Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sundaralingasawmi Kamaya Naik v. *Ramasawmi Kamaya Naik, from the High Court of Judicature at Madras : delivered* 11*th March* 1899.

Present :

LORD WATSON.
LORD HOBHOUSE.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The question in this Appeal is which of the two sons of Nagayasami Kamaya Naik deceased the proprietor of the zemindari or palayaput of Saptur in the taluk of Trumangalam, Madura district, an impartible estate descending to a single heir according to the custom of primogeniture is entitled to succeed to it on the death of their elder brother. The father died on or about the 14th October 1885 leaving three minor sons Nagayasami Kamaya Naik the deceased and the Respondent by his wife Muthuverammal and the Appellant by his wife Nagammal and a daughter. On the death of the father the estate descended to the eldest son Nagayasami and by reason of his minority the Court of Wards took charge of it under Regulation 5 of 1804. He died on the 21st December 1887 a minor and unmarried. The Appellant is the senior in age to the Respondent and as such claimed to be entitled to succeed to the zemindari. The Court of Wards on behalf of the Respondent asserted his title and assumed charge of the estate on his behalf and continued to manage it. The suit

6788. 125.—3/99. [19.]

was brought by the Appellant by his mother and guardian and was defended by the Respondent's guardian and the Court of Wards. One ground of the defence was that the Appellant's mother was not the wife of Nagayasami the father but his mistress and the other that if she was legally married to him the Appellant was not entitled to the zemindari in preference to the Respondent who is the son of the senior wife and the brother of the last owner. It was admitted at the trial in the First Court that the Appellant was the senior in age to the Respondent and that the Appellant's mother was married after the Respondent's mother. It has been found by both the Lower Courts that the Appellant's mother was legally married but that her status and rank was inferior to that of the Respondent's mother the latter being the daughter of a zemindar while the former was the daughter of an ordinary ryot. Upon this finding the First Court held that the Appellant could not be preferred to the Respondent but must give way to him. This was also held by the High Court on appeal. It was treated by both Courts as a question of law and was raised by the third of the settled issues. This question has not been argued before their Lordships and it is not necessary to decide it as the fourth issue was whether as alleged by the Defendant he is entitled by the custom prevailing in the Satpur zemindari and in other zemindaries held by zemindars of the same caste in Madura and neighbouring districts to succeed in preference to the Plaintiff by reason of his mother having been married prior to the Plaintiff's mother.

Upon this issue a large quantity of evidence was put in at the trial in the First Court and appears in the judgments to have been fully considered by that Court and by the High Court on the appeal to it. Both Courts have found for

the Respondent upon this issue. In the argument of this Appeal it was attempted to be shown that in this they were wrong in law and what was laid down by their Lordships in the case in 14 Moore I. A. 585–6 as to the proof which is required of such a custom was referred to. The judgment in that case is noticed by the High Court in its judgment and their Lordships see no reason to doubt that it has received the attention of both Courts. There is really in this case no pretence for saying that there has been any error in law, the concurrent findings must be held to be conclusive.

An objection was made by Mr. Mayne that some of the land in Schedule C appears in it not to be within the limits of the zemindary and the High Court has held that all the lands in that schedule "were merged in the estate "proper and are therefore not partible." This objection is apparently now taken for the first time and cannot be entertained. It should have been taken in the First Court when there might have been an enquiry as to what lands were within the limits of the zemindari.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and dismiss the Appeal. The Appellant will pay the costs.