APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1886. July 14, Oct. 16.

GANGAYYA AND OTHERS (PLAINTIFFS), APPELLANTS,

and

MAHÁLAKSHMI AND OTHERS (DEFENDANTS), RESPONDENT.*

Specific Relief Act, s. 42—Suit by reversioners of Hindú widow

The plaintiffs, uncle's sons of R, a deceased Hindú, brought a suit as reversioners of R, for a declaration that certain alienations made by M, the widow of R, were not binding beyond the lifetime of M.

The District Judge held on the strength of *Greeman Singh* v. *Wahari Lall Singh* (I.L.R., 8 Cal., 12) that the suit would not lie under s. 42 of the Specific Relief Act:

Held, that the suit would lie.

APPEAL from the decree of H. LeFanu, Acting District Judge of Kistna, confirming the decree of O. S. R. Kristnama, District Múnsif of Masulipatam, in suit 687 of 1883.

The facts necessary for the purpose of this report appear from the judgment.

The Acting Advocate-General (Mr. *Shephard*) for appellants.

Anandáchárlu for respondents.

The Court (Muttusámi Ayyar and Brandt, JJ.) delivered the following

JUDGMENT:—The appellants, Adusumilli Gangayya and two others, claiming to be entitled in reversion to certain property on the death of respondent No. 1 Mahálakshmi, the widow of one Pedda Ramana, whose uncle's sons the appellants allege themselves to be, sued for a declaration that certain alienations of the said property made by respondent No. 1 to Upalapati Seshayya and Sayana Subbanna, respondents Nos. 2 and 3, are void as against them except for the term of the widow's life. The respondents pleaded among other things that the suit is not maintainable, and the District Judge, on the authority of the case cited, *Greeman Singh* v. *Wahari Lall Singh*,(1) the reasoning of which, he says, he is unable to understand, allowed this objection.

* Second Appeal 968 of 1885.

(1) I.L.R., 8 Cal., 12.

He proceeded nevertheless to dispose of the appeal on the merits.

It is contended in appeal that the suit is maintainable, and it is urged that even if the decision quoted be correct, it may be distinguished from the persent case, inasmuch as here it is found as a fact that the appellants are the nearest, if not the only, reversioners, whereas in the Calcutta case there were contending reversioners.

We are unable to distinguish the cases on this ground. It is stated most distinctly in the case quoted that the suit was dismissed on the ground that the plaintiff was not entitled to a declaration, not because he was not a nearer reversioner than the defendants who also claimed to be reversioners, but that "a person who stands in the position of a presumptive heir upon the death of a Hindú widow is not entitled to maintain a suit for a declaration of his so-called reversionary right;" and this because "s. 42 of the Specific Relief Act refers only to existing and vested rights and not to contingent rights like those of a person who has only a chance of succeeding to the estate of a Hindú after the death of a female heir in possession."

We confess that we also are unable to follow the reasoning or to concur in the conclusion arrived at.

The language used in illustration (*d*) and (*e*) appended to s. 42 is referred to as supporting this conclusion. Illustration (*e*) appears to us to be conclusive that a suit like the present is maintainable. With illustration (*e*) before us, and reading the section itself apart from it, we entertain no doubt that the present suit is maintainable.

The alienation to respondent Nos. 3 was by way of sale, and the widow and her alienee pleaded that the sale was for purposes necessary and binding on the estate.

The case of respondent Nos. 2 is more complicated and altogether different.

He and the widow pleaded that Ramana brought the respondent No. 2, then a young boy, to his house 16 years before suit, promising the boy (or his parents) a share in his property during his (Ramana's) lifetime, and the whole of it after his death, according to the custom of the country, the boy to be married to the daughter of Ramana, and to help Ramana and to be a member of his family: they further said that the respondent No. 2

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"became (or was constituted) the heir of Ramana's property after his death."

It is admitted that Ramana's daughter died before she was married to respondent No. 2, and it is found by the District Múnsif that after she died Ramana selected another girl for him as wife, and, in accordance with his instructions, his widow had respondent No. 2 married to this girl.

The District Múnsif found that the respondent No. 2 was taken as an "illatam" son into Ramana's family, and that, as such, he is entitled to the whole estate of Ramana, being "constituted his son at a time when he had full power over his property" and that the appellants cannot call his right in question.

The District Judge called for findings on the following issues: (1) Does the custom of "illatam" prevail amongst Kammas in this district? If so, is it a valid and binding custom? (2) Can the relationship of affiliation, otherwise termed "illatam," be established in a Kamma family in this district in cases where the person said to be affiliated has not actually been married to a daughter of the family into which he claims to have been affiliated? If so, has defendant No. 2 been so affiliated? (3) Was there, subsequent to the death of the daughter of Ramana, any agreement that, in return of his taking part in the management of the estate, defendant No. 2 should receive a share, or be substituted as heir to Ramana? Supposing such agreement to be proved, is it valid and binding so as to avail to oust the claim of the reversioners?

He found that without doubt the respondent No. 2 is not an "illatam" son-in-law of Ramana, but in appeal the right of respondent No. 2 was put on the footing of a contract supported and evidenced by a nuncupative will made by Ramana on his death-bed, the consideration being Ramana's promise to give to respondent No. 2 his daughter in marriage and a share in his property; a promise after the daughter's death to affiliate him and to give him half his property in his lifetime and the whole after his death, which intention he instructed his wife to carry out after his death, and also that he directed his wife to marry the young man to a girl whom he had selected, or whom she should select.

In the event the District Judge considered that the respondent No. 2 is entitled to succeed on the ground of a contract, and a

direction by Ramana to his wife—which, he says, may be considered a nuncupative will—to make over the property to respondent No. 2, and as to the alienation to the respondent No. 3 he held that it is open to the respondent No. 2 to repudiate or to ratify it, but that the appellants are not in a position to challenge it.

It is urged in appeal that the respondents Nos. 1 and 2 set up a special custom whereby respondent No. 2 was affiliated to, or made a member of, Ramana's family, and that they referred to certain promises said to have been made by Ramana to give respondent No. 2 a share in this property, or his property, only in proof of the alleged affiliation; that the District Múnsif to whom issues were referred found the alleged custom not proved, and that respondent No. 2 had no right by inheritance; and that as the District Judge did not express dissent from those findings the plaintiffs' claim should have been allowed; that the theory of a nuncupative will was an after-thought on which the District Múnsif declined to express any opinion upon the ground that he was called on for a finding as to the alleged custom only, whereas the Judge disposed of the case on considerations not arising out of the case originally stated, viz., was there a contract? and was there a will? and it is argued that there is no evidence of a contract or of a will, but only an agreement which was invalid, the basis of the agreement on the part of Ramana, viz., the intention to marry respondent No. 2 to his daughter, having failed by reason of her death.

We cannot look upon the instructions given by Ramana shortly before he died as in the nature of a testamentary disposition of property, because he only conferred a power upon his wife to execute a contract which he had made, but had not performed during his lifetime. The instructions given may, however, be regarded as given in furtherance of, or to complete, the prior promise, viz., either the promise to give respondent No. 2 half of his property during his lifetime and the rest after his death in consideration of respondent No. 2 leaving his own family and living with and helping Ramana, coupled with a promise to give his daughter to him in marriage if she lived, or a subsequent promise to do the same, notwithstanding that his daughter had died.

And the questions we have to decide are—whether there was consideration for such promise, whether there was a contract

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which could be legally enforced, or whether the agreement was altogether invalidated by reason of the daughter's death?

There is evidence that respondent No. 2 was allowed by his family to leave them and go permanently to Ramana's house, taking money with him, and to do service with and for him, and this of itself would constitute consideration. The giving of the daughter of Ramana to respondent No. 2 was part and part only of the consideration moving from Ramana to respondent No. 2, and if the two parties resolved to adhere to their mutual agreement notwithstanding the death of the daughter, and if respondent No. 2 relying thereon continued to work with and for Ramana, we do not see why they should not do so, nor why the contract should be regarded as at an end or incapable of enforcement or performance by mutual consent, nor why it should not be regarded as a fresh contract modified in reference to altered circumstances and acted upon by both parties.

As to the contention that the promises were referred to only in proof of the alleged affiliation we have to observe that in substance they imply a contract, although such contract was not formally set out as one of the grounds on which relief was claimed; at all events the question was distinctly raised by the issues referred by the District Judge, and the appellant cannot be held to have been taken by surprise or in any way prejudiced.

The result is that the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

POTHI REDDI (DEFENDANT), APPELLANT,

and

VELAYUDASIVAN (PLAINTIFF), RESPONDENT.*

1886. Aug. 4. Nov. 5.

Evidence Act, s. 91—Suit for money lent—Unstamped promissory note—Cause of action.

The terms of a contract to repay a loan of money with interest, having been settled and the money paid, a promissory note specifying these terms was executed

* Second Appeal 149 of 1886.