

PRIVY COUNCIL.*

1921,
November 8.VENKATA ROW ALIAS GANESH ROW (SINCE DECEASED)
(PLAINTIFF),

v.

TULJARAM ROW AND OTHERS (DEFENDANTS)
(AND CONNECTED APPEALS)[On Appeal from the High Court of Judicature at
Madras.]*Hindu Law—Joint family property—Rights under decrees—
Minor—Agreement by karta releasing rights—Order in
Council declaring agreement invalid against minor—Additions
to joint family pendente lite—Effect of Order in Council.*

Under decrees made in 1896 and 1897 in a suit brought in 1886, a father and his minor son (the appellant), who together constituted a Hindu joint family, were entitled to recover a large sum from the first respondent. By a compromise agreement made in November 1897, the father purporting to act on behalf of himself and the appellant (but without the sanction of the Court), relinquished the claim under the decrees subject to the first respondent withdrawing an appeal which he had entered. In 1906 the appellant on attaining his majority brought a suit against his father and the first respondent, claiming that the compromise agreement was not binding upon him, and to recover under the decrees on behalf of the joint family consisting of his father and himself. Upon an appeal to the Privy Council in that suit an Order in Council was made in 1913 declaring that the agreement of November 1897 was not binding upon the present appellant, and that he ought to be remitted to his original rights under the decrees, and remanding the suit for the disposal of issues as to the share to which he was entitled. Meanwhile in 1907 and 1910, the joint family had been added to by the birth of two further sons to the appellant's father, and they were made parties after the remand. The High Court on appeal, treating the Order in Council as rendering the agreement of 1897 binding upon the father, decreed that the present appellant was entitled individually to a one-third share of a moiety.

* Present :—Lord BUCKMASTER, Sir JOHN EDGE, Mr. AMEER ALI and Sir LAWRENCE JENKINS.

Held, that in the events which had happened the compromise must be regarded as having wholly failed to convey any of the joint estate, though different considerations might have arisen if the appellant had predeceased his father and no further members had been added to the joint family; that the first respondent was entitled to prosecute his appeal in the suit of 1886; and that whatever sum might ultimately be recovered therein would belong to the joint family if it still existed, but if dissolved then in individual shares to be fixed as at the date of the dissolution.

In their Lordships' opinion the High Court having allowed the first respondent's Appeal in the suit of 1886 to be restored, should not have stayed it pending the decision in the present appeal, since that left the Privy Council to consider hypothetical rights which ordinarily no English tribunal would do.

CONSOLIDATED APPEALS (Nos. 23 and 24 of 1919), being cross-appeals from a judgment and decree of the High Court (30th August 1916) varying a decree of WALLIS, J. (18th December 1913) made in Civil Suit No. 194 of 1906; and Appeal from an Order of the High Court (30th August 1916) made in Petition No. 2684 of 1914.

The consolidated Appeals arose out of a suit (Civil Suit No. 194 of 1906) brought by the present appellant in the High Court; the circumstances giving rise to the litigation appear from the judgment of the Judicial Committee, and are shortly stated in the headnote.

The Order in Council made upon the judgment of the Board delivered on 8th April 1913, in the previous Appeal in the suit [see *Ganesha Row v. Tuljaram Row*(1)], set aside the decrees made by the lower Courts and declared as follows, "that an agreement of compromise, dated 21st November 1897, and the satisfaction entered thereunder are not binding upon the appellant and that he ought to be remitted to his original rights under the decrees in Suit No. 266 of 1886 on the file of the said High Court; that the suit out of which this Appeal arises ought to be remitted to the said High Court in

VENKATA
ROW
v.
TULJARAM
ROW.

(1) (1913) I.L.R., 36 Mad., 295 (P.C.); L.R., 40 I.A., 132.

VENKATA
ROW
v.
TULJARAM
ROW.

order that . . . issues Nos. 6 and 7 may be disposed of." The issues referred to were as follows :

(6) Is the plaintiff entitled to recover in any event more than a moiety of the amount sued for ?

(7) Is the plaintiff entitled to charge interest, and if so, at what rate ?

Of these issues No. 7 is not material to this report.

The suit was heard by WALLIS, J., who, on 18th December 1913, delivered a preliminary judgment. He held on issue No. 6 that the compromise was binding upon the half share of the fund to which Rajaram Row would have been entitled in 1897 if there had been a division between him and his son, the present appellant. He ordered that the two sons of Rajaram born in 1907 and 1910, the fact of whose birth was not before the Privy Council, should be joined, and he adjourned the further hearing. The two afterborn sons were accordingly joined, with Rajaram Row as their guardian *ad litem*, and were respondents 3 and 4 to the present Appeal. The case having been further argued the learned Judge on 24th March 1914, passed a decree in favour of the plaintiff, the present appellant, for a one-third share of a moiety of the fund.

Against this decree both Venkata Row and Tuljaram Row appealed. The former contended that he was entitled to recover the whole fund, the latter by his cross-appeal contending that Venkata Row was entitled only to a one-fourth share of a moiety of the fund. Tuljaram Row also filed a Petition (No. 2684 of 1914) praying to have his Appeal of 1897 from the decrees of 1896 and 1897 restored.

The Appeals and the Petition were heard together by the Officiating Chief Justice (ABDUR RAHIM, J.), and SESHAGIRI AYYAR, J., who delivered judgment on August 30, 1916.

The learned Judges dismissed the cross-appeal by Tuljaram Row. On the other hand they were of opinion that to give the plaintiff a decree for the whole amount would be opposed to the Order in Council made in 1913. They rejected the contention of Venkata Row that the half-share decreed was his separate property and that his two afterborn brothers had no share ; they considered that the declaration made by the Privy Council was not made in his favour individually, but as representing the joint undivided family. They rejected also his contention that the undivided status of the family had been disturbed by the agreement regarded as an alienation ; upon this point they relied upon previous decisions of the High Court, and pointed out that Venkata Row sued on behalf of the joint family. They varied the decree of WALLIS, J., so far as it related to the interest recoverable (see issue No. 7), but in other respects affirmed it. On the Petition they held that Tuljaram Row should have leave to restore his Appeal (No. 4 of 1897) for hearing, but by an order made on November 5, 1917, they directed that that Appeal be stayed pending the hearing of the present Appeal.

Venkata Row, the plaintiff-appellant, died in 1920, and was represented by his son. His father Rajaram Row died in 1915. It was stated in the course of the hearing of the present Appeal that the joint family had been dissolved in 1917.

De Gruyther, K.C., and *Kenworthy Brown*, for the representative of Venkata Row.—Venkata Row was entitled to recover in the suit the whole fund. He sued on behalf of the joint family, and by the Order in Council of 1913 was remitted to his original right apart from the compromise. The compromise cannot be treated as an alienation of half the estate. The principle by which in Madras effect in equity is given to an alienation of

VENKATA
ROW
v.
TULJARAM
ROW.

joint family property for consideration, *Manjaya v. Shanmuga*(1), cannot be applied to a mere relinquishment of a debt. Moreover, the compromise did not purport to be an alienation of Rajaram's share, but an act on behalf of the joint family. If, however, the compromise operated as a conveyance of Rajaram's share, it could only do so by effecting a severance : *Ram Chander Dutt v. Clander Coomar Mundul*(2), *Nuro Gopal v. Paraganda*(3), *Soundararajan v. Arunachalam Chetty*(4), *Hardi Narain Sahu v. Ruder Perakash Misser*(5). If there was a severance in 1897, Venkata Row is entitled to a share in which his afterborn brothers cannot participate.

Upjohn, K.C., and *Dube*, for respondents 3 and 4.—Tuljaram Row after the judgment of the Privy Council in 1913 petitioned to continue his Appeal of 1897. He thereby elected to treat the agreement as void. The compromise was entirely ineffective, and Venkata Row is entitled to recover on behalf of the joint family including these two respondents. It is stated that the family was divided in 1917 ; there was no division before that date.

C. D. Murray (Solicitor-General for Scotland), and *Ingram* for Tuljaram Row.—The Order in Council of 1913 declared the compromise not to be binding upon Venkata Row merely. It left it valid as a shield to Tuljaram against everybody else, including respondents 3 and 4. Rajaram Row had power in 1897 to bind his afterborn sons : *Mayne*, 8th edition, paragraph 342. If Venkata Row was entitled to recover the whole property he could take it only on the terms that it was burdened with an equity in favour of Tuljaram.

(1) (1915) I.L.R., 38 Mad., 684.

(2) (1869) 13 M.I.A., 181, 193.

(3) (1917) I.L.R., 41 Bom., 347, 354.

(4) (1916) I.L.R., 39 Mad., 159 (F.B.), 180.

(5) (1884) I.L.R., 10 Calc., 626 (P.O.) ; L.R., 11 I.A., 26.

Uppjohn, K.C., in reply.—The compromise could exist only as the act of the joint family, and was therefore wholly avoided by the Order of 1913. Rajaram did not enter into it as karta, and did not bind his afterborn sons. It cannot be regarded as a severance, because its terms are consistent only with the continued existence of the joint status.

VENKATA
ROW
v.
TULJARAM
ROW.

De Gruyther, K.C., replied in the cross-appeal.

The JUDGMENT of their Lordships was delivered by Lord BUCKMASTER.—The real question for determination in these Appeals is as to the effect of a compromise entered into on 21st November 1897, between Rajaram Row, purporting to act both for himself and as guardian of his minor son Venkata Row, and Tuljaram Row. The compromise related to certain claims then existing between Rajaram Row and his son, as constituting a joint Hindu family, against Tuljaram Row, and it arose in this manner. Originally Venkata Row, together with his four sons, Ramachandra Row, Luchmana Row, Rajaram Row and Tuljaram Row, formed a joint Hindu family, governed by the Mitakshara law. Venkata Row died in 1871, survived by his sons, and in 1881 the joint family was dissolved, and a division of the joint estate took place, leaving the greater part of it in the hands and under the control of Tuljaram Row, who was the manager of the family. In 1886 a suit was brought by Atmaram, the son of Luchmana, against Tuljaram Row, for the purpose of ascertaining the extent of the family assets remaining in his hands, for the necessary accounts, partition, and other reliefs, and to this suit all the members of the family were parties. Two decrees were made in that suit, one on 21st October 1896, and the other on 17th August 1897, and by these orders Tuljaram Row was decreed as liable to pay to Rajaram Row and his branch of the family certain sums of rupees.

Lord
BUCKMASTER.

VENKATA
ROW
v.
TULJARAM
ROW.
—
Lord
BUCKMASTER.

The compromise to which reference has been made was a compromise of the rights possessed by Rajaram Row and his son under these decrees.

The compromise was a very simple matter. It consisted in releasing Tuljaram Row from all liability to make the payments which he had been ordered by the High Court to make, payments which were on the face of them considerable in extent; and the only consideration mentioned was that Tuljaram would agree not to prosecute an Appeal which he then had on foot against these orders. In other words, Rajaram Row, acting in his own interest and on behalf of his infant son, gave up and surrendered, without any further struggle, all the rights to which he was then entitled, together with his son, in the decrees of October 1896, and August 1897.

It is not surprising in these circumstances that on Venkata Row attaining his majority in 1906 he should have taken steps to challenge the validity of this compromise. A suit was accordingly instituted by him under the name of Ganesha Row against Tuljaram and Rajaram Row, seeking to recover the monies mentioned in the decrees as "the undivided son" of Rajaram Row. He failed both before the Judge of First Instance and in the Court of Appeal. The matter then came before the Judicial Committee—*Ganesha Row v. Tuljaram Row*(1)—and on 8th April, 1913, it was decided that the compromise did not bind, and could not bind, the infant, who ought to be remitted to his original rights under the decrees in the suits referred to, and the case was remitted to deal with the remaining issues on this footing.

Two further sons were born to Rajaram Row before the case came on for hearing on remand, and as they were also members of the joint family with their father

(1) (1913) I.L.R., 36 Mad., 295 (P.C.); L.R., 40 I.A., 132.

and the plaintiff, they were added as defendants and are the third and fourth respondents in these Appeals. On behalf of the plaintiff it was argued that the compromise became wholly ineffectual by virtue of the order, as the family had never been divided, that consequently the new members of the family were entitled to their share and their rights could not be established if the compromise remained.

WALLIS, J., before whom the remitted issues were tried, decided that Ganesha could only be entitled to a half-share, but as the further members of the family had come into existence, namely, two further sons of Rajaram, he directed that they should be added as defendants, and on this being done he decreed that Ganesha and his two brothers were together entitled to a half-share of the monies with interest, in other words he gave Ganesha one-sixth of the whole. The judgment also dealt with other matters no longer material, and it gave rise to as many as four Appeals, of which it is only necessary to consider that of Ganesha, whose representatives are the present appellants. His Appeal failed because the High Court regarded the order of the Privy Council as rendering the compromise binding on Rajaram Row's then existing share, but, in fact, the order only declared the compromise was not binding on Ganesha Row, who was remitted to all his original rights under the compromised suits.

The appellants urge that in the events that have happened this entitles the whole family to share in the whole fund, as otherwise the rights of the appellants would have been seriously curtailed by the order which intended that they should be preserved.

Their Lordships think that this argument is well founded. The agreement of 21st November 1897 did not purport to be a release of individual rights or shares

VENKATA
ROW
v.
TULJARAM
ROW.
—
Lord
BUCKMASTER.

VENKATA
ROW
v.
TULJARAM
ROW.

Lord
BUCKMASTER.

in the fund at all; it did not purport to effect any division of the joint family estate that then existed between Rajaram and his son in the subject matter of these decrees. On the contrary, what it purported to do was to release the whole of the debts that were then owing to the joint family, in consideration of Tuljaram not prosecuting his Appeals.

Now it has been held by this Board that that attempted arrangement failed so far as the infant was concerned; and, if it failed so far as the infant was concerned, their Lordships think that in the events that have happened it must also be regarded as failing wholly to convey any of the joint estate at all. They have arrived at that conclusion for these reasons. Rajaram Row, unless he was attempting to divide the joint family, could only deal with this property with the consent of his son or in his capacity as manager of the estate. In his capacity as manager of the estate he was only able to deal with it for certain limited purposes, and none of those purposes are, or can be, suggested as the consideration why these considerable sums were released. It follows, therefore, that the attempt to alienate, or to release, from the estate these substantial portions of the joint family property failed, and that there was no efficacy given to the arrangement that was then contemplated.

Their Lordships have expressly stated that this is their view of this agreement in the events that happened. It might possibly have been that different circumstances would have arisen if Venkata Row, the son, had predeceased his father, and there had been no further members of the joint Hindu family. In that case it is possible that the arrangement would have been one which Rajaram Row would have been unable to dispute; but those are not the circumstances that exist at the present

time. At the present time the joint family continues ; the joint family finds that this is a portion of the joint family estate which has been improperly alienated, and which they are entitled to recover. It, of course, follows equally upon that that Tuljaram Row will be entitled to prosecute his Appeals, and their Lordships are a little astonished to find that, although liberty has been given to him to proceed, an order has been made which has restrained the prosecution of these Appeals until after the hearing of these Appeals by this Board. Were this matter ordinary English litigation, of course no tribunal here would consider hypothetical rights, the exact character and extent of which could only be ascertained after the hearing of other pending litigation ; but unwillingness to let litigants, who have entrusted their disputes to the Board for determination, from a place so far distant as India, be disappointed in receiving judgment, has led their Lordships to disregard the ordinary rules that are followed in these matters, and to hear the Appeal, notwithstanding the fact that it is impossible to know the exact amount upon which it will operate.

In the result their Lordships will humbly advise His Majesty that the decrees of the High Court ought to be set aside, and that it ought to be declared that whatever sums may ultimately be recovered in respect of the monies that were ordered to be paid by the decrees of 21st October 1896, and 17th August 1897, referred to in the agreement of 21st November 1897, form part of the joint family estate which was constituted on 21st November 1897, by Rajaram Row and his son Venkata Row. If, on the other hand, that family has, as is stated, been dissolved, the declaration will be that the shares in the monies are to be fixed as at the date of its dissolution. As regards the further Appeal, Tuljaram

VENKATA
ROW
v.
TULJARAM
ROW.
—
Lord
BUCKMASTER.

VENKATA
Row
v.
TULJARAM
Row.
—
Lord
BUCKMASTER.

Row is entitled to have the case remitted to the High Court to hear the appeal O.S.A. No. 4 of 1897, and to issue a revised decree in O.S. No. 266 of 1886, finally determining the sum, if any, that is due.

As regards the costs the respondent, Tuljaram Row, must pay one set between the appellants and the respondents, Ramachandra Row and Radha Bai.

Solicitor for appellant: *Douglas Grant*.

Solicitor for first respondent: *W. Graham Pole*.

Solicitor for other respondents: *H. S. I. Polak*.

A.M.T.

PRIVY COUNCIL.*

1922,
January 17.

MUHAMMAD IBRAHIM ROWTHER AND ANOTHER
(PLAINTIFF),

v.

SHAIKH IBRAHIM ROWTHER AND OTHERS
(DEFENDANTS).

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

Custom—Inheritance—Lubbai Muhammadans—Exclusion of females—Costs of Appeal—Delay—Madras Civil Courts Act (III of 1873), sec. 16.

Having regard to the Madras Civil Courts Act, 1873, section 16, it is for those alleging among Muhammadans a custom of inheritance at variance with Muhammadan Law to prove by clear and unambiguous evidence an ancient and invariable custom.

In the present case an alleged custom among Lubbai Muhammadans whereby females were excluded from inheritance was held not to have been established, the existence of the custom among that community having repeatedly been negatived by decisions of the Courts, and not being proved by the evidence in the case.

* Present:— Lord BUCKMASTER, Lord ATKINSON, Mr. AMEER ALI and Sir LAWRENCE JENKINS.