against the plaintiff and we see no reason to allow the plaintiff to challenge that finding on evidence before us.

Realising this difficulty, Mr. Pathak based his argument mainly on the construction of the deed of trust executed by Chitti Babu. He urged that this document shows that Chitti Babu wanted to incorporate these buildings in the Zamindari estate. For the purpose of raising this contention, Mr. Pathak conveniently assumes that the properties dealt with by the deed of trust were the separate properties of Chittibabu since the said properties had devolved on him under the will of Ananda Gajapathi; otherwise if the properties in question were ancestral properties in the hands of Chittibabu it was realised by Mr. Pathak that Chitti Babu could not make any incorporation in respect of them. We have already noticed that in dealing with the question of the impartibility of 38 jewels, Mr. Pathak was constrained to contend that though, in law, the will of Ananda Gajapathi bequeathed all the properties of Chitti Babu, in fact Chitti Babu got them as an adopted son in the family and not as a devisee under

the will. We have already dealt with this aspect of the matter. We are referring to it again at this stage in order to emphasise the fact that the attitude adopted by the plaintiff in supporting his case of incorporation of the buildings into the impartible estate on the strength of the trust deed executed by Chitti Babu is not consistent with his attitude in regard to his case as to jewels. But apart from this aspect of the matter, it seems to us clear that the trust deed does not support the theory of incorporation on which Mr. Pathak relies. By this trust deed, the settlor appointed Mr. John Charles Hill Fowler as a trustee to manage the estate on behalf of his minor eldest son Alak Narayana Gajapathi. For the purpose of dealing with Mr. Pathak's argument, it is not necessary to refer to the scheme of the document; it would be enough if we mention the two clauses on which Mr. Pathak relies. In the preamble to the document, the settlor says that he is seized and possessed of or entitled to as for an estate of inheritance all that impartible estate and zamindari descendible to a single heir according to the law and custom of primogeniture applicable to similar estates in Southern India more particularly described in the First Schedule and commonly called the Vizianagram Zamindari or Samsthanam and also the various other properties situated in the presidencies specified. In other words, the preamble refers to the whole of the property consisting of the impartible estate and other properties, and that would take in the houses in question. Then the settlor provides that he is settling the properties in trust in the manner mentioned in the document for the benefit of his eldest son "so that he may have the same kind and nature of estate right and interest in the said Zamindari, its accretions and appurtenances and other properties hereby settled upon him as he would have if the same were now to devolve upon him from the settlor by right of inheritance according to the said law and custom of primogeniture subject, nevertheless, to the payment of

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maintenance and other allowances to the Raja and some other members of the family as hereinafter provided and for the purpose of providing for the payment of all the creditors of the said settlor as hereinafter mentioned." The argument is that by creating a trust in favour of his eldest minor son, the settlor has incorporated all the non-impartible immovable properties into the Zamindari subject to the liabilities specified by the document. Mr. Pathak also relies on the fact that there are certain items of property which are excluded from the operation of the deed, and they are specified in paragraph 2 of the document; and he contends that the buildings in question are not amongst the excepted properties. That is why the buildings must be deemed to have been incorporated by Chitti Babu with the impartible estate. We are not impressed by this argument. In considering the effect of this argument, it would be relevant to recall that about this time, Chitti Babu had to fight for his title which was challenged by four persons in suit No. 18 of 1903, and in that litigation Chitti Babu was asserting his title more as an adopted son than as a devisee under the will of Ananada Gajapathi. If that be so, Chitti Babu was claiming the properties as an adopted son and as such, properties which came into his hands as ancestral properties could not be incorporated by him with the impartible Zamindari estate. Besides, the very clause on which Mr. Pathak relies clearly shows what Chitti Babu intended to be the effect of this document. The document says that the properties have been settled on the trustee for the benefit of his minor eldest son in the same way as his son would have got the said properties if they had devolved upon him by survivorship and that means that Chitti Babu did not intend to confer on the son any larger estate than he would have got by survivorship if Chitti Babu had died at the relevant time and the estate had devolved upon his son by survivorship. There is no doubt that if the son had obtained the estate by

survivorship, he would have got impartible Zamindari estate as such and the other properties which had, till then, not been incorporated with the Zamindari estate would have retained their character as partible properties. The same result is intended to be achieved by the deed of trust. Therefore, we do not think that the argument based on the trust deed executed by Chitti Babu really supports the plaintiff's case that the buildings in question had been incorporated by Chitti Babu with the impartible Zamindari estate.

In the result, the plaintiff's appeals also fail and are dismissed.

Three petitions were filed in this Court, C.M.Ps. Nos. 740/1962, 741/1962 and 1821/1962 for adducing additional evidence. These applications are dismissed. We make no order on the C.M.P. No. 1822/1962 and we have partly allowed C.M.P. No. 2631/1962. By this petition, defendant No. 1 seeks to raise additional grounds to which reference must be made before we part with these appeals. Mr. Kumaramangalam has invited our attention to the fact that there are certain properties which still remain to be dealt with and there are certain inaccurate statements in the judgment under appeal which need to be corrected. In its judgment, the Appeal Court has observed that it is contended for the Rajkumar that Ex. P-132 cannot be deemed as containing a list of buildings owned by the Samsthanam, for it is pointed out that even the Vizianagram Fort and the connected buildings which admittedly belonged to the estate were not included therein. Mr. Kumaramangalam points out that the reference to the Vizianagram Fort as admittedly constituting a part of the estate is wrong. In fact, the question about the character of the Vizianagram Fort is pending before the learned Subordinate Judge, Vishakhapatnam in O.S. No. 120 of 1948. In that suit defendant No. 1 has specifically claimed that the Fort is not an impartible property but

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belongs to the joint family and, therefore, he has a 1/3rd share in it. It is conceded by Mr. Pathak that the reference to the Vizianagram Fort in the statement of the Appeal Court judgment is erroneous and should be treated as such, and the matter should be tried between the parties according to law in O.S. No. 120 of 1948.

The other point on which Mr. Kumaramangalam wants a clarification is in regard to the home farm lands. Both the courts below have left this matter to be decided by the appropriate Tribunal under sections 12 and 47 of the Act. Mr. Kumaramangalam suggests and rightly that we should make it clear that in leaving this issue to be tried under the relevant sections of the Act, the courts below have not decided as to which particular items of property are, or not, home farm lands. That question is at large between the parties and may have to be tried on the merits whenever it arises.

The third point on which it is necessary to make some correction is in respect of the statement contained in the judgment of the trial Court in regard to items under issue No. 4. This statement is that items 33 (b) and 98 were not identifiable at all. Mr. Kumaramangalam points out that it is not correct to say that item 33 (b) is not identifiable and in this connection, he has invited our attention to the fact that his client has in fact made a claim before the Receiver for this item which is Daba Gardens and Bungalow. This position also is conceded by Mr. Pathak. Mr. Kumaramangalam also wants us to make it clear that in regard to properties in suit in respect of which no finding has been specifically recorded by the courts below, it would be open to the parties to ask the Court to deal with them and consider the rival contentions of the parties in respect of them. This position is also not disputed.

In the circumstances of the case, we direct that parties should bear their own costs in this Court.

Narayana Gajapathi Raj (D. 1845)

Sir Vijayarama Gajapathi Raj I (D. 1879)
Alak Rajeswari (D. 1901)

- Sir Ananda Gajapathi Raj (D. 23-5-1897)
- Appala Kondayamba I Maharani of Rewa (D. 14-12-1912)
- Chittibabu Viziaram Raj (B. 27-8-1893, D. 11-9-1922) (adopted by Alak Rajeswari I 18-12-1897 Lalitha Kumari Devi (defendant No. 4)
  - Alak Narayana Gajapathi Raj (B. 1902, D. 25-10-1937) Vidyavathi Devi (deft. N.2)
    - Appalakonda-yamba II.
    - Viziaram Gajapathi Raj II (B.1.5.1924) (plaintiff)
    - Jaya Devi
    - Visweswara Gajapathi Raj (defendant No.1)
  - Sir Vijayananda Gajapathi Raj (B. 25.12. 1905) (defendant No. 3)
  - Alak Rajeswari II