Privy Council Appeal No. 92 of 1913.

V. Vencatanarayana Pillay, since deceased (now represented by V. Kuppusami Pillay) - - *Appellant,*

v.

V. Subbammal and another - - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH NOVEMBER 1915.

Present at the Hearing:

VISCOUNT HALDANE. LORD WRENBURY.
LORD PARMOOR. SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD WRENBURY.]

At the date of the first testamentary instrument, viz., the 8th September 1889, the testator, Vencatarama was sole surviving coparcener of the property here in question. It was ancestral property, but a division had been effected, and of the testator's divided share he had no coparcener. He could, therefore, dispose of it. Under those circumstances he made a will dated the 8th September 1889, which contained an appointment of his wife and his daughter to be executrixes and for the present purpose consisted of two parts, viz.: (1) a disposal of the property in a certain way, and (2) an authority to his widow in a certain event to take a son by adoption.

He had, and it appears by the will that he had, nominated as his son Vencatakrishna, who was a son of his daughter Rajammal, but he had not

completed the adoption. By his will he directed that if he should die before completing the adoption, his wife Subbammal should, after his death complete the necessary ceremonies, and take the said grandson in adoption, and his will contained the following clause : --

"In case any danger may happen to my grandson Siranjeevi Venkatakrishna Pillay during the lifetime of my wife Subbammal who is one of my executrixes my wife Subbammal may according to her wishes take in adoption one of my aforesaid daughter Rajammal's sons, and give my properties to that son"

An argument was tentatively put forward, but was not pressed by the appellant's counsel that this document was not a will. Their Lordships can entertain no doubt that it was a will. It contained an appointment of executors, and (as has already been pointed out) it was executed by a testator who at its date could dispose of the property of which he purported to dispose.

On the 9th February 1890 the testator completed the adoption of Venkatakrishna. Another member of the coparcenary thus entered the joint family, and when the testator subsequently died, the property was ancestral property, of which he was not at that date competent to dispose. In this sense, and to this extent, the will of the 8th September 1889 became ineffectual.

On the 21st March 1890 the testator executed another will. It contains a new appointment of executors. They are the two executors appointed by the will of the 8th September 1889, and a third. It discloses on its face that the property of which it purports to dispose is ancestral, but nevertheless purports to dispose of it although at this date the testator had a coparcener, and could not dispose of it. It contains in Article (5) a gift that, in case Venkatakrishna shall happen to die at any time, his issues shall enjoy the property. It contains no words of revocation of the previous will; is wholly silent

as to adoption ; and does not refer in any way by revocation or otherwise to the clause in the will of the 8th September 1889 set out above, which gave the widow a contingent power of adoption

On the 4th April 1890 the testator died. The will of the 8th September 1889 was not, and the will of the 21st March 1890 was, admitted to probate. On the 4th June 1891 Vencatakrishna died.

In 1893 the plaintiff in the present proceedings being the brother of Vencatarama and thus reversionary heir to Vencatakrishna instituted a suit, and on the 20th November 1894 obtained a decree that the will of the 21st March 1890 was null and void, and inoperative according to Hindoo law. This must have meant as regards the disposal of the ancestral property.

In this state of facts the widow Subbammal, on the 13th August 1906, adopted the defendant Parthasarathi.

The present suit is one instituted by Venkatanarayana, as reversionary heir of Vencatakrishna, against Subbammal, the widow, and Parthasarathi, the son adopted by the widow, for a declaration that his adoption was illegal and invalid.

The appellant advanced two contentions (1) that the document of the 8th September 1889 was not a will—with this their Lordships have dealt above—and (2) that if it was a will, it was revoked by the will of 21st March 1890, and that no power existed in the widow in 1906 to make an adoption.

The appellant rests his case not upon any words in the will of 1890 revoking the will of 1889, for there are none, but upon such an inconsistency between the two wills as that the provisions of the earlier will cannot stand with the existence of the later will. It has already been pointed out that the will of 1889 consists

of two parts, and assuming for the moment that the contention is well founded as to the one part, viz., that which effects a disposal of the property, it does not touch the other part, viz., that which gives a power to adopt.

Whether the contention is well founded as regards the other part, viz., that which effects the disposal of the property, turns upon the application of the doctrine of dependent relative revocation. This is really a question of intention. If by his will a testator gives property to A and by a codicil gives the same property to B, and if in the event it turns out that B cannot take, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended that the gift to A should be displaced altogether or that it should be displaced only in favour of B, and (if B cannot take) the gift to A should remain. If, as in *Tupper* v. *Tupper* 1 K. and J., 665, the testator's language is that (1) he revokes the gift to A and (2) in lieu thereof he gives to B, it may well be that there is a revocation for all purposes. If, as in *Quinn* v. *Butler*, L.R. 6, Eq. 225, the donee of a power to charge does by his will charge with 4,000*l.* to be paid to A and 3,000*l* to be paid to B, C and D equally, and then by codicil revokes the aggregate charge of 7,000*l.* made by his will and charges with 7,000*l.* for A, the charge in the will is no doubt gone for all purposes. If, as in *Baker* v. *Story* (31 L.T., N.S. 631, 23 W.R. 147) A takes absolutely under the will, but under the codicil takes for life only with a gift over which fails, and there is an ultimate effectual residuary gift, it is difficult to find any room for a contention that the gift by will is not gone altogether. But no one of these authorities is pertinent to the present case. *Alexander* v. *Kirkpatrick*, L.R. 2, H.L. Sc. 397, although a case upon two dispositions, of which

the former contained a power of revocation, and not upon two wills, contains a principle applicable in their Lordships' opinion to the present case, viz., that an alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

It is admitted that by the will of 1890 the testator could not give his ancestral properties as he purported to do, but it is argued that from the fact that he purported so to give them there is to be inferred an intention that if he could not give them as he purported to do in 1890 his disposition in 1889 should nevertheless be revoked—and the argument goes beyond this to affirm that not only his disposition of property in 1889 but also the independent provision conferring a power to adopt given in 1889 is in like manner revoked. Their Lordships do not accept either argument as well founded. The effect of that which has taken place is that there are two testamentary instruments. The later must no doubt prevail over the earlier, but the contingent power to adopt in the earlier instrument is unaffected by anything in the later. In their judgment it has been rightly held that on the 13th August 1906 the widow had the power of adoption which she exercised, and the plaintiff's case fails.

Their Lordships will humbly advise His Majesty that the appeal fails and must be dismissed with costs.

In the Privy Council.

V. VENCATANARAYANA PILLAY, SINCE DECEASED (NOW REPRESENTED BY V. KUPPUSAMI PILLAY).

v.

V. SUBBAMMAL AND ANOTHER.

DELIVERED BY
LORD WRENBURY.

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