

PRIVY COUNCIL.*

VENKATANARAYANA PILLAI (PLAINTIFF),

v.

SUBBAMMAL (DEFENDANT).

[On appeal from the High Court of Judicature at
Madras.]

Appeal to Privy Council—Death of plaintiff-appellant—Suit to set aside adoption by widow as invalid and as affecting reversionary interest of plaintiff—Right of contingent reversioners to be joined as plaintiffs in presumptive reversioner's suit—Civil Procedure Code (Act V of 1908), O. I, r. 1—Suit to set aside alienation by widow—Revivor of appeal—Substitution of parties on record—Survival of right to sue.

The appellant brought a suit against the respondents to set aside the adoption of the second respondent by the first respondent as being illegal and invalid under the Hindu Law, and for a declaration that it did not affect his interest in the ancestral estate of one V of whom he claimed to be the nearest reversionary heir. The suit was dismissed by both Courts in India, and the appellant filed an appeal to His Majesty in Council, pending which he died. In an application by his grandson as the sole surviving member of his grandfather's family, and also on his death the next reversionary heir to the estate of V for an order that his name be substituted on the record for that of the appellant, and that the appeal be revived.

Held, that the petitioner was entitled to the order asked for under Order I, rule 1 of the Civil Procedure Code (Act V of 1908), which declares the persons who may be joined in one suit as plaintiffs. A suit to set aside an adoption is brought by the presumptive reversioner in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment, just as the relief sought for is for their common benefit. Under the above rule the contingent reversioner may be joined as plaintiff in the presumptive reversioner's suit, and, if so, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him.

The two kinds of suits which the Indian law permits to be brought in the life-time of a female owner by reversioners for a declaration that an adoption made by her is invalid, or an alienation effected by her is not binding against the inheritance [see articles 118 and 125 of schedule I of the Limitation Act (IX of 1908)], although they differ in character, will be found to be the same in both instances as regards the position of the plaintiffs so far as the point for decision is concerned; and the test of *res judicata* is irrelevant to the inquiry whether the contingent reversioner is entitled to continue the suit commenced by the presumptive reversioner. It is the common injury to the reversioners which

* Present:—Lord DUNEDIN, Lord SHAW, Sir GEORGE FARWELL, Sir JOHN EDGE and Mr. AMEEB ALI.

entitles them to sue, and the question is whether the "right to sue survives" apart from any consideration whether or not the next presumable heir is the "legal representative" of the deceased presumptive reversioner.

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PETITION for an order that the name of the petitioner be substituted on the record of the appeal for that of the appellant, and that the appeal be revived.

The suit which gave rise to the appeal was brought by Venkatanarayana Pillai, the appellant, in the High Court at Madras in its ordinary Original Civil Jurisdiction against the respondents as defendants, to set aside the adoption of the second respondent by Subbammal, the first respondent, as being illegal and invalid under Hindu Law, and for a declaration that it therefore did not affect his right in the estate of one Venkatakrishna Pillai, the deceased adopted son of the deceased husband of the first respondent of whom he claimed to be the next reversionary heir. The respondents contested the suit, the defence being that Subbammal had her husband's authority to make the adoption under his will, dated 8th September 1889. As to that the appellant alleged that the authority to adopt had been revoked by a later will of 21st March 1890 which had been admitted to probate. The construction of these wills was the main issue in the suit; and the Court of first instance had, by a decree of 26th March 1909, held that the later will did not revoke the authority to adopt given by the earlier will, and accordingly dismissed the suit; which decision was affirmed by the Appellate Court on 12th March 1912. Leave was granted by the High Court to appeal to the Privy Council, and this appeal was admitted on 6th November 1913. The appellant died on 11th November 1913, leaving the petitioner Kuppusami Pillai, his grandson, the sole surviving member of his family, and also the next reversioner to the estate of Venkatakrishna Pillai.

Sir R. Finlay, K.C., and *B. Dube* for the petitioner contended that he was entitled to be brought on the record as legal representative of the deceased appellant and allowed to proceed with the appeal. If the appeal be not prosecuted, all the reversioners including the petitioner would be estopped by the decision of the High Court in any suit they might bring. In *Arunachalam v. Vellaya*(1) a decision referred to by the High

(1) (1912) 23 M.L.J., 719.

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Court in its report of the present case to this Board it was held that the appeal in such a case as this abated. It was submitted however that that case was wrongly decided, and that the right to sue survived, as was held by a Full Bench in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(1) where a distinction was drawn between suits to set aside an adoption and suits to set aside alienations by qualified owners. That decision, it was submitted, was right.

DeGruyther, K.C., and *Kenworthy Brown* for the respondents, contended that on the death of the appellant the suit abated, and relied on *Arunachalam v. Vellaya*(2), as having been rightly decided. The Judges by whom it was decided were parties to the decision in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(1), but that was decided on the special facts referred to the Full Bench. There was a consensus of opinion in India that a suit by one reversioner did not bind the other reversioners. During the life of the widow there was no one reversioner who had any estate vested in him. Each one had merely, a possible right of succession to the deceased husband's estate, if he survived the widow, and he claimed by reason of his relationship to the husband, and not through any other of the reversioners. His right was not one transferable under the Transfer of Property Act (IV of 1882). His suit for a declaration of right was governed by section 42 of the Specific Relief Act (I of 1877); see explanations (e) and (f) of that section; and by section 43 the declaratory decree is only binding on the parties and persons claiming through them. His right to sue was only a personal right, and did not survive: Order XXII, rule 1, therefore, of the Civil Procedure Code (Act V of 1908) was not applicable. The right of the petitioner was not the same as that of the appellant. Substitution of parties was governed by the Civil Procedure Code, 1908, Order IV. So far as his cause of action was concerned, the petitioner was not the "legal representative" of the appellant within the meaning of section 2, sub-section (11) of the Civil Procedure Code. A person who claimed not through the deceased plaintiff but in his own right, could not, it was submitted, be said to represent the deceased reversioner, and all the other possible reversioners. All the

(1) (1906) I.L.R., 29 Mad., 390.

(2) (1912) 23 M.L.J., 719.

Courts in India have decided that in case of a suit to set aside an alienation on the death of a widow by a reversioner the suit abates on the death of the plaintiff, and the right to carry on the suit does not survive to any other reversioner. Reference was made to *Sakhyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1), *Bhagwanta v. Sukhi*(2), *Govinda Pillai v. Thayammal*(3) and *China Veerayya v. Lakshminarasamma*(4). The same view has been taken by this Board in *Doorga Persad Singh v. Doorga Konwari*(5) and *Isri Dut Koer v. Hansbutti Koerain*(6). Similar principles, it was submitted, were applicable to a suit by a reversioner to set aside an adoption. In this case the petitioner could not have been joined as a party plaintiff in the suit; *Rani Anand Kunwar v. The Court of Wards*(7). These not being a joint cause of action such a suit was prohibited by section 3 of the Civil Procedure Code; see Order II, rule 3 of the Code.

Sir R. Finlay, K.C., in reply—Order II, rule 3, of the Civil Procedure Code, did not prevent the petitioner from being joined. The Court had a discretion to allow a reversioner other than the next reversioner to be joined; see Order I, rule 6, of the Code. A suit to set aside an adoption, and one to set aside an alienation by the widow are quite different. In any case the petitioner was entitled as legal representative to revive the proceedings in order to relieve the estate, from the orders as to costs.—*Muthusami Mudaliar v. Masitamani* (8).

The judgment of their Lordships was delivered by

Mr. AMEER ALI.—The question for their Lordships' decision arises upon a petition for substitution of the petitioner in place of the deceased appellant, Venkatanarayana, who has died since the filing of his appeal to His Majesty in Council.

Venkatanarayana brought a suit, on the 29th of July 1907, in the High Court of Madras in its ordinary civil jurisdiction to obtain a declaration that the adoption of the second defendant by Subbammal, the first defendant, was invalid, and did not affect his (Venkatanarayana's) reversionary interest in the

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(1) (1804) I.L.R., 27 Mad., 598.

(2) (1900) I.L.R., 22 All., 33

(3) (1904) I.L.R., 28 Mad., 57.

(4) (1914) I.L.R., 37 Mad., 406.

(5) (1879) I.L.R., 4 Cal., 190 at p. 199; s.c., L.R., 5 I.A., 149 at p. 163.

(6) (1882) I.L.R., 10 Cal., 324 at p. 332; s.c., L.R., 10 I.A., 150 at p. 157.

(7) (1881) I.L.R., 6 Cal., 764 at p. 773; s.c., L.R., 8 I.A., 14 at p. 22.

(8) (1910) I.L.R., 33 Mad., 342 at p. 356.

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ancestral estate of one Venkatakrishna, deceased. Subbammal, in her answer, alleged that the adoption which the plaintiff sought to set aside was made by her under the authority of her husband given under a will. The plaintiff, on the other hand, contended that the authority so given was revoked by a subsequent will. The Courts in India have held on the construction of this document that it did not amount to a revocation. Venkatanarayana, after the decision of the High Court in its appellate jurisdiction dismissing his suit, applied for the usual certificate to appeal to His Majesty in Council, which was duly granted, and an appeal was filed and was pending when he died on the 19th of November 1913.

The petitioner Kuppusami Pillay applies to be substituted in the place of the deceased appellant and for an order for revivor of the appeal and for leave to prosecute it "in the usual way." He alleges that Venkatanarayana in his lifetime was a member of a joint undivided Hindu family consisting of himself, two sons, and two grandsons, one of whom was the petitioner; and that he was now the sole surviving member thereof, and entitled to the reversionary interest in Venkatakrishna's ancestral properties.

The application is opposed on the ground that, as the petitioner is not the legal representative of Venkatanarayana in respect of the reversionary right claimed by him to the estate of Venkatakrishna, he cannot be substituted in place of the deceased appellant. It is contended on the authority of certain decisions of the High Court of Madras that where a transaction by a Hindu female taking a limited estate in the inheritance of the last male owner is impugned by the next or presumptive reversioner as invalid and beyond her competency, any adjudication against him does not operate as *res judicata* against the contingent reversioners, and consequently on the death of the presumptive reversioner the others have each, in order of succession, a separate right of suit, and cannot claim to prosecute an action brought by the deceased reversioner as they do not derive their right through him.

Their Lordships think this argument proceeds on an obvious fallacy. Under the Hindu Law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to

possession. In her lifetime, however, the reversionary right is a mere possibility or *spes successionis*. But this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death. The Indian Law, however, permits the institution of suits in the lifetime of the female owner for a declaration that an adoption made by her is not valid, or an alienation effected by her is not binding, against the inheritance. The two articles of the Indian Limitation Act (IX of 1908) which deal with these two classes of suits differ widely in their language; article 118, Schedule I, contains no restriction as to the person entitled to sue; whilst in article 125 the suit is contemplated to be by the person "who, if the female died at the date of instituting the suit, would be entitled to possession." But it does not follow from these words that the suit brought in the latter case by the nearest reversioner is for his personal benefit, for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two articles are distinct in their scope and character: one relates to status and involves the adjudication of a right *in rem*; the other raises a question of mere justifiable necessity. But in both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights.

In the present case Venkatanarayana sued for a declaration that the adoption of the second defendant was invalid. Such a suit brought by the presumptive reversioner is in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment just as the relief sought is for their common benefit. On the death, therefore, of the presumptive reversioner the next presumable reversioner would clearly be entitled to continue the action instituted by the deceased plaintiff, unless there is anything in the Procedure Law of India to preclude him from so doing.

The Madras High Court has drawn a distinction between a suit brought to challenge an adoption and one to declare an alienation by a qualified owner as not binding beyond the lifetime of the alienor. In the first class of cases it has been recognised that the presumptive reversioner's suit is in a representative character; in the other, however, chiefly on the ground that the

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adjudication relating to an alienation in the suit of the presumptive reversioner does not operate as a *res judicata* against the contingent reversioners, it has been held that these have no right to continue an action brought by him. Although, no doubt, as their Lordships have already remarked, there is great difference in the character of the two classes of suits, the position of the plaintiffs in both instances when closely examined will be found, so far as the point for decision is concerned, to be the same. The test of *res judicata* applied by the Madras High Court seems, therefore, to be irrelevant to the inquiry whether the petitioner is entitled to continue the action commenced by his grandfather.

What has to be considered is whether "the right to sue," in the words of the statute, "survives," and if it does, who can continue the action to obtain the relief that is sought?

For the purposes of this application it must be assumed that the facts stated in the petition, which their Lordships note are not controverted, are true, and that Venkatanarayana was the nearest reversioner when he brought his suit, and that the present petitioner was at the time only a contingent reversioner. In *Rani Anand Kunwar v. The Court of Wards*(1) this Board gave expression to the principles applicable to suits by reversioners to impugn the validity of transactions by Hindu females. They said that:—

"As a general rule, such suits must be brought by the presumptive reversioner,—that is to say, by the person who would succeed if the widow were to die at that moment."

But in laying down this broad rule their Lordships pointed out in clear terms that under certain circumstances the "next presumable reversioner would be entitled to sue."

There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore, from the question whether "the next presumable heir" is "the legal

(1) (1881) I.L.R., 6 Cal., 764 at p. 772; s.c., L.R., 8 I.A., 14.

representative" of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights.

Rule 1, Order XXII, in the new Civil Procedure Code of India (Act V of 1908), which corresponds with section 361 of Act XIV of 1882, declares that "the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." Rule 3, clause 1, provides that—

"Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

The words "legal representative" have for the first time been defined in sub-section 11, section 2, of Act V of 1908, which runs thus :—

"'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

Sub-section 11 was embodied in Act V of 1908 with the object of putting in statutory language the result of the decisions of the Indian tribunals on the meaning of the words "legal representative"; but it is not clearly worded and has already been the subject of criticism by at least one of the High Courts in India. The phraseology of sub-section 11, in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his reversionary right, the estate of the last male owner, and that on his death such right devolved on the petitioner. They think, however, that his right to be substituted in place of the deceased appellant rests on a broader ground.

Rule 1, Order I, of Act V of 1908, which brings the Indian practice into line with the English rule, provides as follows :—

"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of, or arising out of the same act or transaction, or series of acts or transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if such

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persons brought separate suits, any common question of law or fact would arise."

It seems to their Lordships that under this rule the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit. The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, viz., the validity or invalidity of the act challenged as incompetently done. If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. Their Lordships are of opinion that in this case the right to sue survives, and that the petitioner is clearly entitled to the order asked for. The costs of this application will be costs in the appeal.

Application granted.

Solicitor for the petitioner—*John Josselyn.*

Solicitor for the respondent—*Douglas Grant.*

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

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NOS. 2, 4, 3, 1 AND 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 27, cl. (b)—Additional evidence on appeal—Powers of the Appellate Court—Test to be applied for admitting—State of mind of the Judge, after hearing the appeal—No external standard—'Any other substantial cause,' meaning of.

Where a Subordinate Judge first heard an appeal and then passed an order for the admission of some additional documents in evidence on the ground that "it was necessary to have the documents before the Court to enable it satisfactorily to pronounce its judgment,"

* Second Appeal No. 819 of 1911.