APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Hayward.

1918. November 11.

BALKRISHNA MOTIRAM GUJAR (ORIGINAL DEFENDANT), APPELLANT *v.* SHRI UTTAR NARAYAN DEV (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Conditional adoption—Adoptive father directing payment of an annual sum in charity out of his property at the time of making the adoption —Consent of the natural father of the adopted boy—Grant of annuity not valid.

A Hindu, who was in possession of ancestral property, executed, when he took the defendant in adoption, a *vyavasthapatra*, with the consent of the natural father of the defendant, whereby he directed payment of an annual sum for the purpose of lighting lamps in a specified temple. A dispute having arisen as to the validity of the grant :—

Held, that the grant in favour of the temple was invalid as not having been recognized by custom to be appropriate at the time of adoption or binding upon the adopted son in modification of the strict rules of Hindu law.

SECOND appeal from the decision of P. J. Taleyarkhan, District Judge of Thana, confirming the decree passed by K. G. Patkar, Subordinate Judge at Alibag.

Suit to recover arrears of an annual grant of money.

The grant in question was made by one Motilal. He was in possession of ancestral property. In 1899, he took the defendant in adoption. At that time he executed a *vyavasthapatra* whereby he made arrangement for the management of the property during the minority of the defendant; and also directed payment of an annual sum of Rs. 20 for the purpose of lighting lamps in the temple of Shri Uttar Narayan at Alibag. To this disposition the consent of the natural father of the defendant was taken. Motilal died some time afterwards.

The defendant did not pay the annual sum of Rs. 20 to the temple specified. The plaintiff, thereupon, filed

* Second Appeal No. 449 of 1917.

the present suit to recover arrears of the grant for three years preceding the suit.

The Court of first instance decreed the suit, holding that the grant was valid, on the following grounds :—

"The defendant's adoption was conditional on the provisions of the will being acquiesced in and the adoption was subject to the interests created by the testator in favour of the religious objects specified in the will."

On appeal this decree was confirmed by the District Judge.

The defendant appealed to the High Court.

P. B. Shingne, for the appellant :—The document by which the grant to the temple has been made is a will. A coparcener in a Hindu joint family cannot make a will. And in the present case, as the result of adoption, the appellant became a member (coparcener) in the family. The concurrent finding that the making of the grant was a condition precedent to the adoption will not affect the present case, because the natural father could not give to the adoptive father any larger rights than the latter could have enjoyed as a coparcener and if the adoption purports in this case to clothe the father with any larger rights and give to him larger freedom to dispose of the joint property, the arrangement to that extent is illegal and void : see *Vyasacharya* v. *Venkubai*[1]. The appellant has neither ratified them, nor is any custom set up to support such an agreement. Hence the case of *Vinayak Narayan Joy* v. *Govindrav Chintaman Joy*[2] or of *Chitko Raghunath Rajadiksh* v. *Janaki*[3] do not apply. Similarly, the decisions in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshimibai*[4], and *Basava* v. *Lingangauda*[5] do not apply : see also the remarks of

(1) (1912) 37 Bom. 251, at p. 262.
(2) (1869) 6 Bom. H. C. (A.C.J.) 224.
(3) (1874) 11 Bom. H. C. 199.
(4) (1887) 11 Bom. 381 at p. 400.
(5) (1894) 19 Bom. 428.

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the Privy Council in *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*[1].

A. G. Desai (for *Y. M. Kamal*) for respondent:—The grant is justified. The adoption was, moreover, made subject to it. It is, therefore, binding: *Lakshmi* v. *Subramanya*[2]; *Narayanasami* v. *Ramasami*[3]; and *Visalakshi Ammal* v. *Sivaramien*[4]. The decision in *Vinayak Narayan Joy* v. *Govindrav Chintaman Joy*[5]; *Chitko Raghunath Rajadiksh* v. *Janaki*[6] and *Ravji Vinayakrav Jaygannath Shankarsett* v. *Lakshimibai*[7] also prove the validity of agreements of the kind found in this case. The grant is also found to be reasonable by the lower Courts and is binding on that account.

The grant can also be upheld on the ground that it was made to a temple of the place where the family resides and was calculated to confer spiritual benefit to the soul of the deceased. A Hindu father can do so and his son is bound by it. The burning of a lamp in a temple has a peculiar religious efficacy according to Hindu Shastras.

Shingne, in reply:—The real point at issue is whether the deceased could make such a grant by a will. It is not a grant by a deed *inter vivos*. Remarks at p. 586 in *Visalakshi Ammal* v. *Sivaramien*[4] help my contention.

HAYWARD, J.:—The plaintiff, a manager of a temple, sued to recover Rs. 20 a year due for three years on a grant for providing lights in the temple under a document termed a *vyavasthapatra* executed by the deceased Motilal. The defendant pleaded that the grant was invalid owing to his adoption at the time of the execution of the *vyavasthapatra* by the deceased Motilal.

(1) (1888) L. R. 16 I. A. 53 at p. 59.
(2) (1889) 12 Mad. 490.
(3) (1890) 14 Mad. 172.
(4) (1904) 27 Mad. 577.
(5) (1869) 6 Bom. H. C. (A.C.J.) 224.
(6) (1874) 11 Bom. H. C. 199.
(7) (1887) 11 Bom. 381 at p. 400,

The Subordinate Judge held at the trial that the grant was not invalid as the adopted son's natural father had consented to it at the time of the execution of the *vyavasthapatra* by the deceased Motilal. This decision was affirmed on first appeal by the District Judge, and the matter has now been brought for final decision in Second Appeal to this Court.

It is admitted that the case concerns ancestral property and that the natural father did consent on behalf of his son to this grant towards lighting the temple as thus described in the *vyavasthapatra* :—

"I have become old and I have been ill for many a day. According to the ways of this mortal world there is no saying when death will come.... I entertaining a desire to take a boy in adoption and with a view that my lineage should continue and after my death my funeral and other death ceremonies should be performed....I have this day taken Bababhai's son Vallabhdas in adoption. Therefore...I execute this deed of management regarding the manner in which the management should take place after my death....I will maintain my adopted son Balkrishna during my life-time and after my demise my brother Bababhai Vithaldas should maintain him. And for that purpose he should get every year one hundred rupees (100) and the management of the estate should be carried on on behalf of the boy till he attains the age of twenty one years by Bababhai....Out of the yield of the next three year's income after keeping aside Rs. 100 for the maintenance of the long-lived Balkrishna the balance so remaining should be expended every year towards performing permanently the following charitable deeds.... For the purpose of lighting lamps in the temple of Shri Uttar Narayan situate at Alibag Rs. 20 should be paid every year....The sum mentioned above that is indicated to be expended towards performing the charitable deed is to be expended after three years' income will have accumulated and the charitable deeds should be performed out of the interest over that sum so accumulated. ...The religious charitable deeds referred to above should be permanently carried on after my demise....And this religious charitable deed is a hereditary one to be performed from generation to generation from son to grandson after my demise....On my estate there is a charge created for the sums to be expended on the charitable deeds".

It appears to me that the intention was that the grant should be paid out of the interest to be received on

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three years' accumulation of the income of the estate after the death of Motilal. The document was, it is true, styled a *vyavasthapatra* and not a *nirutyupatra*, but it must, in my opinion, be taken to have been, upon a true interpretation of its terms, a will, as it was intentioned to take effect after the death of Motilal.

It has not been denied that an alienation would have been good if made before the adoption by Motilal who was the sole survivor of the joint Hindu family. But it has been argued that this particular grant was invalid notwithstanding the consent of the natural father as it was to take effect subsequently after the death of the testator Motilal. It appears that the authorities are by no means clear as to the effect of such agreements entered into at the time of the adoption on behalf of a son by the natural father. It was at one time sought to uphold such agreements as binding contracts as in the cases of reservations for widows in *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* [1], *Chitko Raghunath Rajadiksh* v. *Janaki* [2], *Lakshmi* v. *Subramanya* [3] and *Narayanasami* v. *Ramasami* [4]. But these decisions were not followed in a similar case of *Jagannadha* v. *Papamma* [5], relying upon certain remarks by the Privy Council. It was stated that such agreements would not be void and might be ratified subsequently by the son in the case of *Ramasawmi Aiyan* v. *Vencataramaiyan* [6], and doubts as to their validity were expressed in the case of *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar* [7] by the Privy Council. On the other hand the reservation of rights for the widow was held valid by custom modifying Hindu law

[1] (1869) 6 Bom. H. C. (A. C. J.) 224.
[2] (1874) 11 Bom. H. C. 199.
[3] (1889) 12 Mad. 490.
[4] (1890) 14 Mad. 172.
[5] (1892) 16 Mad. 400.
[6] (1879) L. R. 6 I. A. 196.
[7] (1888) L. R. 16 I. A. 53 at p. 59.

in the case of *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* [1], and again gifts to daughters were held valid though the *ratio decidendi* was not clearly expressed in the case of *Basava* v. *Lingangauda* [2]. An agreement, however, by the natural father for a gift being made to the brother's widow was held invalid in the case of *Venkappa* v. *Fakirgowda* [3]. The decision appears to have proceeded on the reasoning in *Ravji Vinayakrav's case* [1] and the *ratio decidendi* would appear therefore to have been that such an arrangement was not in accordance with any custom modifying Hindu law. There was another case quoted before us which was not however exactly in point in which an agreement made by the adopted son himself who was a major was held binding as a family arrangement. The case is *Kashibai* v. *Tatya* [4]. It would appear that that case also was decided, in view of the reference to a family arrangement, as a matter entirely of Hindu law. A clear statement of the objections to supporting such agreements as contracts was made in the referring judgment of Subrahmania Ayyar Offg. C. J. in *Visalakshi Ammal* v. *Sivaramien* [5]. The matter was expressed by Benson J. in the final judgment (page 586), thus after reciting the various decisions by Hindu Judges: "I think that great weight must be attached to the decisions of such men on a question like the present which I regard as one of Hindu law modified by Hindu custom and usage developed in accordance with the conceptions of the present time. It is to be observed that there is no text of Hindu law which either recognizes or prohibits such an agreement as the present being entered into, and it is certain, as remarked by West and Buhler, 'Hindu law', 3rd edition,

[1] (1887) 11 Bom. 381 at pp. 400, 404.
[2] (1894) 19 Bom. 428 at. pp. 461, 483.
[3] (1906) 8 Bom. L. R. 346.
[4] (1916) 18 Bom. L.R. 740.
[5] (1904) 27 Mad. 577.

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page 1106, that in actual practice 'fair arrangements for the protection of the widow's interest during her life, are commonly made, and are always supported by the authority of the caste' ". And again at page 587 : "I cannot but think that this principle ought to guide the Courts in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father ; if reasonable, such as only to define and limit the son's enjoyment of the property, they should be upheld... If the agreement is such as to be inconsistent with the fundamental idea underlying adoption and the purpose for which it is sanctioned by Hindu law, as, for instance, if it deprived the adopted son of all right to the property of the adoptive father and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu law and would refuse to uphold it. But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu law ". The reservation in favour of the widow upon these principles was held binding according to Hindu law by the Full Bench. The statement of Subrahmania Ayyar, Offg. C.J. was quoted with approval in the referring judgment of Beaman J. in the case of *Vyasacharya* v. *Venkubai* [1]. It was decided there in the final judgment that the reservation in favour of the daughter was invalid relying upon the decision in *Venkappa* v. *Fakirgowda* [2]. The general question referred to was not decided by the Full Bench, but the reasoning proceeded (page 262) upon the rules of Hindu law.

[1] (1912) 37 Bom. 251 at p. 254. [2] (1906) 8 Bom. L. R. 346.

It would appear to have been established by these decisions that agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu law. But no authorities have been quoted before us in favour of any other persons in such connection or in support of a general extension of the modification so as to include, as here claimed, reservations in favour of charities and religious endowments. The burden of establishing any such extension would lie upon the person seeking to prove such modifications of the strict rules of the Hindu law. That burden has here not been discharged. No evidence whatever was adduced to show that reservations in favour of religious endowments have by custom been recognized as appropriate on such occasions and no texts have been quoted to prove that they would be permissible on such occasions under the strict rules of Hindu law.

We ought, therefore, in my opinion, to decline to recognize the extension claimed and we ought to hold that the grant in favour of the temple was invalid as not having been recognized by custom to be appropriate at the time of adoption or binding upon the adopted son in modification of the strict rules of Hindu law. The appeal ought, therefore, in my opinion, to be allowed and the suit dismissed with costs throughout.

HEATON, J. :—I concur.

Appeal allowed.

R. R.