PRIVY COUNCIL*.

RAJAH OF RAMNAD (DEFENDANT No. 2)

v.

SUNDARA PANDIYASAMI TEVAR (PLAINTIFF No. 3).

1918, November 7.

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

Compromise, construction of—Whether benefit of annuity under it was confined to lineal heirs of grantee—No illegal perpetuity where annuity was a charge on the zamindari as long as heirs of grantee existed—Right to arrears of annuity by assignee of a reversioner—Objection not taken in early stage of case and no issue on it settled, not allowed to be raised in appeal to Privy Council.

In a suit between an ancestor of the appellant (third defendant) and an ancestor of the respondent (third plaintiff) for an impartible zamindari, a compromise was come to in 1861 by the parties, by which the ancestor of the appellant retained the zamindari subject to his giving up one village and paying an annual sum of Rs. 700 a month in perpetuity to the ancestor of the respondent. The terms of the compromise were contained in two petitions, dated 8th January 1861, one being in Tamil and the other in English, the only difference between them being that in the former the annuity was to be paid to the grantee "and his discendants from generation to generation," and in the latter to the grantee "and his heirs." In a suit for the annuity by a collateral descendant of the respondent's ancestor

Held, on the construction of the compromise that the right to it was not confined to lineal heirs;

Held also that the agreement lay not in covenant, but in charge, and that the annuity being a charge on the estate, it was not illegal as there was no difficulty in making it perpetual as long as there were lineal or collateral heirs of the grantee.

Where an objection which might and ought to have been but was not, taken by the appellant at a stage of the case when an issue could have been raised on it, and the matter was subsequently decided by the High Court against the appellant, the objection by him was not allowed to be raised on an appeal to the Privy Council.

APPEAL No. 13 of 1917 from a judgment and decree (28th October 1914) of the High Court at Madras, which affirmed a judgment and decree (28th March 1911) of the Court of the District Judge of Madura.

The main question for decision in this appeal is whether the appellant is liable to pay to the respondent and his heirs and

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assignees in perpetuity a sum of Rs. 700 a month as being a charge on the Rāmnād estate.

The facts were that in 1853, one Rani Parvatavardani Nachiar was the Zamindar of Rāmnād, against whom a suit was brought in the Civil Court of Madura by one Sivaswami Tevar to recover possession of the estate. Sivaswami claimed to succeed to it as the surviving member of a joint family in preference to the widow of the zamindar. The Judge dismissed the suit on 4th April 1857, and on 14th January 1858 the Court of Sadr Adalat on appeal by Sivaswami affirmed that decree though for different reasons from those on which the first Court's judgment was based.

Pending an appeal to the Privy Council the parties came to a compromise, the terms of which were recorded in petitions, dated 8th January 1861, one in Tamil and one in English, filed in the Court of Sadr Adalat. The material portion of each so far as this appeal is concerned were as follows:—The translation of the Tamil petition was:

"As consideration for the plaintiff having lost wholly his future claim and all other rights, the defendant and her heirs who are in enjoyment of the zamindari should pay to the plaintiff and his descendants, from generation to generation, an allowance at the rate of Rs. 700 a month from the 1st November 1860."

The English petition stated:

"The plaintiff having thus completely relinquished all right and claim the defendant and her heirs holding the zamindari shall, from 1st November 1860, pay to the plaintiff and his heirs a monthly allowance of Rs. 700."

Sivaswami Tevar died on 1st July 1861, leaving two widows Kulanthai Nachiar and Ramamani Ammal and a son by the latter named Muthudoraswami Tevar. Kulanthai Nachiar denied that Ramamani had ever been married to the deceased, and as sole heir of her deceased husband she sued the then zamindar Rani Parvatavardani Nachiar and her adopted son Muttu Ramalinga Setupati for the allowance payable under the compromise. On 25th January 1869, the Civil Judge of Madura decreed her claim against the adopted son, who by virtue of his adoption had succeeded to the estate and on 5th April 1870 this decree was affirmed by the High Court at Madras.

Meanwhile Muthudoraswami Tevar had brought a suit against Kulanthai Nachiar to establish his legitimacy in which he obtained, on 21st November 1871, a final decree of the Privy Council in *Ramamani Ammal* v. *Kulanthai Nachiar*(1). He then sued the Rajah of Rāmnād to recover the monthly allowance for himself, and on 4th February 1884, he obtained a final decree in his favour from the High Court at Madras. He continued to receive the allowance until he died on 16th November 1905.

The Rajah of Rāmnād on 12th July 1895 executed a deed of trust by which he assigned the whole estate to trustees for the benefit of his eldest son, the present appellant, and, *inter alia*, provided for the payment to Muthudoraswami Tevar and his heirs of the monthly sum of Rs. 700 payable under the decree in Original Suit No. 16 of 1881 on the file of the District Court of Trichinopoly," which was the suit brought by Muthudoraswami Tevar against the Rajah of Rāmnād in that year.

The suit giving rise to the present appeal was brought by Ramamani Ammal as heir to her son to recover arrears of the allowance. The plaintiff based her claim to recover the allowance and have it charged on the Rāmnād estate on the compromise of 1861 and the deed of trust of 1895. The nature of the defence appears from the following issues which are those now material :—

" (2) Whether on a construction of the razinama, dated 8th January 1861, and the deed of trust, dated 12th July 1895, in favour of the first defendant's predecessor, the right to the allowance would descend only to the lineal heirs ? If so, has the second plaintiff any cause of action ? (4) Are the defendants Nos. 1 and 2 estopped from raising the contention covered by issue (2) in consequence of the decisions in Original Suit 10 of 1867 on the file of the District Court of Madura and in Original Suit 16 of 1881 on the file of the Trichinopoly District Court, and by the provisions of the trust deed, dated 12th July 1895 ? (7) Whether by virtue of the razinama or of the trust deed, of 12th July 1895, the plaintiffs are entitled to a charge on the Rāmnād zamindari ? (8) If issue (7) is found in the negative, whether the plaintiffs are now entitled to a declaration of such a charge ? "

(1) (1871) 14 M.I.A., 346.

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Ramamani Ammal died on 14th March 1910 after all the evidence had been recorded. Poolar Tevar, the next reversioner to Muthudoraswami's estate, executed on 8th April 1910 a document in favour of the respondent purporting to be a deed of release, but which the respondent contends is an assignment to him of all rights in the allowance claimed. On 21st July 1910 the respondent applied to be substituted on the record as representative of Ramamani, and on 18th March 1911 the District Judge directed that to be done.

The District Judge held that there was no estoppel. On issue (2) he decided that the respondent was entitled to recover from the appellant the allowance claimed, and on issue (7) that the allowance had been charged on the estate.

An appeal by the appellant to the High Court was heard by WALLIS, C.J., and SESHAGIRI AYYAR, J., who made a decree affirming that of the District Judge so far as it decided that the appellant was liable to pay the respondent the allowance claimed but varying the decree by directing that it should be a charge on a part of the zamindari to be determined by the District Judge.

ON THIS APPEAL

DeGruyther, K.C., and *E. B. Raikes* for the appellant contended that, on the true construction of the deed of compromise, no right to the allowance had been established in Ramamani, the original plaintiff. If the true construction was as alleged by her it was void and not enforceable both under the law of India and the Hindu Law. Even if she had any such right the respondent did not by virtue of the document executed by Poolar Tevar obtain an assignment of his rights, an assignee being unable to acquire any right to an allowance which by the plain terms of the deed could be payable only to heirs. No charge on the estate was created by its terms; and the Zamindar Rani could not bind her successors, so that the deed was not enforceable against them. Reference was made to the case of *Mahomed Hussain Khan* v. *Mahomed Nahaluddin Khan*(1) relied on by the High Court which was distinguished as the grant there expressly created a charge; and to *Lakshmi Narayan Ananga* v. *Duga Madhawa Deo*(2), where the finding

(1) (1883) 13 C.L.R., 330, 333.
(2) (1892) I.L.R., 16 Mad., 268; L.R., 20 I.A., 9.

that the grant created a charge though made was not necessary for the decision of the case. Reference was also made to *Balvankav* v. *Purshotam Sideshar Bapaji*(1) which it was contended was not applicable. On the terms of the compromise in the translation from the Tamil document, it was submitted that the right to the allowance was limited to lineal heirs, and did not extend to collaterals; and reference was made to *Ekradheswar Singh* v. *Janeshwari Babuasin*(2). As to the arrears of the allowance they belonged to the widow, and unless it was shown that she had made them part of her husband's estate the presumption was that she had not done so; see *Akkanna* v. *Vendayya*(3). At any rate the respondent had no right to them, as he was not her legal representative: as to the arrears the suit should be held to have abated; the respondent had no title to revive the suit on the death of the original plaintiff, and should not have been permitted to do so. Reference was also made to Mayne's Hindu Law, 8th edition, paragraph 627, to *Babaji* v *Ganesh*(4), and to the Civil Procedure Code, 1908, Order XXII, rules 1, 3, 5 and 10.

Sir *H. Erle Richards*, K.C., and *Kenworthy Brown* for the respondent were not called upon.

The JUDGMENT of their Lordships was delivered by

Lord PHILLIMORE.

Lord PHILLIMORE.—This is an appeal from the decree of the High Court of Judicature at Madras, affirming, with a modification, the decree of the District Judge of Madura, who ordered that the second defendant, that is the present appellant, should pay out of the income of the Rāmnād zamindari to the third plaintiff, the present respondent, the sum of Rs. 24,126-10-8 with interest, and should also pay future instalments from the date of the plaint at the rate of Rs. 700 a month, and gave the plaintiff the costs of the suit.

The first question which the Board has to decide is upon the construction of a deed of compromise, which is the root of the title of the third plaintiff. That compromise passed between the ancestor of the appellant and the ancestor, though not the lineal ancestor, of the respondent, and by that compromise

(1) (1872) 9 Bom., H.C.A.C., 99.
(2) (1914) I.L.R., 42 Calc., 582, 592; L.R., 41 I.A., 275, 285.
(3) (1901) I.L.R., 25 Mad., 351.
(4) (1902) I.L.R., 27 Bom., 162.

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between two parties claiming the impartible zamindari, the ancestor of the present appellant retained the zamindari subject to his giving up one village and paying an annual sum of Rs. 700 per month to the ancestor of the present respondent. It has been contended that the effect of that compromise was to limit the payment of the Rs. 700 to the lineal heirs of the grantee and that, as the present respondent is only a collateral heir and only represents, by virtue of the assignment under which he claimed, a nearer collateral heir of the grantee, he is not within the terms of the deed. Both Courts below have taken the opposite view and their Lordships see no reason to differ from that view. The ground may be put quite shortly: it was a compromise dividing the estate—not dividing the estate equally by any means, but giving a share to the grantee of this annuity, and a larger share to the other party. The less successful party got a village and an annuity, the more successful party got all the rest of the property. There is every reason to suppose that the intention of the parties was that, just as one side was to keep the majority of the property for himself and his heirs, lineal or collateral as the case might be, so the other side was to have the village, and, in the same way, the annuity, for himself and his heirs lineal or collateral as the case might be. If the question of construction be determined with reference to the village, the sense of this view is even more marked. Therefore one of the grounds for the appeal fails.

A second contention was that this was a creation of a kind of perpetuity, which the law did not allow, or an attempt to create a permanent relation which was impossible of creation. Whatever might be said about that, if this agreement lay in covenant, seeing that it lies in charge, there is no difficulty in making it perpetual as long as there are lineal or collateral heirs of the grantee, and in our view the District Judge and Mr. Justice SESHAGIRI AYYAR, in the High Court, were right in holding that this is a charge. In that respect, and in that respect only, we differ from the view taken by the learned Officiating Chief Justice. If it is a charge, the modification which the High Court made in the decree of the District Judge is, by the allowance of counsel for the appellant, not injurious to his client. The decree of the District Judge may well be read as making

the annuity a charge on the whole raj, and it is very much more convenient, and indeed in the interest of the appellant, that it should be limited in the way proposed by the decree of the High Court, that is to say, that it is to be referred back to the District Judge so that he shall settle on what part of the Rāmnād zamindari the charge shall be allowed. That being so, there is no objection to the decree so far.

A point was taken that the third plaintiff, claiming under an assignment from a nearer reversioner, had not made out his title to the assignment; that it was void for want of consideration; that it was obtained by fraud, or some similar objection. It is enough to say that their Lordships agree with the Courts below in saying that there is nothing in any of these points.

The one matter which requires a little more consideration is as to the title of the third plaintiff to maintain his decree for the arrears of the annuity. Now the suit in the first instance was brought by the first plaintiff, who claimed to be the adopted son of the previous grantee, and the widow of the previous grantee as second plaintiff, and she sued for herself and for her heirs: "Plaintiffs therefore pray"—that is the adopted son and the widow—

"For a decree in favour of the first plaintiff and his heirs, or the second plaintiff and heirs as may be found entitled."

No doubt the prayer goes on to pray that the declaration may be in favour of the first plaintiff and his heirs or the second plaintiff and reversioners, and that the arrears may be paid to the first plaintiff or the second plaintiff as the case may be. The first plaintiff sued as an adopted son, and his claim was found to be unfounded, and he was dismissed and has not appealed. The second plaintiff, the widow, died in March 1910, and shortly afterwards the next reversioner sold his rights to the third plaintiff for a small consideration and in order to effect a family settlement. Among the rights which he professed to pass were the widow's claim to the allowances. Thereupon the present third plaintiff petitioned to be substituted in the suit in place of the second plaintiff, so that he might carry it on, and he set out by reference the deed of assignment as part of his title and prayed that he might be

"brought on record as legal representative in place of the deceased

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Lord HILLIMORE.

The present appellant resisted this application on the ground that the assignment was fraudulent, and perhaps for other reasons; but he took no objection based on the fact that the third plaintiff was claiming to be brought on the record as the legal representative of the deceased second plaintiff; he did not say that, while he might go on the record as the assignee of the next reversioner, and to that extent fulfil part of the position of the deceased second plaintiff, he was not the legal representative of the deceased second plaintiff, and could not exhaust the whole claim by being substituted for her; and, he not taking that point, the learned Judge made an order which declared the third plaintiff to be the legal representative of the deceased second plaintiff, and that the suit do proceed. It may be observed in passing that if the third plaintiff was only a partial legal representative of the second plaintiff the suit which was proceeding as to the arrears would have been defective. It is now said, and very elaborately argued on behalf of the appellant, that the present respondent is not and cannot be the legal representative of the widow so as to be in a position to claim for or give a good discharge for the arrears, which were very considerable, of the annuity, and that therefore the suit fails as regards all that claim, and must be limited to a declaration *de futuro*. Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property. The third plaintiff when he petitioned to be substituted in her place relied upon a title which purported to assign to him the widow's arrears of the annuity as well as the right to the annuity *de futuro*, and if there was an accretion to the estate that title would be a good one, the next reversioner could pass it to him and he properly represents the estate in respect of the whole. As no objection was taken, as no issue was raised, as the matter was not even raised on appeal from the District Judge (because we cannot take a general allegation in the memorandum of appeal as pointing to this question), it was too late to raise it after the High Court had decided the matter, and it is therefore

not open to their Lordships to consider whether or not a good case could have been made requiring the addition of some other representative of the widow.

Upon the whole, the case for the appellant fails, and their Lordships will humbly advise His Majesty that the decree of the Court below should be affirmed, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondent: *Chapman, Walker* and *Shephard.*

J.V.W.

PRIVY COUNCIL.*

MAHARAJA OF JEYPORE (PLAINTIFF)

v.

RUKMINI PATTAMAHDEVI GARU (DEFENDANT).

APPEAL AND CROSS APPEAL.

1918, November, 4, 5, and 1919 January, 20.

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

dlord and tenant—Contract for payment of rent, also with conditions for rendering services when called upon—Denial of title and refusal to render services—Services, a subsidiary consideration and of a ceremonial nature—Forfeiture and resumption, right to.

The suit which gave rise to this appeal was brought in 1906 by the appellant, the Maharaja of Jeypore, against the husband of the respondent (now deceased and represented by his widow) for the possession and arrears of rent of a pargana called Bissamcuttak, on the allegation that it was part of the appellant's zamindari, and had been held by the predecessors in title of the defendant under grants or leases on conditions of payment of kattubadi or rent and of rendering services to the Maharaja. The latest was a patta, dated 1st August 1877, under which the possession of the defendant's father had been

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