APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice and Mr. Justice Krishnaswami Ayyar.

1909. October 20, 21.

RAJAMMAL (PLAINTIFF), APPELLANT,

v.

AUTHIAMMAL *alias* AUTHI LAKSHMIAMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Construction of document—Test to determine whether document is testamentary—No will when there is no power to revoke.

One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable. If it is not revocable, the document is not a will.

The fact that the paper is drawn in the form of an agreement and that it is registered, are circumstances to be taken into consideration, though they do not *per se* amount to much.

Where the document contains provisions which are not of an ambulatory character, the presumption will be against the testamentary nature of the document and the fact that such provisions are expressed to operate in the future will not affect the nature of the document.

The intention of the party will be given effect to, though it is expressed in inappropriate language.

The reservation of a life interest does not of itself suffice to make the document testamentary.

In the matter of "Reference by the Collector and Superintendent of Stamps, Bombay," [(1896) I.L.R., 20, Bom., 210 at p. 214], referred to.

In the goods of Robinson, [(1867) L.R.I.P. & D., 384], referred to.

SECOND APPEAL against the decree of V. Venugopaul Chetti, District Judge of Chingleput, in Appeal Suit No. 10 of 1906, presented against the decree of E. J. S. White, District Munsif of Poonamallee, in Original Suit No. 144 of 1905.

The material facts are thus stated in the judgment of the lower Appellate Court which is as follows:—

JUDGMENT.—This was a suit on a document purporting to be a maintenance deed. The District Munsif held it to be a will and dismissed the suit as no probate was produced.

The sole question for consideration is whether the document (exhibit A) is a will or a deed of settlement.

* Second Appeal No. 171 of 1907.

It has been written on a 15-rupee stamp paper and is styled a deed of settlement. It was also registered as such. But the form of the document is immaterial in determining the main issue.

The document recites that the executant will transfer the pattas nominally to the plaintiff and the first defendant, that he will give them Rs. 5 each during his life-time and will enjoy the lands himself. After his death, the document adds, the plaintiff and the first defendant will have full right to the property.

Taking the document as a whole, I have no doubt it is a will. It does not vest the property in question in the plaintiff and the first defendant at once. It distinctly says that the transfer of the patta is only nominal and that during the executant's life-time he has the sole ownership thereof. He does not constitute himself a trustee or manager of the property nor does he say that he has only a life-interest. It is true that he says that he executes the document to see that harmonious relations exist between himself and the other parties during the closing years of his life. This was the motive for his executing the document, but it does not show that he intended that it should begin to operate till after his death.

The case is clearly distinguishable from that reported in 20 Bombay, page 210, when the vesting of property took place at once. My attention has also been drawn to 21 Madras, 422, and 12 Madras, 491 and 10 Calcutta, 792.

In my opinion the document was of a testamentary character. The promised payment of Rs. 5 and the fact that it was executed to secure harmony of feeling at once do not make it a deed of settlement as the executants specifically laid down that ownership should vest in the persons in whose favour it was executed (plaintiff and first defendant) only after his death.

The Munsif's view is correct and the appeal is dismissed with costs.

The material portion of exhibit A the construction of which was in question was as follows :—

"I shall transfer the patta of the lands and the salt-pan hereunder described in the name of you both nominally and give you Rs. 5 each every month till I die, and after my death you shall not only have the rights I have in the said lands and salt-pan, but also the profits accruing therefrom in proportionate shares after paying the Sirkar kists in moieties, and I shall dispose of the dwelling

BENSON, OFFG. C.J., AND KRISHNASWAMI AYYAR, J.

RAJAMMAL v. AUTHIAMMAL.

house which stands nominally in the name of my wife, and after paying out of the sale-proceeds the money due to Vasa Baliah Chetti, I shall pay the balance towards the debt of Rs. 1,650, and I shall clear the remaining debt out of the pension I get every month, and these properties are not liable to the debt which I may hereafter incur, and I shall take back from Rajammal the jewel *Vairumani* I have given her and give it to my wife Authilatchmi Ammal after giving Rajammal jewels worth Rs. 400. I execute this document so that there may be amicability among ourselves at the close of my days. I shall enjoy the lands and the salt-pan though the pattas for them are made in the name of you both. The salt-pan will be sold."

Plaintiff appealed to the High Court.

A. Krishnaswami Ayyar for *P. R. Sundara Aiyar* for appellant.

The respondent was not represented.

JUDGMENT.—The question in this case is whether the instrument (exhibit A) is a settlement or a will. In form it purports to be an agreement executed by Nilakanta Pillai to his wife and his son's widow. This is a circumstance to be taken into account although as observed in *Rambhat* v. *Lakshman Chintaman Mayalay*(1), "this, *per se*, is not much." It has been registered as a settlement. In *Marjoribanks* v. *Hovenden*(2), as observed by Jarman "the fact of registration as a deed appears to have been deemed almost conclusive against its testamentary character." (See Jarman on "Wills," 5th Edn., Vol. 1, page 22.) Without giving the same effect to registration in this country, it is at least permissible to hold that that is also a circumstance to be taken into account. Going to the provisions of the instrument it is to be observed that there is no reservation of a power of revocation. It may be doubted whether the same importance should be attached here to the absence of a power of revocation as in England where testamentary instruments are generally drawn by solicitors. (See, however, *Jeffries* v. *Alexander*(3).) The author of the instrument promises to transfer the patta for the lands and the license for the salt-pans to the names of his wife and his son's widow. He provides for the kist of the lands

(1) (1881) I.L.R., 5 Bom., 630 at p. 636. (2) (1843) 1 Dru., 11.
(3) 11 E.R., 562 at p. 581.

being paid and the materials for the salt pans being supplied by both. He makes a gift of jewels to his wife and his son's widow or promises to do so. Above all he declares that his future debts shall not be binding on the properties. None of these can be said to be provisions of an ambulatory character. The fact that some of these are expressed to operate in the future cannot affect the character of the instrument as a settlement. As observed by Kekewich, J., in *Johnston* v. *Mappin*(1), "There is no magic in the use of the future tense which is frequently employed to express a present contract, and if on the construction of the whole instrument the true conclusion is that a present complete settlement was intended, ... then I take it the intention must prevail, notwithstanding it be expressed in inappropriate language." The only problem is whether the instrument partakes of a testamentary character by reason of the following clause, "after my life-time, both of you shall not only get the right due to me in the said lands and the said salt pans, but shall also divide and enjoy in equal shares the income derived therefrom." As observed by Sargent, C.J., in the case referred by the Collector and Superintendent of Stamps(2), "Even the reservation of a life estate by the settlement does not render the instrument less a settlement." It is provided in Exhibit A that Rs. 5 a head shall be paid during the period of the settler's life-time, apparently out of the profits of the property. It was observed by Sir J. R. Wilde in "*In the goods of Robinson*"(3). "The first difficulty that arises is, that the Court is asked to deal with a portion only of a document, and declare it to be testamentary. I have met with no case where that has been done, although I by no means say that it could not be done." These remarks appear to us to be applicable to the present case in which there are clear provisions having an immediate operation. One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable. We are satisfied that Exhibit A is not. The decision in *Lakshmi* v. *Subramanya*(4) has no application. There the governing words with which the instrument begins are "what should be done by my adopted son and my wife after my life-time." In *Thakur Ishri*

(1) (1841) 64 L. Tis., 49 at p. 51. (2) (1896) I.L.R., 20 Bom., 210 at p. 214.
(3) (1867) L.R., 1 P. & Di., 384 at p. 386. (4) (1889) I.L.R., 12 Mad., 490.

BENSON, OFFG. C.J., KRISHNASWAMI AYYAR, J.

RAJAMMAL v. AUTHIAMMAL.

Singh v. *Thakur Baldes Singh*(1), their Lordships of the Judicial Committee set out at page 800 the indicia of a will in that case. This case does not apply either. We must reverse the decrees of the Courts below and remand the case to the District Munsif for disposal according to law. Costs will be provided for in the revised decree.

APPELLATE CIVIL.

Before Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. October 18, 27.

SUBRAMANIA AIYAR (PLAINTIFF), APPELLANT,

v.

GOPALA AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Son not liable for father's debt when barred—Indian Contract Act, ss. 134, 151—Surety not discharged if claim against principal debtor allowed to become barred—Limitation Act, sch. II, art. 98.

Undivided family property devolving on the son by survivorship is not 'the general estate' of the father within the meaning of article 98 of schedule II, Indian Limitation Act, and a suit to recover from the son out of such estate the loss occasioned by his father's breach of trust is not governed by article 98.

A son is not, under the Hindu Law, liable to pay a debt of the father which was barred against him.

A debt, the recovery of which is barred by limitation, is not extinguished and the debtor is not, by reason of the bar of limitation, discharged therefrom.

The omission of the creditor to sue the debtor within the period of limitation is not an act, the legal consequence of which is the discharge of the debtor and such omission has not the effect of discharging the surety under sections 134 and 137 of the Indian Contract Act.

Carter v. *White*, [(1883) 25 Ch. D., 666], referred to.

Ranjit Singh v. *Naubat*, [(1902) I.L.R., 24 All., 504], dissented from.

SECOND APPEAL against the decree of V. Subramaniyam Pantulu, Subordinate Judge of Tanjore, in Appeal Suit No. 1234 of 1905, presented against the decree of J. Sundaranana Rao, District Munsif of Tiruturaipundi, in Original Suit No. 136 of 1904.

(1) (1884) I.L.R., 10 Calc., 702. * Second Appeal No. 581 of 1906.