PRIVY COUNCIL.*

JAGANNATHA BHEEMA DEO (PLAINTIFF),

v.

KUNJA BEHARI DEO (DEFENDANT).

1921, May, 10.

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

Indian Registration Act (III of 1877), sec. 17—Registration—Adoption—Authority to adopt—Whether document a will.

A Hindu about three weeks before his death executed a document which was headed by a statement that it was a will in favour of the executant's wife; by it the executant, after stating that he had long been seriously ill and had no issue said, "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed by my consent." The document was not registered. After the executant's death his widow adopted a son to him.

Held, that the document was merely an authority to adopt and not a will, and was therefore required to be registered by the last provision in section 17 of the Indian Registration Act, 1877.

[*Judgment of the High Court affirmed.*]

APPEAL (No. 55 of 1920) from a judgment and decree of the High Court in Appeal No. 135 of 1917 (September 12, 1918) affirming a decree of the District Judge of Ganjām.

The suit was brought in 1916 by the appellant claiming to be the adopted son of Brojo Kishoro Deo who died on September 3, 1906, to obtain possession of the estate. The deceased was a Hindu governed by the Mitakshara, and on August 14, 1906, had executed a document headed by a statement that it was a will in favour of the executant's wife, and proceeding in the terms set out in the judgment of the Judicial Committee. In 1915 the widow adopted the appellant to her deceased husband. The power to adopt, according to the case made in the plaint, was given orally, also by the document above mentioned. The defendant by his written statement denied that any authority to adopt was given, and contended that the document was not a will but a mere power to adopt, and as such

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required registration under section 17 of the Indian Registration Act, 1877; he pleaded further that the estate had vested in him before the adoption was made and was not devested by the adoption.

The District Judge dismissed the suit; he found that no oral authority had been given and that the document was not a will, and was consequently inoperative for want of registration.

The High Court (WALLIS, C.J. and SESHAGIRI AYYAR, J.) affirmed that decision. The learned Judges were of opinion that the document contained no disposition of property, the powers of management being given merely as incidental to the power to adopt; upon the question of the devesting of the estate they held in favour of the plaintiff.

Kenworthy Brown (*De Gruyther*, K.C., with him) for the appellant.—The document was a will for the purpose of section 17 of the Registration Act, and consequently did not require registration. Not only does it clearly purport to be a will, and a will in favour of the executant's wife, but it provides that she is to have the management of the estate and the heirs are not to raise objection. The right of management given could be exercised by the widow before she chose to adopt, and cannot be regarded as merely incidental to the power to adopt. Even if the instrument was ineffective by reason of the Madras Impartible Estates Act (Madras Act II of 1904) it was none the less a will within the meaning of section 17. It was within the definition of a "will" in section 3 of Act V of 1881, a "legal declaration of the intention of the testator with respect to his property." The decision of the Board in *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Choudhry*(1) is distinguishable, as the document in question was in terms simply an authority to adopt. So also in *Somasundara Mudaly* v. *Duraisami Mudaliar*(2), the document contained no power to manage the estate, nor any other disposition of it. *Seshamma* v. *Chennappa*(3), referred to in the High Court, is not applicable.

Hon. Sir *William Finlay*, K.C., and *Parikh* for the respondent.—The document is merely an authority to adopt, with power

(1) (1865) 10 M.I.A., 279, 309. (2) (1904) I.L.R., 27 Mad., 30.
(3) (1897) I.L.R., 20 Mad., 467.

ancillary to that authority; it is not a will and accordingly, having regard to sections 17 and 49, conferred no power to adopt in the absence of registration. (They were stopped.)

The JUDGMENT of their Lordships was delivered by

VISCOUNT HALDANE.

Viscount HALDANE.—This case is an important one, and but for a preliminary point on which it turns, might have been a long one. There is, however, a preliminary question which goes to the root of the Appeal. Sri Sri Brojo Kishoro Deo executed a document in favour of his wife on the 14th August 1906. He called it a will, in the body of the document; but its only operative contents are to be found in the words which follow:

"I have been laid up with severe bodily illness for about the last seven months. Consequently having had serious misgivings, and not having until now been blessed with an heir-apparent for want of divine favour, I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed with my consent."

It will be observed that what is said by the writer of the document is that having had serious misgivings, and not having been until now blessed with an heir-apparent, he has consented to his wife adopting a son at her pleasure, and conducting the management of the estate in the best manner. That standing by itself appears to their Lordships to be no more than a present authority to the wife to make an adoption, and there is nothing else of substance in the document. It may be that the writer was in a position under the law applicable to give her such power, but whether he was or was not, he purports to give her nothing else; for the references to property that occur in it are no more than consequences of the guardianship of the wife, and the character of being a will is not established independently of these. Their Lordships therefore agree with the learned Judges in the Court of Appeal in thinking that the document is not a will, but only a power to adopt, and as such ought to have been registered as being an authority to adopt a son, not conferred by a will within the meaning of section 17 of the Registration Act of 1877.

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Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *Douglas Grant.*

Solicitors for respondent: *Chapman-Walker & Shephard.*

PRIVY COUNCIL.*

1921, May 26.

THIRUVENKATASAMI IYENGAR AND ANOTHER (DECREE-HOLDERS),

v.

PAVADAI PILLAI (EXECUTION DEBTORS).

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

Code of Civil Procedure (Act XIV of 1882), ss. 36, 37—"Pleader duly appointed"—Appointment of authorized agent—Signature to execution petition.

Where a party to a suit authorizes an agent by special power-of-attorney to appoint a pleader to sign execution petitions, a pleader so empowered by the agent, is a "pleader duly appointed to act on his" (the party's) "behalf," within section 36 of the Code of Civil Procedure, and the petition signed by the pleader but not signed by the party, is a duly presented petition even if neither the agent nor the pleader is a "recognized agent" within section 37.

[*Judgment of the High Court reversed.*]

APPEAL from a judgment and decree of the High Court (November 25, 1910) affirming a decree of the Subordinate Judge of Kumbakōnam.

The appellants, the panchayatdars or trustees of a temple, held a decree for mesne profits against the respondents, or their predecessors, for mesne profits. In 1905, the then trustees petitioned for execution of the decree. The petition was signed on their behalf by one Raghava Naicker and their duly authorized agent and by the first-grade pleader whom he had retained acting under a special power-of-attorney from the trustees, authorizing him to "execute vakalat to vakils, to sign execution petitions." The defendants contended that the petition was

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