APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1917, January, 24 and February, 6.

APPAN PATRA CHARIAR (PLAINTIFF), APPELLANT,

v.

V. S. SRINIVASA CHARIAR AND FOUR OTHERS (DEFENDANTS NOS. 1 TO 5), RESPONDENTS.*

Hindu Law—Joint family—Will by father bequeathing some lands to his daughter with consent of major son and of relations interested in his minor son—Validity of disposition.

A father in a joint Hindu family can with the consent of his adult son and with the consent of his relations who are interested in a minor son of his bequeath a portion of his ancestral property to his daughter provided the portion is reasonable in extent.

Brijroj Singh v. *Sheodan Singh* (1913) I.L.R., 35 All., 337 (P.C.), *Kudutamma* v. *Narasimha Charyulu* (1907) 17 M.L.J., 528, *Anivillah Sundara Ramayya* v. *Cherla Seethamma* (1911) 21 M.L.J., 695 and *Arunachela Pillai* v. *Sampurnathachi* (1914) 27 M.L.J., 485, applied.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, the Temporary Subordinate Judge of Trichinopoly, in Appeals Nos. 266 and 320 of 1914, preferred against the decree of P. RANGASWAMI AYYANGAR, the Additional District Munsif of Trichinopoly, in Original Suit No. 49 of 1914 (Original Suit No. 207 of 1912 on the file of the Principal District Munsif of Trichinopoly).

The facts of the case appear from the first three paragraphs of the judgment of SADASIVA AYYAR, J.

G. S. Ramachandra Ayyar for the appellant.

S. Subrahmanya Ayyar for the second respondent.

T. R. Venkatarama Sastriyar for the third respondent.

The other respondents were not represented.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. He purchased the plaint lands in December 1909 from the first defendant. The first defendant has a minor step-brother who is th s cond defendant and also an uterine sister, the third defendant The first and the third defendants' mother was the predeceased first wife of one Srinivasa Chariyar who died on the

* Second Appeal No. 1379 of 1915.

14th November 1908. Within a fortnight before his death and on the 1st November 1908 (when he was on his death-bed and with the knowledge that his dissolution was not far off), he executed the will, Exhibit V (a), by which he gave the properties mentioned in the Schedule A attached to the will to his eldest son, the first defendant, gave the properties mentioned in the Schedule B to his minor son, the second defendant, and the land mentioned in the Schedule C to his daughter, the third defendant, besides making some other provisions. It is not denied that relatively to the A and the B schedule properties bequeathed to the two sons, the C schedule property left to the daughter is one of small value and it would not be an unreasonably large gift to be made by a very well-to-do father to his only daughter, though he has two undivided sons. It is further found that the first defendant, the elder of the two sons who was a major at the time of the will consented to this provision being made in favour of his sister and attested the will and that the second defendant's mother, the testator's second wife, also consented.

Within a year of the testator's death, however, the widow acting as the guardian of her minor son (the second defendant) repudiated in one respect the validity of the very fair testamentary arrangements made by her husband and while willing that the A schedule properties which were given to her step-son, the first defendant, for his share by her husband, should be his and that the B schedule properties given to her son, the second defendant, should belong to the said son absolutely, grudged the gift of the C schedule properties to her step-daughter, the third defendant. Thereupon on the 3rd November 1909, the first defendant and the step-mother acting as guardian of the second defendant executed the agreement (Exhibit K) by which the C schedule properties were arranged to be sold and converted to cash and the sale-proceeds divided equally between the two sons. It was in pursuance of this agreement that the first defendant sold the properties to the plaintiff in December 1909 under Exhibit A.

The lower Appellate Court held that though the properties dealt with under the will, Exhibit V (a), were ancestral properties in which the two sons of the testator owned interests by birth, a reasonable gift could be made by the father in favour of his only daughter so as to bind his sons and that such a gift

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even though made by will would be binding on the sons if they consented to it. It also held that the first defendant having consented to the dispositions in the will was bound thereby and that the second defendant, though a minor at the time, was also bound as consent could be given on his behalf by his mother in his interests and such consent was given. On these findings it held that the third defendant became the sole owner of the C schedule properties, that is, the plaint lands by the testamentary gift and that the plaintiff purchased nothing but a bag of wind under the sale deed (Exhibit A). The lower Appellate Court accordingly dismissed the plaintiff's suit with the costs of the defendants Nos. 2 and 3.

The plaintiff's memorandum of second appeal contains twelve grounds, but leaving aside the general grounds and those which relate to the binding nature of the plaintiff's sale deed on the second defendant and those which relate to questions of fact, those which attack the legal validity of the third defendant's title as claimed under the will, Exhibit V (a), may be shortly stated thus:—

"1. The will can only operate from the date of the death of the testator at which time all the properties would pass to the two sons by right of survivorship, being ancestral property.

"2. It is not within the scope and powers of the guardian of a minor son to consent to the giving of property by a father to a third person.

"3. The said consent is also inoperative as it was given by a person who was not the guardian at the time, when she so consented.

"4. The authorities relied upon by the Subordinate Judge are clearly distinguishable and they only refer to gifts *inter vivos* and not to testamentary dispositions."

Besides these four grounds, Mr. G. S. Ramachandra Ayyar who appeared for the appellant raised a new contention before us that the document Exhibit V (a) was not a will but was a settlement *inter vivos* and as it was not registered, it was wholly inoperative and invalid. But this contention was not raised in the lower Courts and not even in the grounds of the second appeal memorandum, and I must decline to allow it to be raised at this stage.

As regards the grounds, Nos. 2 and 3, I agree with Mr. Ramachandra Ayyar that the second defendant's mother was not the legal guardian of the second defendant so long as his father was alive. Her consent therefore to the testamentary dispositions under Exhibit V (a) cannot give legal validity to the will but can only be an item of the evidence proving that the disposition under the will were in the nature of a fair family-settlement to take effect after the death of the testator and were intended to avoid disputes and litigation and to promote peace. Of course, the father himself as guardian of his son, could act in his son's interest.

I shall now consider the first and the fourth contentions which may be dealt with together. I think that, on the authorities, the father in a joint and undivided family can, with the consent of his adult son and with the consent of his relations who are interested in a minor son of his, make valid provisions by will in favour of the female members of his family provided the said provisions are reasonable in extent and value. I shall refer only to a few cases.

The first and the most important case is the Privy Council decision in *Brijraj Singh* v. *Sheodan Singh*(1). The following sentence occurs in the judgment of their Lordships of the Privy Council at page 346 :—

"But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various members of the family *except with their consent.*"

The words I have italicised afford in my opinion clear indication of their Lordships' view that with 'their' consen (that is, the consent of other members of the family) a disposition of property by will by the managing member would be binding on them after his death. No doubt, the observatio[n] is an *obiter dictum* as their Lordships found in that case that the document called "will" was really a disposition *inter vivos* but I think that the dictum which was so clearly laid down is binding on this Court especially as in my opinion there is nothing in the Hindu Shastras opposed to the above dictum which (if I may say so with respect) is eminently just and equitable.

(1) (1913) I.L.R., 35 All., 337 (P.C.).

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In *Kudutamma* v. *Narasimha Charyulu*(1) it was held that a Hindu brother who is the managing member of a joint Hindu family would not be acting in excess of his powers as such, in giving away a reasonable portion of the joint family property to his sisters who, though married in their father's lifetime, were left for some reason or other without a marriage portion.

In *Anivillah Sundara Ramayya* v. *Cherla Seethamma*(2) it was held that a gift of 8 acres of ancestral land by a Hindu father to his daughter after marriage when the family was possessed of 200 acres of land was valid against his adult sons *even without their consent.*

I shall next consider *Arunachela Pillai* v. *Sampurnathachi*(3) which in my opinion is a very strong case. There the undivided paternal grandfather of a minor gave a portion of the family property (about 30 per cent in value of the whole) to his third wife and daughters with the consent of his grandson's widowed mother. It was held that the gift was binding upon the grandson. The learned Judges say :

"It is clear that it was open to the grandfather if he had chosen and without any one's consent to effect a partition and leave the whole of his half share to his third wife and her daughters and it was in our opinion clearly for the benefit of the minor and his guardians to avoid an eventuality so injurious to his interests by consenting to the alienation effected by Exhibit I."

In the present case also, the testator could have separated from his two sons and taken one-third share as his separate share and given it away to his daughter, the third defendant. This would have been much more to the detriment of the second defendant than the provision made in the will by which he got half of the whole ancestral properties except the C schedule properties. In the present case, the testator could have made a gift of the C schedule properties validly to his daughter and effected a partition between his two sons during his *life time.* But with the consent of his major son and with the consent of his minor son's mother and in what he himself as the guardian of his minor son considered to be in the interests of his said son, he made a gift by will to take effect after

(1) (1907) 17 M.L.J., 528. (2) (1911) 21 M.L.J., 695.
(3) (1914) 27 M.L.J., 485.

his death instead of by a deed to come into effect at once. I think that on the logical application of the principles laid down in the cases I have referred to above and seeing that their Lordships of the Privy Council treated the disposition by will in certain circumstances though of ancestral property as standing in the same footing as dispositions by deed *inter vivos* provided the consent of the parties to be affected is obtained, the family settlement made by will [Exhibit V(a)] in this case ought to be upheld. In the result the second appeal will be dismissed with costs.

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SPENCER, J.—I concur.

SPENCER, J.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Oldfield.

V. KRISHNAIYAH (TRANSFEREE—PLAINTIFF), APPELLANT

1917, March 20.

v.

C. GAJENDRA NAIDU AND TWO OTHERS (SECOND PLAINTIFF, SECOND DEFENDANT AND HIS LEGAL REPRESENTATIVE), RESPONDENTS.*

Limitation Act (IX of 1908), art. 183—Decree of Original Side of High Court against two persons jointly—Revivor of decree on notice to one only under section 248 of Civil Procedure Code (XIV of 1882), whether a revivor against the other also.

On the Original Side of the High Court an order of revivor under section 248, Civil Procedure Code (Act XIV of 1882), of a decree against two persons jointly when made on an application for execution against only one of them does not keep the decree alive as against the other, so as to enable the decree-holder to execute it against that other judgment-debtor, more than twelve years from the date of the decree. Article 183 of the Limitation Act (IX of 1908) which is applicable to execution of decrees passed on the Original Side of the High Court differs in this respect from article 182.

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* Original Side Appeal No. 93 of 1915.