Privy Council Appeals Nos. 114–16 *of* 1910.

Sri Raja Venkata Narasimha Appa Row Bahadur Zemindar, since deceased (now represented by Meka Venkataramayya Appa Row Bahadur and another) - - - *Appellants,*

v.

Sri Raja Parthasarathy Appa Row Savai Aswa Row Bahadur Zemindar and another - - - - - *Respondents;*

Sri Raja Venkatadri Appa Row Bahadur Zemindar - - *Appellant,*

v.

Sri Raja Venkata Narasimha Appa Row Bahadur Zemindar, since deceased, and another - - - - *Respondents;*

Sri Raja Venkatadri Appa Row Bahadur Zemindar - *Appellant,*

v.

Sri Raja Parthasarathy Appa Row Savai Aswa Row Badadur Zemindar and another - - - - - *Respondents.*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON THE QUESTION OF ADOPTION, DELIVERED THE 10TH DECEMBER 1913.

Present at the Hearing:

LORD SHAW. SIR JOHN EDGE.
LORD MOULTON. MR. AMEER ALI.

Delivered by LORD MOULTON.

The further question now for consideration in these consolidated Appeals is the ownership of the Zamindari of Medur. It is common ground that at one time this zamindari belonged to Narayya Appa Row, the son of Venkataramayya Appa Row, who will for convenience be

referred to as Narayya the younger It is also common ground that Narayya the younger died intestate on the 4th August 1895. The points in dispute are whether at the time of his death Narayya the younger had become by adoption the son of Raja Narayya Appa Rao Bahadur Garu, who died on the 7th December 1864 (and who will for convenience be referred to as Narayya the elder), and whether if such adoption took place, it had the effect of divesting him of the Zamindari of Medur. In order that the Respondents in this Appeal may sustain their claim to a share of the Zamindari of Medur, it is necessary that they should succeed on both these points, inasmuch as their claim by inheritance from Narayya the younger depends on his having been validly adopted into the family of Narayya the elder. Their claim must therefore fail if he was not validly adopted, or if, having been so adopted, he thereby forfeited his right to the Zamindari of Medur, which appears to have been ancestral property in his family of origin.

The alleged adoption took place after the death of Narayya the elder and was made by his widow Papamma. The Respondents claim that this adoption was a valid exercise of the powers given by the last will of Narayya the elder. The Appellants, on the other hand, contend that the power of adoption which purported to be given by the said Will was in itself invalid, and that even if the power was valid as given in the will the alleged adoption was not in accordance with that power, and was accordingly of no force or validity. If the Appellants succeed in making good either of these objections to the validity of the adoption, the whole claim of the Respondents admittedly falls to the ground, and their Lordships have therefore considered it desirable that these points should be fully argued in the

first instance as preliminary points, and that they should express their opinion on them before considering the other portions of the case.

The Will of Narayya the elder is dated the 6th day of December 1864, *i.e.*, immediately previous to his death. He was a member of the Velama branch of the Sudras caste. He had two wives named respectively Papamma and Chinnamma. So much turns upon the language of this Will that it is advisable to cite it in full. It reads as follows :--

" As my illness increased, and as I think I would not " survive, you both should divide in equal shares my " Zamindari Nidadavole and Bahargalli parganas and " Amberpet pargana, the cash in the upstair building and " all other moveable and immoveable property. It has " been arranged that my nephew (sister's son) Chiranjivi " Vellanki Venkatakrishna Row should enjoy hereditarily " from son to grandson the profits of the village of Mandur " attached to Ambarpet Muttah, and also of Nagulapalli " and Rajupotepalli villages attached to the Taluqdari, and " that my brothers-in-law Vellanki Jagannadha Row Garu " and Vellanki Sura Row Garu, should enjoy hereditarily " the profits of the village of the Undrajavaram attached to " Nidadavole pargana paying every year the peishcush " fixed therefor at the sub-division according to the kistbund " (instalments). You both should maintain our samastanam, " servants, clerks, dasis and other servants. You should " for the most part live in harmony with my younger " brother Chiranjivi Venkatadri Appa Row. You should " adopt a boy who is our sannihita (one closely related) " whenever it strikes you that our samastanam should " continue. In all matters both should act without " quarrelling. I have this day alone caused a petition to " be written and sent to the Collector of Godavari in regard " to this matter. You both should without fail act " according to the aforesaid paddhalis (terms)."

The Will is signed by the testator and witnessed by four witnesses, and under their names come the words :—

" We both have agreed to act according to the aforesaid " terms."

and this is signed by Papamma and Chinnamma.

Chinnamma died in 1881. It was not until the year 1895 that any steps were taken with regard to the adoption of a boy, but in that year the surviving wife Papamma purported to adopt Venkataramayya, the father of Narayya the younger. This so-called adoption of Venkataramayya was declared by the Court to be invalid, and thereupon in the year 1890 Papamma purported to adopt Narayya the younger.

The Appellants contend that the proper construction of the language of the Will is that, it gives a joint power of adoption to the two wives to be exercised when they shall think it desirable that the testator's *samastanam* should continue. They contend that such a joint power of adoption is in itself invalid, inasmuch as only one wife can adopt, and they further say that, even if this be not so, the occasion for the exercise of the power is when the two wives should jointly decide that it was desirable that the family should be continued, and the act must then be the joint act of the two wives. If this be so, it follows that the power could not be exercised after the death of one of the two wives, since thereafter there could be neither agreement nor joint action.

It is somewhat difficult to set out precisely the contentions of the Respondents on these points. Their Counsel admit that while both the widows were living no adoption could take place without the consent of both. But they contend that the proper interpretation of the language of the Will is that when the two widows should agree on the desirability of adoption taking place and on the person to be adopted, the adoption should be carried out by one of the widows (preferably the first wife) who would thereby become in law the mother of the adopted child. They contend that a joint power of adoption is valid by Hindu law and must be interpreted in the

above sense, and, further, that on the death of the one widow the power both of choice and adoption would, under the terms of the Will, pass to the survivor.

Before examining the validity of these contentions it will be well to clear up one or two points upon which their Lordships are of opinion that no reasonable doubt can exist.

In the first place there could be no power of adoption by either or both of the widows in the present case excepting such as might be derived from the powers given by the Will. In this part of India, at all events, a widow has no power to adopt a son to a deceased husband excepting by express authority given by him in his lifetime or by will. In the next place only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance.

But it does not follow as a matter of necessity from these considerations that a power given to more than one wife to adopt must be an invalid power. In many matters custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view. In the very question that is before their Lordships there are indications in the cases cited that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the first wife. But their Lordships are of opinion that the validity of a joint power of adoption and its interpretation

are questions of far-reaching importance in Hindu law and that in the present case the materials for deciding them are very insufficient. They would greatly regret to find themselves compelled to decide such questions on imperfect materials and inasmuch as in the view which their Lordships take of this case it is not necessary that these points should be decided they desire to express no opinion upon them, and will assume for the purposes of their decision that the Respondents are right in their contention that such a joint power of adoption given to the two widows was, if properly interpreted, a valid power, and that if they had agreed to a person to be chosen for such adoption they could have validly executed the power.

There remains the second point, *i.e.*, whether the power given by the Will was exerciseable by the surviving widow alone after the death of the other.

The arguments of the Appellants on this point are that upon a proper construction of the Will it gives a joint power to the two wives to be exercised when they jointly come to the conclusion that it is desirable that it should be exercised, and that it should then be exercised only in case of a boy to be chosen by them jointly. As a mere matter of construction their Lordships are of opinion that the Appellants are right in this contention and in an ordinary case of the giving of a joint power to two donees the legal consequences claimed by the Appellants would follow.

But the Respondents claim that this must not be treated as a mere question of construction. They submit that the continuation of the line of the testator must be taken to have been for religious purposes in order that he might have the advantages of an heir who could perform the

religious ceremonies affecting his future life. They therefore contend that this Board should put aside all rules of law prevailing in England with regard to joint donees of a power and should, as a matter of judicial duty, give effect to the intention of the testator with respect to procuring for himself an heir by adoption, and not permit that intention to be defeated by its becoming impossible of execution by the two donees jointly by reason of the death of one of them.

Their Lordships are of opinion that this reasoning is unsound. In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, *i.e.*, to construe the Will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure "The Court is entitled to put itself into the testator's armchair." Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality

unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a Will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the Will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life.

This fundamental principle does not clash with the principle that the Court will not necessarily apply English rules of construction to such a Will as we have here to deal with. These rules of construction amount in many cases to nothing more than saying that a special phrase which may be used in more than one sense shall *primâ facie* be deemed to be intended to bear one particular meaning, unless from the consideration of the context or the surrounding circumstances, the Court can come to the conclusion that it is there used in a different sense. In other cases the rules are the expression of such tendencies in the Court as the desire to avoid an intestacy or the presumption in favour of immediate vesting of an estate. Such rules are purely an English product based on English necessities and English habits of thought, and there would be no justification in taking them as our guide in the case of Indian wills. Nor does this fundamental principle clash in any way with what is sometimes called "giving a liberal interpretation" to native wills. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the "surrounding circumstances" which the Court must bear in mind, and it is

justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained they must not be departed from.

Applying these principles, their Lordships have to ascertain the true intentions of the testator from the language used in the Will. The words are " You should adopt a boy who is our " *sannihita* (one closely related) whenever it " strikes you that our *samastanam* (family) should " continue." Such an adoption would have effects of two very different kinds. In the first place it would provide someone who would offer the customary oblations for the good of the soul of the testator, and in the second place it would change the succession of the property. The devolution after the death of the widows would no longer be to the persons entitled to succeed on an intestacy, but to the heirs of the person adopted. Counsel for the Respondents would have us regard the religious motive as the overmastering one, so that the intentions of the testator must be treated as if they were dictated by it alone. Their Lordships fully appreciate how strong such a motive may be expected to be in the mind of a Hindoo. But in their Lordships' opinion the language of the testator points to the predominance of the secular motive. He does not direct that there shall be an adoption, as he would naturally have done had he wished in all events to secure that there should be a son to perform the due religious rites. He makes it depend on the opinion of his widows whether and when an adoption should take place. It is common ground that the occasion for an adoption would not arise in the lifetime of the two widows unless they both agreed to use the power, and there is nothing which indicates any intention to

interfere with their freedom of choice in the matter, whether the true interpretation be that the power was joint or several.

But this does not exhaust the material which we have for arriving at the testator's true intentions. In judging of the light in which the directions of the testator are to be regarded, it is legitimate to look at the contemporaneous document referred to in the will which he wrote or caused to be written with the express intent to render clear his wishes with regard to his succession. This document has, of course, no testamentary effect, but it is legitimate to look at it as one of the surrounding circumstances in order to test the soundness of the principle of interpretation pressed upon us by Counsel for the Respondents. In the Will the testator writes : " I have this day alone caused a petition to be " written and sent to the Collector of Godavari " in regard to this matter." This petition, which is signed by the testator and bears the same date as the Will, is substantially a repetition of it, though the language is not precisely the same. The passage relating to adoption reads thus : " That, if it should strike them (*i.e.*, his " widows) to continue the *samastanam*, they " should adopt a boy who is my *sannihita*." This language emphasizes that which is expressed also in the Will, viz., that the adoption should only take place if and when the widows thought it desirable that such should be the case, or in other words if and when they thought it desirable that the succession to the property should be changed. Had the testator been moved by an overmastering religious motive to secure that there should be someone to act as his son after his death, it is inconceivable that he would have used such language or made such provisions relating to the future adoption of a son. He would have directed that an adoption should take place and

not left it to depend on the problematical concurrence of his widows in their views as to its desirability.

For what it is worth, it is clear that this was the interpretation put upon the Will by the widows themselves. It will be remembered that they signed the Will at the date of its execution and promised to act according to its terms. Three days after this they write to the Collector of Godavari referring to these provisions of the Will in the words "and that if "it should strike us that the *samastanam* should "continue we should adopt a boy who is our "*sannihita*." The testator died in 1864. His widow Chinnamma died in 1881 leaving Papamma surviving her. It is not until 1885, four years after the death of Chinnamma, that any steps to adopt a boy are taken. It is clear therefore that the widows who were acquainted with the provisions of the testator's Will at the time and undertook to carry them into effect did not interpret them as doing more than leaving them quite free to adopt or not as they might think desirable.

Their Lordships are therefore of opinion that in the present case there is nothing which requires or justifies them in interpreting the provisions of the Will with regard to the adoption in any special way arising from the fact that the testator was a Hindoo. They must adhere to the plain meaning of the language used. So construing it they are of opinion that it gives to the widows jointly the power to adopt a son should an occasion arise which in their opinion makes it desirable so to do. The power is a joint power and the occasion on which it is to be exercised depends on their joint opinion. In other words, the exercise of the power is vested in the discretion of the joint donees. Now it is

clearly the law that in such a case the death of one of the donees puts an end to the joint power. This is not by virtue of any peculiar doctrine of English law or of any series of English decisions. It flows from the nature of a joint power. If power is given to A. and B. *personæ designatæ* to do an act if and when they think it desirable the occasion cannot arise nor can the power be exercised unless they are both living and in agreement as to the act. This cannot be the case after the death of one of them and the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague nor can he then do the act, seeing that the authority to do it is only given to the two acting jointly. The case is different when the power is vested not in *personæ designatæ* but in the occupants for the time being of a specified office such as executors or trustees, but that is not the case which we have to consider here.

The point may perhaps be put in a simpler form not involving any appeal to legal doctrines as to joint donees of a power. Their Lordships are of opinion that the words of the Will when properly construed relate to choice and adoption by the two widows acting jointly. Hence those words refer only to the period of time when both widows are living. The Will is silent as to the period after the death of one of the widows and if their Lordships were to hold that Papamma could adopt a son after Chinnamma's death they would be providing for a period of time which the Testator left unprovided for, and unnoticed in his Will, *i.e.*, they would be making an addition to his testamentary dispositions which is a thing that no Court is entitled to do.

It follows therefore that at the death of Chinnamma the power to adopt given to his widows by the testator came to an end, and

therefore the alleged adoption of Narayya the younger is of no validity.

On the consolidated Appeals (Judgment in one of which has already been delivered on the 24th July 1913) their Lordships will therefore humbly advise His Majesty to affirm the Decree of the High Court of Madras dated the 20th November 1905 so far as it dismissed with costs Appeal No. 32 of 1904, and to reverse the said Decree and the Decree of even date therewith so far as they dismissed with costs Appeals No. 122 and 123 of 1900, and allowed with costs Appeal No. 41 of 1904, and that it ought to be declared that the adoption of Narayya Appa Row the son of Venkataramayya Appa Row the Zamindar of Medur and Venkayamma Row his wife by Papamma the widow of Narayya Appa Row the Zamindar of Nidadavole was invalid, and that on the death of Venkayamma Row, Rangiah Appa Row and Venkata Narasimha Appa Row, both now deceased, became entitled as reversionary heirs to the estate of Medur and the lands and moveable properties appertaining thereto, and further that the said estate and the lands with mesne profits and the moveable property appertaining thereto, ought to be divided into moieties between the Appellants, viz : (1) Venkatadri Appa Row, the only son of the said Rangiah Appa Row, as to one such moiety, and (2) Meka Venkataramayya Appa Row and Sobhanadri Appa Row, the two sons of Venkata Narasimha Appa Row, as to the other moiety.

With regard to the costs, their Lordships think that as to the Nidadavole estate there ought to be no costs in the Privy Council, and as to the Medur estate there ought to be no costs either in the Privy Council or in the Courts below.

In the Privy Council.

SRI RAJA VENKATA NARASIMHA APPA ROW BAHADUR ZEMINDAR, since deceased (now represented by **Meka Venkataramayya Appa Row Bahadur** and and another)

v.

SRI RAJA PARTHASARATHY APPA ROW SAVAI ASWA ROW BAHADUR ZEMINDAR and another.

Consolidated Appeals.

Judgment on question of adoption.

DELIVERED BY LORD MOULTON.

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