CHOCKALINGA PILLAI v. NATESA AYYAR.

the firm. In our opinion the plaintiff's suit was not properly framed and ought to have been dismissed.

If Visvanadha Ayyar and Iyavier were partners of a firm constituted in the ordinary way by contract, as appears to have been the case, for otherwise the second plaintiff would not have been said to have joined the firm on his father's death (see *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll*(1)), then it is clear that their representatives or at least the representative of the survivor must establish his character as such in the legal way by taking out letters of administration. In that case the Act clearly applies.

On the other hand, if it is said that the money was due to the family and that the plaintiffs as surviving members of the family were suing to recover it, they are met with the difficulties already mentioned.

We must reverse the decree and dismiss the suit directing the plaintiffs to pay the costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893.
April 25.
October 20.

SRI RAJA RAU VENKATA KUMARA MAHIPATI SURYA RAU (PLAINTIFF), APPELLANT,

v.

SRI RAJA RAU CHELLAYAMMI GARU (DEFENDANT), RESPONDENT.*

Grant of portion of impartible zamindari—Construction of instrument of grant—Absolute grant—Creation of separate estate in favour of grantee as between him and grantor—Restriction in instrument contravening Hindu law of succession.

In a suit for the recovery of possession of an estate, it appeared that the estate in question had formerly formed a portion of an impartible zamindari, but had been granted, in the year 1845, by the plaintiff's father to his younger brother, in whose name the estate was registered in the Collector's books as a separate estate. The instrument of grant provided (*inter alia*) that in case of failure of self-begotten male issue in the grantee's line, the immovable property of the grantee should be put in possession of the grantor's line. On the death of the first grantee, the

(1) I.L.R., 18 Calc., 86.

* Appeal No. 44 of 1892.

property passed into the possession of his two sons, and on the death of the elder son it came into the possession of the younger son. On his death, without male issue, the estate passed into the possession of his widow, defendant in the present suit. The plaintiff contended that the grant made to respondent's father-in-law was a maintenance grant; that under its terms the estate reverted to his father (now deceased) on the death of respondent's husband, when there was a failure of male heirs in his branch; and that, notwithstanding the grant, the members of the two branches did not cease to be co-parceners, and that consequently the right of survivorship of the plaintiff attached to the exclusion of the defendant:

Held, that, on the construction of the instrument of grant, the estate became, by virtue of that instrument, the separate and absolute property of respondent's branch of the family, and that the provision in that instrument purporting to create a special right of reversion in case of failure of male issue contravened the principle laid down in the Tagore case and was inoperative.

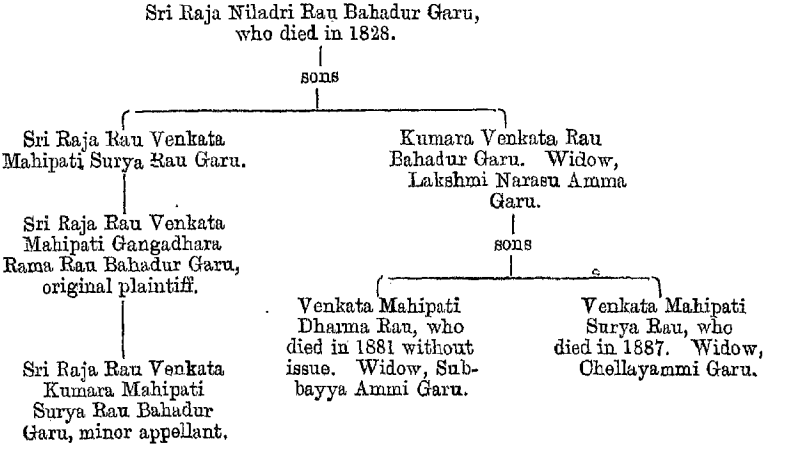
APPEAL against the decree of the Subordinate Judge's Court of Cocanada in original suit No. 27 of 1888.

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Bhashyam Ayyangar for appellant.

Subramanya Ayyar for respondent.

JUDGMENT.—This was a suit brought by the late Zamindar of Pithapuram to recover possession of an estate called the Kolanka estate. The plaint prayed also for a decree for *mesne* profits at the rate of Rs. 26,400 per annum for fasli 1297 and subsequent years till delivery of possession. The appellant is the present minor Zamindar of Pithapuram, and respondent is his paternal grandfather's brother's son's widow. The subjoined pedigree shows how the parties are related to each other and to the other members of their family :—



SRI RAJA RAU VENKATA KUMARA MAHIPATI SURYA RAU v. SRI RAJA RAU CHELLAYAMMI GARU.

The estate of Kolanka had, prior to 1845, formed part of the zamindari of Pithapuram which is impartible property belonging to appellant's family and descending in accordance with the rule of primogeniture. Exhibit I declares that it was the ancient custom of the family for the eldest male in the eldest line to manage the zamindari, and for the other members to receive from him a periodical money allowance on account of their maintenance. On the 26th April 1845, appellant's grandfather severed nine villages from the zamindari, constituted the group into a separate estate and granted it to his younger brother who was respondent's father-in-law.

Exhibit I is the instrument whereby the grant was made, and it is in these terms :—

"Kararnamah (agreement) executed on Saturday the 5th "Chaitra Bahula of Visvavasu, corresponding to 26th April 1845, "by (me) Sri Raja Rau Venkata Surya Rau Bahadur, Zamindar "of Pithapuram, &c., in favour of my younger brother, Raja "Kumara Venkata Rau.

"The conditions agreed to by us are as follow :—

"1. As from the days of the person who first acquired the said "zamindari, it has been the unbroken custom in our family for "the eldest to manage the raj in the eldest line, and for the rest "to receive maintenance in cash from the person exercising the "powers of the raj, and as the zamindari has been put in my "possession this year after I ceased to be a minor, and as it is "difficult for me to pay maintenance annually in cash as has been "done by our ancestors, and difficult for you, too, if I should fail to "pay it regularly, it appears convenient to me to give to you and "your descendants, on account of maintenance, the following nine "villages, viz., (i) Kolanka, (ii) Mungetooru, (iii) Veeraraghava-"puram, (iv) Raipuroo, (v) Chanduroo, (vi) Vunnapoody, (vii) "Kaddavaly, (viii) Gokivanda, (ix) Jagapatirajapooram, attached "to Gollaprolu Mutta acquired by our father and paying a cist of "Rs. 18,494 a year up to fasli 1254. You have also consented to "this. I will get registered and give you, on account of mainte-"nance, the said villages for hereditary enjoyment. From the "date of this kararnamah you should conduct all the affairs of "these villages for fasli 1255. The Collector of Rajahmundry "should collect from you from fasli 1255, according to kistbundi, "the permanent peshcush already fixed, until a permanent beriz

"is fixed by him for the sub-division and after wards the perma- "nent beriz which may be fixed for it and grant receipts in your "name. Henceforward, inayatnamahs relating to those villages "should be addressed to you. As I have written an arzi this day "to the Collector of Rajahmundry specifying the terms under "which you and your descendants should enjoy those villages for "maintenance, you must yourself manage hereafter the affairs of "those villages for the ensuing fasli 1255, and enjoy all the "profits hereditarily from son to grand-son, paying to the Govern- "ment the permanent beriz each year from the said fasli.

"2. Till the said nine villages given to you by me are formed "into a sub-division and a permanent beriz is fixed therefor, you "should yourself from this date manage all the affairs of the "villages, such as leasing them for fasli 1255, &c., and pay from "the said fasli every year the permanent beriz already fixed "without allowing it to fall in arrears. As I have been collecting "the rents for fasli 1254, I will continue to do so to the end of the "year and pay the peshcush due to Government up to the end of "this fasli paying the money due for all remaining instalments so "that there may be no arrears. It is also settled that I myself "should take the profit and loss for fasli 1254. You have nothing "to do with it. Therefore, we must pay the permanent beriz to "the Collector of Rajahmundry as stipulated above.

"3. If while [the peshcush] is being paid to the Collector as "stated above, the Government should take under its own manage- "ment the said villages dispossessing you of the same, owing to "arrears which may accrue since fasli 1255 by reason of adverse "season or for any other reason, you should be responsible for it. "I have nothing to do with it.

"4. As referred to in the first paragraph of this kararnamah, "I have sent a petition to have registered in your name the said "nine villages given to you by me. We both must, therefore, "submit to any amount that may be fixed as permanent beriz for "the said nine villages and not quarrel that it is high or low.

"5. If owing to your failure to pay and obtain receipts for the "permanent beriz which may be fixed as stated in paragraph 4 for "the nine villages which I have resolved to get registered in your "name on account of maintenance, according to the instalments, "or for any other reason, the said villages should be attached and

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"sold, neither you nor your heirs shall again claim from me or "my heirs maintenance or make any kind of demand.

"6. It is agreed that water should every year continue to flow "through the channels issuing from Yelaru to the nine villages "given to you by me and to the other villages in the manner in "which it used to flow for the past up to fasli 1254.

"7. If I should be in arrears of peshcush due to the Govern- "ment on account of the zamindari of Pithapuram or if there "should be outstandings due by me to people or litigation in "Courts, you have nothing whatever to do with them and the like. "Nor have I anything to do with the arrears due by you to "Government or with the outstanding due by you to people or "with any litigation in Courts and the like. As we have entered "into a settlement as indicated above, we will never have any "pecuniary claim against each other with reference to the above "conditions.

"8. Your assets and liabilities and your property, movable and "immovable, belong to you and to your heirs and my assets and "liabilities and my property, movable and immovable, belong to "me and my heirs. Neither of us need therefore be responsible "for the affairs of the other.

"9. In whatever manner you may hereafter acquire property, "movable and immovable, I will have nothing to do with it. "In whatever manner I may hereafter acquire property, movable "and immovable, you shall have nothing to do with it.

"10. As to the immovable property belonging to us both, "the said immovable property should in case of the failure of "'aurasa' (self-begotten) male issue in either of these two lines, "*i.e.*, either for yourself or in your line of 'aurasa' sons or in "my line of 'aurasa' sons be put in possession of the other line, "but it should not be alienated by making adoption and the like.

"11. We both having resolved to carry out the provisions of "this kararnamah, you have this day executed to me a karar- "namah with the above conditions and I too have executed this "kararnamah to you.

"This kararnamah has been executed of my own full accord."

Subsequent to the grant, the nine villages were registered in the Collector's books as a separate estate in the name of the grantee Kumara Venkata Rau. They were also charged with proportionate peshcush and became under Regulation I of 1819 an

independent permanently assessed estate. From the year 1845 to the year 1887, they had been in the possession, first of the grantee, Kumara Venkata Rau; next of his son Venkata Mahipati Dharma Rau and respondent's husband; and since the former's death in 1881, in the possession of respondent's husband alone till his death in 1887 when the villages passed into the possession of his widow, the respondent.

During this period, there occurred three events in the family which require to be noticed in this judgment. The first is another grant of three villages made in December 1869 by the original plaintiff for the maintenance of his own younger brother when the latter executed a document in favour of the former, similar in terms to exhibit I. The next event is the litigation in the family commencing with original suit No. 11 of 1879 on the file of the District Court of Godavari and ending with the judgment of the Privy Council, dated the 29th September 1886 (exhibits A, B, C, D, II, III and IV). Respondent's late husband brought that suit to set aside an adoption made by appellant's father, the late Zamindar of Pithapuram, on the ground that such adoption was contrary to the ancient custom of the family and to the agreement made in 1845, which it was alleged, precluded the Zamindar for the time being from excluding by adoption or the like, the next heir male from succession. Referring to the 10th article of the agreement, the Judicial Committee observed, "It is clear that the "father of Gangadhara could not bind his son, who was then in "existence, *not* to adopt or legally stipulate that if he should adopt, "the son so adopted should not inherit. The words are 'In case of "the failure of self-begotten male issue.' Mr. Mayne has been "forced to admit that those words meant an indefinite failure of "issue; and that an adopted son should not even take by descent "from his father. It appears to their Lordships that that would be "entirely altering the law of descent and contrary to the principle "laid down in the Tagore case." The third event is the will left by respondent's husband on the 6th January 1887 granting her authority to adopt and constituting her his successor until such authority was exercised. The testator died on the 22nd January 1887 and this suit was instituted on the 2nd July 1888.

The appellant's case is (I) that the grant made to respondent's father-in-law was a maintenance grant; (II) that under its terms the estate reverted to his father on the death of respondent's husband when there was a failure of male heirs in his branch;

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(III) that notwithstanding the grant, the members of the two branches did not cease to be co-parceners and by right of survivorship, the original plaintiff was entitled under Hindu law to take the Kolanka estate to the exclusion of a childless widow like the respondent. It is also contended for the appellant that on the question of subsisting co-parcenary between the two branches, the adjudication in the suit of 1879 and in the appeals which arose from it is conclusive.

On the other hand, it is urged for the respondent that by reason of the grant, the Kolanka estate became the separate property of her branch of the family; that article 10 of the agreement I is inoperative and does not support appellant's claim; that the two branches were since then divided in interest; and that the decisions in the suit of 1879 had reference to the zamindari of Pithapuram. The Subordinate Judge upheld respondent's contention and dismissed the suit with costs; hence this appeal.

It is urged on behalf of the appellant that the Subordinate Judge is in error in holding that the Kolanka estate was the separate property of Kumara Venkata Rau's branch and that the grant made to him in 1845 was not a mere maintenance grant. We do not consider this contention to be tenable. Our decision must depend on the legal effect of exhibit I as to the nature and extent of the estate which was thereby intended to be granted. The object with which the grant was made was certainly a desire to assign land in lieu of money allowance which was previously paid for maintenance, but that object might legally be effectuated either by an absolute grant in full satisfaction of the claim to maintenance or by an annual grant of the income for one or more lives. The question, therefore, is one of construction as to the intention of the parties to the agreement I. What was actually given under that instrument was a group of villages and the intention was to transfer the property therein to the grantee and not merely its income. The villages are described as 'given'; they were further constituted into a separate mitta; and the mitta was registered in the name of Kumara Venkata Rau as proprietor. Possession was also transferred to him at once and his right of independent management and his right to the whole of the profit was recognised. Moreover, the grant was declared to be hereditary from son to grandson or to be 'Putra poutra paramparyam' which are words of inheritance and mean the grantee and his heirs.

Again, there are several provisions which make the Kolanka estate independent of the zamindari of Pithapuram and the one is severed from the other as completely as it can be severed by partition. The words in article 5 'to you and your heirs,' and 'me and my heirs' show that the agreement was intended to be in force between the future representatives of the two branches as well as between the parties themselves. Exhibit I is manifestly not a grant either for one life or a specific number of lives, but it is a permanent grant made for hereditary enjoyment. In this connection appellant's pleader argues that the grant was made for a *specific* number of lives, but the grant suggests no determinate number of lives. Again, he draws our attention to article 10 of the agreement and urges that it was a grant to Kumara Venkata Rau and to the heirs male of his branch. But that article which relates to the immovable property owned by the appellant's grandfather and by the grantee purports to create a special right of reversion in respect of such property for each branch, in case there was failure of male issue in the other and forbids its alienation by adoption and the like. It was held to be inoperative in the previous suit by their Lordships of the Privy Council so far as it prohibits adoption, and in our judgment it is equally inoperative so far as it excludes female heirs from succession. Both restrictions alike contravene the principle laid down in the Tagore case, viz., that when property is once given absolutely, the grantor is not competent to restrict its descent in accordance with the law of inheritance which is applicable to the parties concerned. The conclusion to which we come is that by agreement, property in the Kolanka estate was given to Kumara Venkata Rau and his heirs absolutely, that as between appellant and respondent it is the separate property of the latter's branch, and that article 10 which forbids its descent in accordance with the Mitakshara law to the widow of the last male holder is inoperative.

Another ground upon which the Subordinate Judge relies is that even assuming that article 10 is not inoperative, the intention was, upon its true construction, *not* to exclude the respondent from succession.

In support of this view he observes that respondent, though a childless widow in Kumara Venkata Rau's branch, was entitled to maintenance like its male representatives, and that there is, therefore, no reason to think that she is not of that class of persons for whose benefit the grant was made. Adverting to a similar provision

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in exhibit VIII which is a grant made by appellant's father on account of the maintenance of his own brother, the Subordinate Judge refers to an admission made by the former that the article was designed to prevent the estate passing to strangers outside the family and not to shut out from succession wives of the grantee's male heirs. So far as the inference from the object of the grant is concerned, the reasoning does not appear to be conclusive. So far as the original plaintiff's admission regarding the effect of a similar article in exhibit VIII is concerned, it cannot be used against the appellant in favour of the respondent who was no party to it if, upon the true construction of Article 10 of agreement I, it excludes females. The words are "on failure of "aurusa or self-begotten male issue in either of these two lines, the "immovable property should be put in possession of the other "line," and they are wide enough to bear the interpretation that the contingency contemplated is either an adoption from outside the family or the failure of male representatives. We prefer to rest our decision on the ground that article 10 being inoperative should be expunged from the instrument and that the agreement I when read without that article clearly evidences a permanent grant to Kumara Venkata Rau and his lawful heirs of whom respondent is one.

Another contention urged on behalf of the appellant is that when respondent's husband died, the Kolanka estate was co-parcenary property and that by right of survivorship the appellant is a preferable heir. It is further stated that the decisions in the previous suit of 1879 are conclusive on this matter.

The decision of the Privy Council in the previous suit proceeded on the ground that a custom prohibitive of adoption was not made out as found by the District Court and the High Court and that article 10 which forbade adoption was illegal and inoperative. The High Court, whilst it rested its decision on the custom not being proved, expressed also an opinion that there was co-parcenary among the parties to that suit. But that opinion was expressed with reference to the zamindari of Pithapuram to which the adopted son was an heir previous to the birth of the appellant, and it is not conclusive as argued for the appellant in respect of the Kolanka estate which forms the subject of the present suit.

It may well be that the zamindari of Pithapuram is an impartible estate from which male co-parceners of a junior branch have a right to exclude a childless widow of the last male Zamindar and

yet with respect to all other properties the two may be divided in interest. Unlike the zamindari, the Kolanka estate is property carved out of it and made the subject of a recent grant. We have already stated our reasons for holding that under the terms of the grant, it is, as between the parties to this appeal, the separate property of Kumara Venkata Rau's branch. This does not rest on mere inference for article 8 of the agreement refers to the property owned then by each branch and describes its *status* in relation to it in these terms—" your assets and liabilities and your property, " movable and immovable, belong to you and your heirs, and my " assets and liabilities and property, movable and immovable, belong " to me and my heirs. Neither of us need therefore be responsible " for the affairs of the other." They are words of severed interest and several liability and are inconsistent with community of interest in the absence of which no co-parcenary can subsist.

Article 9 relates to after-acquired movable and immovable property and provides with reference to it in these terms—" in " whatever manner you may hereafter acquire property, movable " and immovable, I will have nothing to do with it. In whatever " manner I may hereafter acquire property, movable and immov- " able, you shall have nothing to do with it." It appears to be a reasonable inference from these two articles that, from the date of the agreement, the parties by mutual consent determined their *status* as co-parceners, for from that day forward, it is clear there was to be neither unity of interest nor of enjoyment either in the Kolanka estate or in after-acquired property. In paragraph 44 of his judgment, the Subordinate Judge discusses also the conduct of the parties both prior and subsequent to the agreement and comes to the conclusion that it likewise denotes determination of co-parcenary from the date of the agreement I. We do not desire to be understood as expressing any opinion regarding the zamindari of Pithapuram which is an ancient impartible zamindari, but we entirely agree with the Subordinate Judge that as regards the Kolanka estate, the after-acquired and other property of the respondent's branch, the co-parcenary or joint interest of the appellant's branch has ceased from the date of the agreement I.

For these reasons, we are of opinion that this appeal cannot be supported and that it must be dismissed with costs.
