APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1889.
Feb. 22.
August 9.

LAKSHMI (PLAINTIFF), APPELLANT,

v.

SUBRAMANYA (DEFENDANT), RESPONDENT.*

Hindu Law—Will of a Hindu in favor of his wife made on his taking a son in adoption—Adoption made on the understanding that the dispositions of the will be observed.

A Hindu, on taking a son in adoption, executed a "settlement as to what should "be done by my adopted son and my wife after my lifetime," providing that on an event, which happened, the wife should enjoy certain land for life in lieu of maintenance. In a suit by the widow of the executant against the adoptive son for possession of the land :

Held, that the instrument was a will.

On its appearing that the defendant's natural father, when he gave him in adoption, tacitly submitted to the arrangement contained in it.

Held, that the adoptive son was bound by its provisions.

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suit No. 490 of 1887, reversing the decree of T. Ganapati Ayyar, Subordinate Judge of Kombakónam, in original suit No. 28 of 1886.

Suit by a Hindu widow to recover from her husband's adoptive son, with mesne profits, certain land which her husband was alleged to have settled upon her under exhibit A. The Subordinate Judge passed a decree in favor of the plaintiff for the land, but disallowed her claim to mesne profits. The District Judge, on appeal, reversed the decree of the Subordinate Judge, holding that exhibit A was on its true construction a will, and that it was for that reason invalid as against the defendant under the rule in *Vitla Butten* v. *Yamenamma*(1).

Exhibit A began as follows:—"Vyavasta Patra Udambadikkai "(deed of settlement), executed on the 25th Kartigai of Rudro-"takary year, by me, Ramaien, son of Subbien, residing in "Veppathoor, as to what should be done in my family. As I this "day adopt ——, aged ——, son of Subbramaien, of the said "village, son of my divided junior uncle, for my spiritual benefit,

* Second Appeal No. 682 of 1888.

(1) 8 M.H.C.R., 6.

"because I have no issue, the following is the settlement as to "what should be done by my adopted son and my wife after my "lifetime;" and proceeded (after making certain dispositions immaterial for the purpose of this report) as follows:—"all the "remaining properties and the cash as per documents shall be "enjoyed by my wife alone until my adopted son, above said, "attains the proper age, and she shall protect the adopted son and "live jointly with (him). If, while so continuing to live, they "shall not agree to live jointly after the said adopted son shall "have attained the proper age, my wife shall enjoy with all "privileges for her maintenance, for her lifetime, the nanjai and "punjai lands appertaining to $\frac{1}{4}$ karai out of the $\frac{5}{8}$ karai in the "'Ulloor' [native village], and the cocoanut tope called the "Cavery Amman Koviladi on account of the Ulnatham and Pora-"natham attached thereto, half of the vessels then remaining and "with the profits, remaining after deducting the vari and erai "[assessment, &c.], in respect of the said $\frac{1}{4}$ karai, she shall maintain "herself for her lifetime, live in 'Thamanai thalvaram,' including "the 'Rali' [apartments of the house], on the northern side, in "the house on the $1\frac{1}{4}$ house-ground, on the western side, and are "the backyard."

The plaintiff preferred this appeal against the decree of the District Judge.

Subramanya Ayyar for appellant.

Ramachandra Rau Saheb and *Mahadeva Ayyar* for respondent.

The further facts of this case and arguments adduced on second appeal appear sufficiently for the purpose of this report from the judgments of the Court (Muttusami Ayyar and Shephard, JJ.).

MUTTUSAMI AYYAR, J.—The appellant is the widow of one Ramayyan and the respondent is his adopted son. On the 9th December 1863 Ramayyan executed exhibit A which provided *inter alia* that, in case the appellant and respondent did not agree to live together, the former should enjoy the land in dispute during her lifetime in lieu of maintenance. A disagreement arose between them after Ramayyan's death, and the appellant separated from the respondent and claimed to be placed in possession of the land. The respondent resisted the claim, alleging, among other things, that exhibit A was a will and that it was invalid as against ancestral property which devolved on him by right of

LAKSHMI v. SUBRAMANYA.

survivorship. The Subordinate Judge was of opinion that the instrument was a deed of settlement and decreed the claim. On appeal the District Judge held that it was a will and dismissed the appellant's suit. I agree with the Judge that exhibit A is upon its true construction a will. The disposition contained in it was clearly intended to take effect after Ramayyan's death and the contention that the document was styled a deed of settlement is immaterial. It is the substance of the transaction that ought to be taken as a guide. It is conceded that where a Hindu father disposes by will of ancestral property, the disposition is inoperative as against his son; but it is argued that when the disposition made is in the nature of a provision for the maintenance of the testator's widow, the will is valid. I am unable to adopt this view. The ground on which a will in regard to ancestral or joint family property was held to be invalid in the case of *Vitla Butten* v. *Yamenamma*(1), is that directly the testator dies the co-parcener's right of survivorship takes effect and that a testamentary disposition cannot be permitted to prevail against that right. In the absence of testamentary power the contention that that power was exercised for the purpose of making a provision for the support of the testator's wife could not in my opinion validate the will.

Another contention in appeal is that in the case before us it was known to all the parties concerned, when the respondent was given in adoption, that exhibit A was in existence and that the respondent was given and taken in adoption on the understanding that the disposition contained in it was to be accepted by him. The decision in *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*(2), lends support to the contention. In that case it was held that when the adopted son and the person who gave him in adoption were fully cognisant of the disposition of property made by the testator, and with the knowledge of such disposition the natural father consented to the adoption taking place and when the disposition and the adoption might under the circumstances be regarded as one transaction, the disposition though contained in a will could not be repudiated by the adopted son. The principle underlying the decision is that the disposition was one which it was competent to the testator to make prior to the

(1) 8 M.H.C.R., 6. (2) 6 Bom. H.C.R. 224.

adoption, and that its acceptance being presumably a condition subject to which the adoption was made, it made no difference that the disposition was testamentary. In the case before us the Subordinate Judge observes that exhibit A was made two days prior to the respondent's adoption, and that but for acquiescence in it the adoption might not have taken place. The Judge, however, has expressed no opinion on this point. The disposition impugned is nothing more than charging the appellant's maintenance on a specific portion of family property and creating for her a life estate in A and thereby preventing discord and litigation between the mother and the son by reason of their not agreeing to live together. Before disposing of this second appeal, I would ask the Judge to ascertain whether, when the respondent was given in adoption, the person who gave him in adoption was aware of the existence of exhibit A, and whether, but for his consent to it, Ramayyan would not have adopted the respondent. Both parties will be at liberty to adduce fresh evidence, if so advised, in regard to this issue. If the Judge should be of opinion that the respondent's parents consented, either expressly or tacitly, to the arrangement when the adoption took place, he will also return findings on the 7th and 8th issues.

SHEPHARD, J.—While I agree in thinking that there should be a finding on the proposed issue, I should like to add my reasons for holding that a finding on that issue may entitle the plaintiff to a decree in the suit. The question is whether the parties to an adoption, that is, the parents on the one side and on the other, can by contract between themselves, prescribe the terms on which the adopted child shall enter the family of the adopting parent, in such manner as to bind the adopted child, and further whether such a contract can be effectively carried out by a will executed by the adopting parent. As far as this Court is concerned there appears to be no distinct authority on the question, for in the case of *Lakshmana Rau* v. *Lakshmi Ammal*(1), the disposition made by the adopting widow was upheld on another ground and the judgment does not profess to decide the point now at issue. On the other hand in the Bombay reports there is distinct authority in favor of the plaintiff's contention and in one case the disposition impugned by the adopted son was, as it is in the present

(1) I.L.R., 4 Mad., 160.

LAKSHMI v. SUBRAMANYA.

case, made by will—*Vinayak Narayan Jog* v. *Govindrav Chintaman Jog*(1). In the present case the adoption was made not by a widow, as in the case of *Lakshmana Rau* v. *Lakshmi Ammal*(2), but by the plaintiff's husband who, before the adoption took place, was unquestionably at liberty to alienate his property as he pleased, subject only to the plaintiff's right of maintenance. If being thus full owner he might before the adoption have disposed of his property in part or in whole in favor of the plaintiff, I fail to see why he should not, when making the adoption, stipulate with the other party to the adoption that a certain part of his property should be set apart for the maintenance of his wife and to that extent taken out of the category of property in which his intended son should have the full right of a co-parcener. It seems to me a mistake to say that the infant adopted son on whose behalf the natural father consents to such a stipulation can only be bound by that consent on the principle on which he might be bound by other agreements made on his behalf, viz., on the principle that the agreement is made for a necessary purpose, *Lakshmana Rau* v. *Lakshmi Ammal*(2), for the supposition is that, but for the consent of the natural father, the adoption would never have taken place. To object to the agreement is therefore tantamount to objecting to the adoption. The adoption and the disposition of his property by the father being part of one transaction, the son never acquired any interest in the property disposed of and therefore no question can arise as to his guardian's competency to deal with it.

These considerations, if well founded, also dispose of the defendant's contention that, in view of the right of survivorship, Ramayyan's will must as against him be inoperative. The will was only a means by which the supposed contract was carried into effect. It was a term of that contract that certain property should be withdrawn from Ramayyan's estate and applied to a particular purpose, which should take effect after his death. To that extent the defendant never acquired co-parcenary right in his father's property and consequently there was no right of survivorship. The circumstance that the disposition was made by will makes no difference because the will must not be regarded by itself but as part of the contract, and before the adoption took place it was

(1) 6 Bom. H.C.R., 224. (2) I.L.R., 4 Mad., 160.

competent to Ramayyan to bind himself by contract to make the will which he did make. For these reasons I am of opinion that if it can be shown that the adoption was made on an understanding between the parties that the defendant should take his place in the family subject to the arrangement made by his adoptive father in favor of the plaintiff, the plaintiff ought to succeed in this suit.

[The District Judge recorded a finding in the affirmative on the issue framed by the High Court; and when the case came on for re-hearing and the Court passed a decree setting aside the decree of the District Judge and restoring that of the Subordinate Judge.]

APPELLATE CIVIL.

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

VALLABHA (DEFENDANT NO. 1), APPELLANT,

v.

MADUSUDANAN (PLAINTIFF), RESPONDENT.*

1889. March 1. April 29.

Defamation—Illegal declaration that one is out-casted—Observations on the use of books of history to prove local custom, and on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast.

According to the usage of certain Nambudris, a caste enquiry is held when a Nambudri woman is suspected of adultery, and if she is found guilty, she and her paramour are put out of caste.

An enquiry was held into the conduct of a certain woman so suspected; she confessed that the plaintiff had had illicit intercourse with her and thereupon they were both declared outcastes, the plaintiff not having been charged nor having had an opportunity to cross-examine the woman or to enter on his defence and otherwise to vindicate his character. In a suit for damages for defamation by the plaintiff against those who had declared him an outcaste:

Held, the declaration that the plaintiff was an outcaste was illegal, and it having been found that the defendants had not acted *bonâ fide* in making that declaration, the plaintiff was entitled to recover damages.

*Observations on (1) the use of books of history to prove local custom, and (2) on the position as heads of their caste of the representatives of the ancient sovereigns of the West Coast.

SECOND APPEAL against the decree of the District Judge of South Malabar, in appeal suit No. 613 of 1887, confirming the

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* Second Appeal No. 151 of 1888.