KRISHNAN NAMBIAR v. KANNAN.

In that litigation the present plaintiff and the second defendant (as representing the tarwad) were joint plaintiffs, and it was then found as between each of them and the persons in possession of the property that the second defendant and his tarwad had no title to the property. The title to the property is therefore *res judicata* as between the persons in possession and the second defendant and his tarwad. It is idle to contend that, in these circumstances, and useful purpose was, or could be, served by admitting evidence as to the tarwad's alleged title.* On both grounds then the second appeal fails and is dismissed with costs.

The plaintiff files a memorandum of objections to so much of the decree as disallows his claim for costs of the former litigation, viz., Rs. 527-15-2 *plus* Rs. 69-11-0 and for interest on the purchase money prior to the plaint.

On both points we think the objections are valid. The costs of the litigation which resulted from the breach of covenant of title are proper damages and not too remote. The omission as regards interest is clearly a clerical error. We allow the memorandum of objections with costs in the Lower Appellate Court and in this Court, and modify the decree accordingly. The rate of interest will, however, be 6 per cent. as allowed by the District Judge, not 12 per cent. as claimed. We allow interest at 6 per cent. on the costs of the former litigation.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

1897. September 17. October 5.

GANAPATI AYYAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SAVITHRI AMMAL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Agreement on adoption—Charitable endowments—Civil Procedure Code, s. 30—Interest sufficient to support a suit relating to charity.

A Hindu shortly before his death directed his wife and mother to employ part of his property for the maintenance and upkeep of a charitable institution, being a choultry where Japta Brahmans and travellers were fed, and at the same time empowered his wife to make an adoption, declaring that the adopted son should have no interest in the property devoted to the charitable purpose. On

* Appeal No. 90 of 1896.

his death the widow and mother executed a document, relating to the property, to give effect to the wishes of the deceased for the benefit of Brahmans; and three years later the widow took in adoption a boy whose father acquiesced in the deceased man's dispositions. The charitable trust having been neglected and the adoptive son having taken possession in his own right of the lands constituting the endowment, two Brahman residents of the neighbourhood who had obtained leave under section 30, Civil Procedure Code, instituted a suit as representing the Brahman community at large to remove the widow from the office of trustee, to have the adopted son declared ineligible for that office and for the appointment of a new trustee:

Held, that the plaintiffs possessed sufficient interest in the charity to enable them to maintain the suit, and that they were entitled to the relief claimed by them.

APPEAL against the decree of C. Vencoba Chariar, Subordinate Judge of Tanjore, in Original Suit No. 18 of 1895.

The plaintiffs, two Brahman residents of Mannargudi taluk, having obtained permission of the Court under Civil Procedure Code, section 30, brought this suit as representing the Brahman community for the removal of defendant No. 1 from the trusteeship of a charity founded by her late husband, as it was alleged, for the benefit of Brahmans generally, and secondly for a declaration that defendant No. 2 was not eligible for the office of trustee, and thirdly for the appointment of a new trustee.

The plaintiffs' case was that the deceased husband of defendant No. 1 had some years before his death established and endowed a choultry at Nagai for the feeding of Brahmans, and had performed the charity until his death in November 1878: that shortly before his death he had directed his mother to continue the charity and arranged that with the profits of part of the land constituting the endowment, defendant No. 1 should maintain another choultry which he desired her to establish at Adhiehapuram: and that after the death of his mother all the endowments should go to the benefit of the new choultry, the charity at Nagai being discontinued. At the same time he empowered defendant No. 1 to make an adoption on the understanding that the adopted son should have no interest whatever in the charity properties. It was stated that, after the founder's death, the charity at Nagai was carried on by his mother only until she died in 1890, since when the choultry at that place had fallen into decay, and that defendant No. 1 had taken defendant No. 2 in adoption and allowed him to take possession of the properties devoted to the charity neglecting to carry out the trust.

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It appeared that shortly after the founder's death his mother and his two widows, including defendant No. 1, had executed a deed of settlement, dated 15th November 1878 (exhibit A), embodying the directions of the deceased founder and that, at the time of the adoption of defendant No. 2, a similar agreement was drawn up and executed by his natural father ratifying those directions, and agreeing that after the death of defendant No. 1 defendant No. 2 should be the trustee and manager of the charities and otherwise should have no claim on the properties constituting the endowment. Defendant No. 1 admitted the trust and stated that she had performed it in part and would have done so completely but for a suit instituted in 1886 on behalf of the adopted son by his natural father as next friend which she had been compelled to compromise with the result that she lost possession of the properties.

The Subordinate Judge held that all the plaintiffs' averments were established by the evidence, but he dismissed the suit on the ground that the plaintiffs were not beneficiaries possessing an interest in the charity sufficient to support the suit. "The plaintiffs described themselves," he said, "as permanent residents of "Nemmeli in the taluk of Mannargudi. The simple fact that they "are Smarta Brahmans is not, I think, a sufficient qualification "to enable them to come in as beneficiaries. The charity according "to the evidence was confined to Japta Brahmans and travellers, "including perhaps pilgrims to Rameswaram, if any. The plaintiffs are neither the one nor the other."

The plaintiffs appealed.

Sundara Ayyar and *Ramachandra Ayyar* for appellants, contended (1) that the appellants had sufficient interest to sue, and (2) that there was a trust created by the deceased, and cited *Bhaskar* v. *Saraswati*(1).

Srinivasa Ayyangar for respondent No. 1.

Pattabhirama Ayyar and *Ranga Ramanuja Chariar* for respondent No. 2 contended that no trust or alienation of any sort had been effected, and that, if there was any alienation, the adopted son was entitled to set it aside.

SHEPHARD, J.—After deciding all the other issues in the appellants' favour, the Subordinate Judge dismissed the suit on the

(1) I.L.R., 17 Bom., 486.

ground that they had failed to prove such an interest in the subject-matter as to entitle them to maintain it. It is first to be observed that this point was not taken in the written statement and was not included in any of the thirteen issues, though it was taken and overruled in the proceedings before the Collector when sanction to prosecute the suit was asked for and granted to the plaintiffs. It has been repeatedly held in this country that such a suit as the present may be instituted by any member of the class intended to be benefited by the charity for the support and preservation of which the aid of the Court is invoked. According to the document which evidences the institution of the charity the class for which it was intended comprised Brahmans generally. The document does not restrict the charity to any particular sect, nor does the oral evidence show that the alleged founder Gopalakrishna Ayyan excluded from his bounty such Brahmans as the plaintiffs might properly be taken to represent. The circumstance that the Brahmans entertained by him were ordinarily Japtas or travellers does not, especially when taken with the language of the instrument of dedication, indicate any intention to restrict the charity to Brahmans answering to one or other of those descriptions. For these reasons, I think the Subordinate Judge was wrong in dismissing the suit on the ground of want of interest in the plaintiffs. I have now to consider the several points raised on behalf of the respondent, Gopala Ayyan, who is the adopted son of the alleged founder of the charity. It was first contended that the story told by the plaintiffs' witnesses and recited in the instrument of 1878 and again in the agreement of 1881 relating to the adoption, was a pure invention, that Gopalakrishna Ayyan never made any arrangement or gave any instructions such as are attributed to him, and that his widows and mother never had any real intention of dedicating property to charitable purposes. Although the instrument of 1878 was executed only ten days after his death and actually written by the second respondent's father, although the same facts are recited in the agreement of 1881 to which the second respondent's father was a party, and although the same individual representing one of the widows, insisted before the tahsildar in 1883 that the charity should be maintained as it had been instituted by the adoptive father of the second respondent, we are asked to say that the idea of dedicating property to charity originated solely in the minds of the widows, and was carried out

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merely as a scheme for preserving to them as against a child who might be adopted some control over the property of their deceased husband. A more hopeless contention can hardly be conceived. It seems necessary to observe that there is a strong presumption in favour of the truth of statements recorded in writing by persons who are under no disability, and that the Court is most reluctant to hold that the parties did not mean what they said. I think there can be no doubt that the widows intended to create or confirm a valid trust, and further I agree with the Subordinate Judge in finding that they acted in conformity with directions given by their deceased husband. The question then is whether the evidence justifies the finding that there had been a previous declaration of trust by the husband. The plaint alleges that fifteen years before his death he had set apart certain lands for charitable purposes and there is some general evidence in support of the allegation. It certainly is proved that, for some years, he had been carrying on the charities which are mentioned in the instrument of 1878, and it is probable that he did so with the proceeds of the Adhichapuram lands. But I do not think it is proved that he dedicated any particular lands or even any particular share to this purpose. The evidence is wholly wanting in the precision and detail requisite for the proof of such a dedication, when no written instrument executed by the alleged founder is produced. It is not unimportant that he did execute a registered deed for the benefit of a Siva temple.

But I think there is another ground on which the plaintiffs' claim may be supported. As an act done by the widows in pursuance of the instructions of their husband, the deed of settlement of 1878 would be inoperative as against the adopted son. Regarded as an incomplete gift made by the husband and carried out by the widows, it could not stand on a higher footing than would a will executed by Gopalakrishna Ayyan, and the interest of the adopted son clearly could not be defeated by a will. But if the directions given by Gopalakrishna Ayyan to the widows regarding his charities, and the mode of maintaining them are associated with the direction to take a child in adoption, it may fairly be inferred that he did not intend an adoption to take place, except on the condition that his directions as to the charities are observed. This is the view of the matter which the widows actually took, for the father admits that they would not have taken

his son unless he had consented to maintain the charities. The written agreement made in respect of the adoption shows that the adoption was made on that condition and on the other terms mentioned in the instrument of 1878. If the condition had been originated by the widows, it might not have been binding on the adopted son, but seeing that the husband's authority was qualified by a condition which he was at liberty to impose, and that the condition was insisted on when the authority was exercised, I think the adopted son is in no other position than he would be, if Gopalakrishna Ayyan himself had taken him in adoption, at the same time declaring that he did so only on the condition of certain property being set apart for charity. As there would have been no adoption if the requisition of the widows had not been obeyed, and as the widows were entitled and indeed bound to make that requisition, I do not think it is open to the adopted son, now to repudiate the condition. In this view of the facts, the decision in *Lakshmi* v. *Subramanya*(1) applies.

The decree of the Subordinate Judge will be reversed. It being necessary to provide for the conduct of the charity and the second defendant having, in consequence of his conduct, forfeited his right to act as trustee, we must direct the Subordinate Judge to inquire and submit the name of some competent person willing to accept the office. The trustee when appointed will be subject to the superintendence of the Tanjore District Board, and his accounts will be open to the inspection of the managing member of the founder's family for the time being. The Subordinate Judge will also ascertain the probable average income of the endowments and submit a scheme for the disposal of the income in accordance with the wishes of the founder. On the occasion of a vacancy, the President of the Local Board to appoint a successor out of the founder's family, if possible. The Subordinate Judge will be at liberty to apply for further directions. The second defendant must pay the plaintiffs' costs in this and in the Lower Court.

The report is to be submitted within three months from the date of the receipt of this order, and seven days will be allowed for filing objections after the report has been posted up in this Court.

SUBRAMANIA AYYAR, J.—I wish to make a few observations only, with reference to the contention urged on behalf of the second

(1) I.L.R., 12 Mad., 490.

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defendant, that the dedication of the lands to the charity in question is not binding upon him.

The evidence clearly proves that the second defendant's adoptive father Gopalakrishna Ayyan, shortly before his death and during the illness which terminated fatally, directed his widows to make the dedication referred to and authorized the adoption of a son to him. Accordingly ten days after his death, they executed exhibit A and handed over possession of the property dedicated to the person who was entrusted with the management of the affairs of the charity, and about two or three years after exhibit A the second defendant was adopted. It is also established that the natural father of the second defendant gave him in adoption with the full knowledge of the alienation and acquiescing in it and that, but for such acquiescence, the second defendant would not have been adopted.

The contention on behalf of the second defendant was twofold, first, that though the second defendant was adopted in 1881, yet his title related back to the date of the adoptive father's death, and as exhibit A was later, the alienation is not binding on him; secondly, even if his rights accrued from 1881, still he is entitled to set aside the alienation. The first part of the contention may be dismissed from notice, for it is too late to question the doctrine that the adopted son's rights arise from the time of the adoption (*Bamundoss Mookerjea* v. *Mussamut Tarinee*(1)). The second part of the contention alone requires some consideration. Now under the nuncupative will of Gopalakrishna Ayyan—such in my view do the instructions evidenced by exhibit A amount to (compare *Hari Chintaman Dikshit* v. *Moro Lakshman*(2)), the direction that the property be devoted to the charity and that the authority to adopt, both should be given effect to only after his death. Though in fact the second defendant was adopted two or three years subsequent to the execution of exhibit A, yet his case cannot possibly be put on a higher footing than if he had been adopted at the moment of the adoptive father's death. Let us, for argument, suppose that such was the case. It is clear that the direction as to the allotment of the property to the charity was an oral devise, which became operative the moment the testator died and as *ex hypothesi*, the second defendant's title to his adoptive father's

(1) 7 M.I.A., 169. (2) I.L.R., 11 Bom., 89.

estate accrued then and not earlier, it is difficult to see how on principle the defendant could be entitled to question the alienation. For, unlike the case where the adoption takes place before the will comes into force, the adopted son's right, according to the supposition, comes into existence simultaneously with the right of the charity. How then can the former derogate from the latter right? Even if the above view were unsustainable (though it is not easy to see how it could be), the second defendant must nevertheless be held bound by the alienation. For the circumstances in which the adoption took place rendered it conditional on the alienation not being challenged by the adopted son, and the case would then be clearly governed by the decision in *Lakshmi* v. *Subramanyá*(1), *Narayanasami* v. *Ramasami*(2), and *Basava* v. *Lingangauda*(3).

If, from the hypothetical case, we turn to the actual facts of the case before us, there is no doubt that the title of the adopted son could not affect the right of the charity for the latter right had vested long before the adopted son's right arose. The second defendant's rights must therefore be held to be subject to that created in favour of the charity by the oral devise, and it is hardly necessary to point out that exhibit A does not evidence an alienation by the widows, but is a mere formal declaration executed by the persons appointed by the testator to bring into existence such written evidence of his disposition and who held possession of the property devised till they transferred the same, to the duly constituted manager of the charity only as the trustees for the charity. Compare *Bhaskar Purshotam* v. *Sarasvatibai*(4).

In the view I have taken of the case, it has become unnecessary to consider, supposing that the direction to transfer to the charity amounted not to a devise, but to a mere power to transfer at the discretion of the widows, whether the execution of such power, before the power to adopt was exercised, would not disentitle the adopted son to question the alienation.

I, therefore, concur in the conclusion arrived at by my learned colleague.

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(1) I.L.R., 12 Mad., 490.
(2) I.L.R., 14 Mad., 172.
(3) I.L.R., 19 Bom., 428.
(4) I.L.R., 17 Bom., 486.