APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Phillips.

1916. October, 19, 20 and 26.

T. MUTHUSWAMI AYYAR (PLAINTIFF), APPELLANT,

v.

KALYANI AMMAL *et al* (DEFENDANTS), RESPONDENTS.*

Hindu Law—Gift to unborn person, validity of—Settlement deed in 1889—Gift to daughter for life, then to her unborn children, effect of—Alienation by daughter—Suit by adopted son of settlor—Right of reversioner to sue—Hindu Transfers and Bequests Act (Madras Act I of 1914)—Suit decided before the Act—Act passed pending appeal—Act, if applicable to the appeal—Power of Appellate Court in passing decrees on appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Declaratory decree, nature of—Discretion of the Court in such cases.

A Hindu executed a deed of settlement in 1889 by which he demised some properties to his daughter, "in order that she may enjoy them during her lifetime and that after her they should be enjoyed *with all rights* by her sons and daughters who may be alive"; the daughter alienated some of the properties in 1907; the plaintiff, the adopted son of the settlor, claiming to be the nearest reversioner filed a suit in 1912 for a declaration that the alienations were without necessity and not binding on the reversioners. He impleaded the settlor's daughter as the first defendant, and her daughter, born in 1899, as the second defendant and the alienees as the other defendants. The Hindu Transfers and Bequests Act (Madras Act I of 1914) came into operation during the pendency of the appeal in the Lower Appellate Court. Both the Lower Courts dismissed the suit:

Held, on second appeal:

(1) that the Hindu Transfers and Bequests Act (I of 1914) was retrospective in its operation and was applicable to this case;

(2) that the gift in favour of unborn children of the daughter of the settlor was valid;

(3) that consequently the plaintiff was not the nearest reversioner entitled to maintain the suit;

(4) that the rule that a remote reversioner can sue if the nearest reversioner is a female is inapplicable when the latter is entitled to an absolute estate;

(5) that there was no collusion between the first and the second defendant by reason of the fact that the latter's guardian put forward an alternative contention on a point of law setting up an absolute title in favour of the first defendant;

(6) that the authority of an Appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the date of its judgment, but was entitled to pass such decree or order as was

* Second Appeal No. 168 of 1915.

in accordance with any later enactment which came into operation subsequent to such date;

Kanakayya v. *Janardhana Padhi* (1913) I.L.R., 36 Mad., 439 (F.B.) and *Govinda Parama Guruvu* v. *Dandasi Pradhanu* (1910) 20 M.L.J., 528, referred to;

and (7) that a declaratory decree is a matter of discretion and, when there was already one and there might be more than one preferential heir before the plaintiff, the discretionary relief could be properly refused.

SECOND APPEAL against the decrees of D. G. WALLER, the acting District Judge of Tinnevelly, in Appeals Nos. 49 to 53 of 1914, preferred against the decrees of K. S. RAMASWAMI SASTRIYAR, the District Munsif of Tinnevelly, in Original Suits Nos. 7 and 9 to 12 of 1912.

One Muthu Ayyar, who was the maternal grandfather and the adoptive father of the plaintiff, executed a deed of settlement, dated the 30th January, 1889, under which he demised some properties in favour of his daughter Kalyani Ammal, consisting of shops, house-sites, etc., and cash amounting to Rs. 8,500 and directed that out of the cash, lands should be purchased and a house built,

"in order that the said Kalyani Ammal should enjoy them during her lifetime and after her they should be enjoyed by her sons and daughters who may be alive."

The settlor died within three weeks of the settlement. The daughter, while in enjoyment of the properties purchased for her, alienated by way of exchange, sale and mortgage some of the said properties about the year 1907. The plaintiff, who was the adopted son of the settlor, claiming to be the nearest reversioner to the properties dealt with in the settlement deed after the death of the daughter, brought the present suit for a declaration that the alienations made by the daughter, who was the first defendant, were without necessity and not such as were binding on the reversioners. The first defendant had a daughter born in 1899 who was joined as the second defendant in the suit, while the alienees were the other defendants therein. The plaintiff contended that the demise under the settlement deed was only valid to the extent of a life-interest in favour of the first defendant and that the gift in favour of her children who were not in existence at the date of the deed was void under the Hindu Law as they purported to be made in favour of unborn persons. The first and second defendants pleaded *inter alia* that the gifts in favour of the first defendant's children was valid;

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and that the plaintiff was not competent to sue. The guardian of the second defendant as well as the first defendant also contended in the alternative that the first defendant took an absolute estate under the deed of 1889; the defendants further pleaded that the plaintiff was not a reversioner at all or only a remote reversioner who was not competent to sue; and that in any event a declaratory decree was a discretionary relief which should not be granted in this case. The District Munsif, who tried the original suit, held that the first defendant took under the deed of settlement an absolute and heritable estate subject to defeasance and that the plaintiff was not a reversioner to the estate and dismissed the suit on the 30th September, 1913. The plaintiff preferred an appeal on the 28th January, 1914 to the Lower Appellate Court which came on for hearing on the 31st October, 1914. During the pendency of the appeal, the Hindu Transfers and Bequests Act (Madras Act I of 1914) was passed which came into force on the 14th March, 1914. The learned District Judge held on appeal that the provisions of the new Act I of 1914 applied to the case, and decided that the disposition in favour of the second defendant (who was the daughter of the first defendant) was valid under the provisions of the Act, and that the plaintiff was not at the time a reversioner at all, near or remote, inasmuch as the second defendant was alive at the date of the suit; he consequently dismissed the appeal. The plaintiff preferred a second appeal to the High Court.

T. R. Ramachandra Ayyar and *N. A. Krishna Ayyar* for the appellant.

C. V. Anantakrishna Ayyar for respondents Nos. 1, 3 and 4.

T. Eroman Unni for the second respondent.

SPENCER AND PHILLIPS, JJ.

JUDGMENT.—This suit was brought to have an alienation made by a Hindu female declared to be void. The plaintiff's grandfather, Muthaiyar, by whom he was adopted as a son, demised by a settlement deed of the year 1889 certain properties of the value of Rs. 8,500 in favour of Kalyani Ammal, his daughter by his second wife, in order that she

"should enjoy them during her lifetime and that after her they should be enjoyed with all rights by her sons and daughters who may be alive."

The plaint alleges that out of the said properties Kalyani Ammal, who is first defendant, had in 1907 alienated certain

immoveable property without necessity by a deed of exchange in favour of the third defendant.

The first defendant has a daughter, second defendant, who was born in 1899. As she was unborn at the date of the execution of the settlement deed, the main question to be decided was whether, the disposition in her favour was valid. The District Munsif held that it was valid under Hindu Law. An appeal was preferred from his decision on 28th January, 1914 and was heard and decided on 31st October, 1914. Between the filing and the disposal of the appeal Madras Act I of 1914 came into force. Section 3 of this Act declares that transfers and bequests may be validly made in favour of unborn persons. The District Judge therefore applied the provisions of this Act and dismissed the appeal, holding that the plaintiff not being at present a reversioner had no right of suit.

It is now contended on the plaintiff's behalf that he was the nearest reversioner at the time when he instituted his suit, seeing that the second defendant acquired an interest by virtue of an enactment which came into force after the suit was decided in the first Court and while an appeal was pending. It is argued that the law applicable to this suit will be the law as it stood at its institution on 3rd January, 1912 ; further, that as the second defendant has precluded herself from suing by colluding with first defendant and setting up her mother's absolute right, he is entitled to sue for the preservation of the estate and that he does so on behalf of the general body of reversioners.

It is not necessary to go into the question whether this disposition in favour of unborn persons was valid even under the general law applicable to Hindus before the passing of Act I of 1914, as the District Munsif held that it was; for we are satisfied that the Act was rightly applied by the District Judge to the facts of the present case.

The Act is by nature a declaratory one, and therefore it cannot be argued that it must not be construed so as to take away previous rights (*vide* Maxwell on the Interpretation of Statutes, page 361). Section 2 declares :—

"In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date."

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In *Kudappa Venkayamma* v. *Narasimma*(1) the provisions of the Act were applied retrospectively to dispositions under a will in favour of persons who were not in existence at the death of the testator, although the will was made long before the Act was passed and although the suit, like the present suit, was instituted in 1912 before the passing of the Act. We see no reason to differ from that decision and are of opinion that Act I of 1914 has retrospective effect. So far as second defendant's rights under the will are concerned, section 2 (2) expressly gives retrospective effect to the dispositions under the will. This being so, plaintiff's rights must also be retrospectively affected by necessary implication.

As was pointed out in *Kanakayya* v. *Janardhana Padhi*(2) the authority of an Appellate Court is not limited to determining the question whether the Original Court was right according to the law in force at the time of its judgment. Under Order XLI, rule 33 of the Code of Civil Procedure an Appellate Court is entitled to pass such further decree or order as the case may require, the object being, as explained in *Govinda Paruma Guruvu* v. *Dandasi Pradhanu*(3), to avoid unnecessary multiplicity of proceedings. In that case a ryot was allowed to plead in appeal a right of occupancy which had been conferred on him by section 6 of the Madras Estates Land Act, although, when the Court of First Instance passed a decree for ejecting him, the said Act had not come into force.

As regards the plaintiff's right to obtain a declaratory decree, it may be observed in the first instance that he is not at the present date the nearest reversioner to the property in suit, if as the settlement deed implies, the children of first defendant who survive their mother are to take an absolute estate at her death. Besides second defendant who is still a minor, other children may be born or adopted during the first defendant's lifetime.

Article 125 of the Limitation Act, as pointed out by their Lordships in the Privy Council decision—*Venkatanarayana Pillai* v. *Subbammal*(4)—contemplates suits for a declaration that an alienation effected by a Hindu female life owner is not binding being brought by the person who, if the female died at the date

(1) (1916) 31 M.L.J., 33. (2) (1913) I.L.R., 36 Mad., 439 at p. 444 (F.B.).
(3) (1910) 20 M.L.J., 528. (4) (1915) I.L.R., 38 Mad, 406 (P.C.).

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of instituting the suit, would be entitled to possession. At the date of instituting this suit if Kalyani had died, the second defendant would certainly have been entitled to possession unless the creation of an interest in favour of an unborn person be held to be void at its inception.

The principle laid down in a previous decision by Privy Council—*Rani Anand Kunwar* v. *The Court of Wards*(1)—was that although a contingent reversionary heir may bring a suit of this nature, yet, as a general rule, it must be brought by the presumptive reversionary heir, i.e., the person who would succeed if the life owner were to die at that moment. This principle was held in *Chidambara Reddiar* v. *Nallammal*(2), to be inapplicable to a case where the nearer heir is a female and *as such* is entitled only to a limited estate. It would apply when a female entitled to an absolute estate intervenes.

Thus the plaintiff in the present suit has no present right to impeach the alienations made by the first defendant unless he can show either that the demise in favour of the unborn children of first defendant was void in law, or that if it was not void, the interest thereby created in favour of second defendant as well as that of first defendant were those of limited owners. We are not prepared to find for him on either of these legal contentions. But his pleader quotes *Rani Anand Kunwar* v. *The Court of Wards*(1) for the further purpose of showing that if the heirs nearer in succession collude with the life owner, a more distant reversioner may sue.

In this case defendants Nos. 1 and 2 put in a joint written statement asserting that under the deed of settlement the first defendant became absolutely entitled to the properties given to her thereby. It was also put forward that if this was not the right construction to be put on the document, the plaintiff was still not entitled to succeed.

The construction of the document depended on the interpretation to be put upon it in a Court of Law. It is not known what view the minor will adopt as to her rights when she attains majority. At present she is under the control of her father and mother who have merged her interests in their own. The circumstances, therefore, are not such as to justify a

(1) (1881) I.L.R., 6 Calc., 764 (P.C.). (2) (1910) I.L.R., 33 Mad., 410.

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presumption that she will not assert her reversionary rights when she becomes a major, and there is certainly no evidence that when plaintiff filed his suit he was aware that the presumptive reversioner (second defendant) was colluding with the first defendant.

A declaratory decree is a matter of discretion [*vide Doorga Persad Singh* v. *Doorga Konwari*(1)] and we think that the District Judge exercised a sound discretion in refusing to give the plaintiff the relief sought in his plaint, seeing that there is already one and there may in time be more than one preferential heir to him.

This second appeal is dismissed with costs (one set). In the District Munsif's Court the plaintiff succeeded on the issue as to adoption and to a great extent on other issues. We direct each party to bear his own costs in the Court of First Instance and that the order of the Lower Appellate Court as to costs of the first appeal do stand.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1916, October, 31 and November, 1 and 9.

KULLAPPA GOUNDAN (PLAINTIFF RESPONDENT), APPELLANT,

v.

ABDUL RAHIM SAHIB, FIRST DEFENDANT (FIRST DEFENDANT PETITIONER), RESPONDENT.*

Court Fees Act (VII of 1870), *sec.* 7, *cl.* v (*b*) *and* (*e*) — *Assessed land — Coconut trees thereon—Suit for land and trees—Valuation of suit—Garden, meaning of.*

In a suit to recover possession of assessed land on which coconut trees stand, the valuation should be under section 7, clause v (*b*) and not under clause v (*e*) of the Court Fees Act (VII of 1870).

The word 'garden' in section 7, clause v (*e*) of the Court Fees Act (VII of 1870) should be taken as referring primarily to a garden in the English sense, that is an ornamental or pleasure or vegetable garden attached to a house.

Andothodan Moidin v. *Pullambath Mamally* (1889) I.L.R., 12 Mad., 301, (F. B.), referred to.

(1) (1879) I.L.R., 4 Calc., 190.

* Letters Patent Appeal No. 110 of 1915.