Privy Council Appeal No. 65 *of* 1925.

Krishnamurthi Ayyar - - - - - - - *Appellant*

v.

Krishnamurthi Ayyar 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 28TH MARCH, 1927.

Present at the Hearing:
VISCOUNT DUNEDIN.
LORD SALVESEN.
SIR JOHN WALLIS.

[*Delivered by* VISCOUNT DUNEDIN.]

Ramakrishna Ayyar was a Hindu gentleman in possession of ancestral lands extending to some 135 acres. He was not living joint with any relative, and he was childless. On the 23rd March, 1910, he made a will by which he disposed of his property roughly as follows :—12 acres in charity ; 44 acres to his wife for her life ; 45 acres to the son of a distant connection, whom he designated as being his adopted son, the appellant in the present suit, and the rest to persons who were connections, but were in no case within the degrees entitled to maintenance, and who are the respondents in the present suit. After the death of the widow, part of the land which she held for life was to go to the appellant, and part to the respondents. On the same day, the natural father of the appellant executed a deed in the following terms :—

"The deed of consent for adoption executed on the 23rd March, 1910, in favour of Ramakrishna Ayyar, son of Venkatachala Ayyar, Brahman, Saivite and Mirasidar, residing in Kunnam, Shiyali taluk by Natesa Ayyar, son of A. Ramaswami Ayyar, Brahman, Saivite and Mirasidar, residing in Kunnam village of the said taluk :—

"You have this day executed a Will and have alienated your own properties. When you asked me to give you my son Krishnamurthi in

> adoption subject to the condition that he should take only such properties as were given him by the said Will and be bound by the alienations made thereunder, I consented to it and admitted the alienations made in the said Will, and, in pursuance of the arrangement that Krishnamurthi should take only such of the properties as were left to him thereunder, I have executed this deed of consent for adoption in support of my having this day given the said Krishnamurthi my son in adoption."

Immediately thereafter the adoption took place with all due ceremony.

Ramakrishna Ayyar died in April, 1911, and his wife in June, 1911. The present suit was raised in 1918 by the respondents to obtain possession of the properties left them by the will. It was directed against certain parties who were in possession and were alleged to be holding benami for the appellant and also against the appellant.

The persons who were holding as alleged eventually renounced all claim to the property. The appellant, through his guardian, alleged that the adoption had taken place before the date of the will, but it was found, in fact, and is not now contested, that the will was executed *unico contextu* with the deed of consent by the natural father, and that both were executed in view of the adoption which took place subsequently with all due ceremony. It is also admitted that the natural father was a poor man and had two other sons at that time, and has had two subsequently. The sole question in the case is, therefore, whether the will, taken along with the deed of consent, is binding on the appellant so as to cut down what would have been his rights had he been a natural instead of an adopted son.

The learned Subordinate Judge held that the deed was binding in respect of the consent of the natural father ; he considered that an adoption, even on such terms, was obviously a beneficial arrangement for the appellant, and that the validity, as he phrases it, of such conditional adoption was settled for Madras by the cases in 12 Mad. 490 and 21 Mad. 10 and 27 Mad. 577. He accordingly decreed in favour of the respondents. His view was confirmed by the learned Judges of the High Court. They also considered that so soon as it was shown that the arrangement as a whole was beneficial to the adopted son, and that but for the arrangement the adoption would not have taken place, the natural father could give a consent which validated the arrangement as against the adopted son if, when he came to be of age, he sought not to acquiesce therein.

This is most clearly explained by one of the learned Judges :—

> " I am of opinion that where an adoption is made by a Hindu who at the time of adoption had absolute power of disposal over the property, an agreement between the natural father and the adoptive father as regards alienations which the adoptive father wants to make either by a document *inter vivos* or by will binds the adopted son in all cases where such an agreement would be for his benefit, and that the only question which Courts ought to consider is whether the transaction is for the benefit of the boy to be adopted.

"If the adopting father would not make the adoption but for the conditions agreed to by the natural father, and if in spite of those conditions the adopted son would be benefited, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. In the present case the agreement is clearly for the benefit of the appellant, as he gets properties of large value which he would not have got but for the adoption, and there can be little doubt that he would have remained a poor man if the natural father had not agreed to the adopting father making the will and the adoption being conditional on the said disposition."

This view is really based on the case of *Visalakshi Ammal* v. *Sivaramien* (I.L.R. 27 Mad. 577), which will be presently examined. The appellant has appealed to the King in Council.

The question is a very important one of general interest. There is a very large body of authority in decided cases which touches it, but it is not concluded by any judgment of this Board. The argument for the appellant is simple enough. An adopted son, from the moment of adoption, occupies the place of a natural son. A natural son, in the case of ancestral property, becomes a co-sharer with his father, with the rights of survivorship and of partition as to the whole ancestral property. This is an incident of Hindu law arising from status. No consent by his natural father could affect that position. His power is limited to the giving or withholding of giving his son in adoption, but if he gives, his power ends.

The present will purports to infringe his rights in three particulars :—(1) The gift to charity ; (2) the gift to persons outside the family ; and (3) the postponement of the son's own right in certain lands till his father's death, and in others till his mother's death.

The argument for the respondents is that, in any view, the law has by custom been relaxed, and that the general proposition which is stated in the view of the High Court is based on authoritative decision and is now the law.

As in several of the decisions to be examined there has been the suggestion that the matter has been decided by this Board, it may be well at once to mention cases where the question has been approached.

The case of *Ramasawmi Aiyan* v. *Vencataraminyan* (6 I.A. 196) was as follows :—There was a widow and a son who had been adopted by the husband in his lifetime. During the lifetime of that son, two-thirds of the ancestral property was alienated ; the son then died, and the widow, who had been given power to adopt by the deceased husband, then adopted another son. At the time of the adoption the natural father entered into an agreement that the adopted son should not challenge the alienation which had been made. When that son came of age, he entered into an agreement which the Board held was a ratification of the agreement

made by his natural father. The general question is dealt with at page 208 :—

> "How far the natural father can by agreement before the adoption renounce all or part of his son's right so as to bind that son when he comes of age is also a question not altogether unattended with difficulty, although the case of *Chitko Raghunath Rajadiksh* v. *Janaki* (11 Bombay H.C.R. 199) certainly decides that an agreement on the part of the father that his son's interests shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age."

It seems impossible to hold, as some seem to have held, that this is inferentially a judgment on the general question. The whole point there was that, however the general question stood, there was an agreement which was not void in the sense of being an agreement that was *funditus* null, *e.g.*, an agreement that marriage should be for a limited period, and that, therefore, as there was ratification, there was no need to decide the general question.

The other case was that of *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar* (16 I.A. 53). The facts were that a widow, with power to adopt, adopted a son and at the same time she obtained a document from the natural father consenting to her being in possession of the whole property during her lifetime. The suit was raised by the nearest relatives to declare the adoption invalid. The Board held that the adoption was duly performed and was recorded in a deed of adoption which made no mention of any condition. No other deed could, therefore, affect the adoption, but Lord Macnaghten, in the course of his judgment, said :—

> "It is difficult to understand how a declaration by [the natural father], or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined."

It is clear that there is here no judgment on the point, for the judgment merely declared the adoption valid and did not determine any case between the widow and son, but Lord Macnaghten's dictum shows an obvious leaning to the view that an agreement by the natural father should not prejudice the right of the adopted son. It follows, as already said, that the question is not absolutely decided by any judgment of this Board.

Their Lordships will therefore turn to the numerous decisions in India. It will be convenient to take the Madras and Bombay decisions separately. But first it will be well to point out that there are distinctions to be drawn between the various cases that arise, but whether these distinctions create any difference in principle is another question. The distinctions to be drawn are these : First, whether the agreement, which is *ex hypothesi* always made by the natural father, and is also *ex hypothesi* an agreement, but for which the adoption of the son would not have taken place, is made with the adoptive father, who is the unfettered owner of the

whole property (the fact in the present case), or whether it is made with the widow, who has got from her deceased husband a power of adoption, but who only herself possesses a widow's estate. Second, whether diminutions of the right of the adopted son go only to protect and define in quality the widow's estate, which ordinarily by adoption would be swept away, or whether they go farther and give part of the ancestral property to persons outside the family altogether.

It will be convenient to deal with the Bombay cases first, as they begin at the earlier date. *Vinayak Narayan Jog* v. *Govindra Chintaman Jog* (6 Bombay H.C., at 224). In this case, by a will, the testator, who was a separated person, divided his property practically into two parts, and gave one to his widow absolutely and the other to his adopted son. The son was a nephew, and it was found that the whole arrangement was known to all members of the family. It was acquiesced in by the natural father of the boy. The High Court held that the provision for the adopted son was adequate and that the will could not be challenged by the adopted son. The judgment went on two grounds. First, that although an alienation of the whole estate would be bad and inconsistent with the duties cast upon an adopted son, still, if the provision was adequate, there was no reason why it should not stand. Second, that as the adopted son proposed to take what he could under the will, he could not, on the principle of approbate and reprobate, refuse to acknowledge its validity. It is to be observed that this second view scarcely does justice to the opposing argument. The son did not propose to take his half under the will; he proposed to take the whole in right of his position as a son. There is, however, one other sentence which would seem to point to the right of the testator to make an adequate provision for the widow instead of allowing her life interest to be entirely destroyed by the adoption.

Chitko Raghunath Rajadiksh v. *Janaki* (11 Bombay H.C. 199). This was an adoption by a widow, subject to a stipulation that the widow should enjoy the whole property during her life, giving the boy maintenance. Held a good stipulation. Haridas, J., puts it partly on what may be called conditional adoption, a view which it is hard to agree to, and partly on approbate and reprobate. To the argument that it was a condition repugnant to Hindu law, he says that there is no text to that effect. Westropp, C.J., in *Radhabai* v. *Ganish Tatya Gholap* (I.L.R. 3 Bombay, at page 8), *obiter*, takes these two cases as deciding the general point.

After this case in date comes the case before this Board in 6 I.A.

Accordingly, in *Ravji Vinayakrav Jagganath Shankarsett* v. *Lakshmibai* (I.L.R. 11 Bombay 381), it was sought to urge that this Board's decision had overturned the authority of the former cases, because their Lordships held that the general question was still open. The facts were practically the same as in the first case,

i.e., adoption by a widow and a contemporaneous agreement with the natural father that the widow should have full enjoyment for her life. There is a long and very careful judgment by Farran, J. It is too long to quote in full, but may be summarised thus :—The early Bombay Shastris or Pundits were logical in holding the strict view. But custom and practice may modify the strict view. The possibility of such an agreement is in no way negatived by a direct text. Fair arrangements for protection of the widow's interest are commonly made and supported. He then prays in aid the judgment of this Board in 6 I.A., but here their Lordships think he is somewhat misled as to the sense in which the word "void" was used. Then, after saying that it is the general law that the guardian of an infant can bind the infant when the contract is made *bona fide* for his interest, he sums up the matter thus :—

> "I cannot but think that this principle ought to guide the Court 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 a limit of the son's enjoyment of the property, then they should be upheld. The reasoning in the judgment of the Court in the *Chitko* case (*supra*) goes far beyond this view, but the actual decision of the Court is in accordance with it."

Basava v. *Lingangauda* (I.L.R. 19 Bombay 428). This was a case where the man who adopted a son conveyed by a deed of gift, which was referred to in the deed of adoption, part of the ancestral property to his daughters, and the natural father was a party to the deed of adoption. Held that the deed of gift was good and binding on the adopted son. The case is taken as plain, and not argued.

The next case is *Vyascharyar* v. *Venkubai* (I.L.R. 37 Bombay 251). The facts were: Adoption by a widow and a gift of part of the property to her own daughters. Assented to by the natural father at the time of the adoption. Beaman and Heaton, JJ., referred to a Full Bench the general question: "Whether the terms of an agreement entered into between the natural and adoptive parents as conditions of the adoption are binding upon and can be enforced against the adopted son?" but they added that, if that question was too wide, it ought to be considered in the light of the facts of the case. This was the view taken by the Full Bench, Scott, C.J., Chandravarkar, Batchelor, and Rao, JJ. They held that "an agreement by which the adoptive widow is to be allowed to retain her life interest, notwithstanding the adoption, differs in fact and in principle from an agreement under which a power is conferred upon her which, as a widow enjoying a life estate, she could by no other means obtain." On the facts, therefore, they held the agreement not binding, holding, first, that the condition was unreasonable and took the test proposed by Farran, J., and, second, that it was covered by a case of *Venkappa* v. *Fakirgouda*, only reported in 8 Bombay Law Reporter, at 346,

where a widow was given power to give the property to her own brother, and the condition was held to be bad.

Then came the case of *Balkrishna Motiram* v. *Shri Uttar Narayan Dev* (I.L.R. 43 Bombay 542). This was a gift of an annual sum as a charge on the ancestral property for a charity made by the adopting father and agreed to by the natural father at the time of the adoption. The gift was held bad. Hayward, J., delivering the judgment, examined the cases and sums up thus :-

> "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."

To sum up the Bombay cases. As a question of actual decision, the Courts have always upheld the grant to the widow of her interest for life, and that whether the stipulation had been made by the husband while still alive, or by herself, it being always the case that the agreement was anterior to or contemporaneous with the adoption itself, and that the natural father concurred. But when the gift is to outsiders it has been held invalid, and that whether made by the widow or the adopting father himself. The reasons given have varied. Some have put the deviation from strict principle on custom, some on the view of approbate and reprobate, and in one case upon the view that the father as guardian can bind an infant by any contract which is for his benefit.

To turn now to Madras.

Lakshmana v. *Lakshmi Ammal* (I.L.R. 4 Mad. 160). There is at page 163 a general remark by Turner, C.J., against the validity of conditions imposed by agreement with the natural father, but the remark is based on an erroneous view of the judgment of this Board in 6 I.A. and is really of no authority. The case itself turns on a speciality.

Lakshmi v. *Subramanya* (I.L.R. 12 Mad. 490). This was a case where the adoptive father stipulated that certain lands should be enjoyed by the widow for life. This was agreed to by the natural father. It was held binding. The reasons given by the learned judges were dissimilar. Muthusami Ayya, J., held that this was just an arrangement for fixing maintenance. Shephard, J., held that the father, being at the moment undisputed owner of the property, could do what he liked with it, and that the effect of what he did was really to withdraw that portion of the ancestral property. He repudiated the idea of reasonableness being a test.

Narayanasami v. *Ramasami* (I.L.R. 14 Mad. 172). This was precisely the same case as the last and, being decided by the same Judge, Shephard, J., followed the last case, the other Judge simply following the decision and not going into the reasons.

Jagannadha v. *Papamma* (I.L.R. 16 Mad. 400). This was a case of adoption by a widow. The agreement was that the widow was to have half the property. Collins, C.J., and Handley, J., held the agreement not binding. They rested on Lord Macnaghten's dictum in 16 I.A. and distinguished this from the case in 12 Mad. in their own Court by which they were bound on two grounds, that in that case the arrangement was by the father himself, whereas here it was by the widow.

Ganapati Ayyan v. *Sarithri Ammal* (I.L.R. 21 Mad. 10). This was a disposition in charity by the adoptive father, who at the same time gave his widow power to adopt. She adopted; the natural father acquiesced. Held binding. Shephard, J., held that it had been settled by 12 and 14 Madras. Subramania Ayyar, J., agreed.

Visalakshi Ammal v. *Sivaramien* (I.L.R. 27 Mad. 577). Adoption by a widow. Agreement come to by natural father that, in the event of disagreement between widow and adopted son, widow should enjoy half the property until her death. Referred to Full Bench. The order of reference drawn by Subramania Ayyar, J., contains a weighty argument in favour of what may be called the strict view. He argues :—

1. That there is no reason against an adoptive father doing anything in a question with an adopted son which he could have done with a natural son.

2. That if the adoption by a widow takes place after the death of the adoptive father, all the provisions of the adoptive father will stand, because the will speaks at his death and takes out of the property whatever is dealt with before the adoption takes place.

3. But further than that the arrangement cannot go, because it is allowing the adoptive father, or the widow, to do something which is incompatible with the proper position of an adopted son.

4. That it is just as impossible for the natural father to do, on behalf of the son to be adopted, anything as regards what is to happen after the adoption as it is for the adoptive father to have acted as to his rights before adoption.

5. Approbate and reprobate cannot apply, for that implies election, and there is no election open to the adopted son. If, on the contrary, it is looked on as a condition, this condition is repugnant and must be disregarded.

The result must be to hold the present case not binding.

But, before the Full Bench, Benson, Davies, and Russell, JJ., all concurred in thinking that 6 I.A. indicated that the natural father was not incapable of giving a consent. If that is the position, the only question that remains is, Is it fair and reasonable ?—that is to say, Is it for the minor's benefit ? Then take Farran's, J., test as to the power of the father. They point out that there is no authoritative text forbidding such an arrangement. They consider a fair and reasonable disposition not inconsistent with Hindu Law, and therefore they upheld the arrangement.

To sum up the Madras cases. As regards decision, the general result has been to validate the arrangements so far as provision is made for the widow, just as in Bombay, but one case, *Jagannadha* v. *Papamma* (I.L.R. 16 Mad. 400), is the other way, and the referring judgment of Subramania Ayyar J. is also of that way of thinking. As regards reasons, again they vary, some going on the power of the adoptive father to do what he likes, some on fair and reasonable arrangements, and some on approbate and reprobate.

It will be apparent from this examination that it is not possible to reconcile all the decisions, and still less the reasons on which they have been based. Their Lordships will, therefore, examine the matter on principle. When a disposition is made *intra vivos* by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. It is also obvious that the consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate, and the disposition, if given effect to, is inconsistent with these rights and cannot of itself *vi propria* affect them. There are two propositions so well settled that no authority need be cited. They are, first, that the natural father loses all power over the son from the moment when he is adopted, and, second, that the adopted son has in his new family precisely the same rights as a natural son, save only when the question is one that raises a competition between the natural and the adopted son. Can, then, the consent of the natural father who judges, and, *ex hypothesi*, rightly judges, that it is more expedient for the boy to be adopted, even though his rights are limited, than not to be adopted at all, make any difference? The doubt expressed by Lord Macnaghten in 16 I.A. seems unanswerable. How can the consent of the natural father take any effect on the rights of the boy which only arise when his rights as a natural father are non-existent? But if the father cannot do it by virtue of any power in himself, can he do it as guardian of the infant so as to bind him? Farran, J., who is an exponent of this view in the case of 11 B. 381, was curiously misled by an undue veneration for Mr. Mayne. He quotes a sentence from Mr. Mayne's work as follows:—

> "He (the minor) will also be bound by the act of his guardian when *bona fide* and for his interest and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age."

This quotation is from the third edition of Mayne's work, and as a universal proposition is obviously unsound. Accordingly,

in the fourth edition, which was published soon after the date of the judgment in question, and in all subsequent editions, Mr. Mayne inserted between the words "guardian" and "when *bona fide*" the words "in the management of the estate," which turns an inaccurate proposition into an accurate one. But it is no longer of service to Farran, J., in the matter in hand, for assuredly the natural father is not managing the estate of his child when the estate referred to is the estate which he will only get after adoption by another person. Therefore, reverting again to Lord Macnaghten's dictum, it seems impossible to ascribe any value to the guardianship power of the natural father to bind the son as to property in which he cannot have an interest until the time when the guardianship has ceased.

Next, can the case be solved by the doctrine of approbate and reprobate? Their Lordships think clearly not, for the doctrine of approbate and reprobate assumes election, and the adopted son has no election. He cannot undo the adoption and be as he was. The same fact destroys the idea of conditional adoption. The adoption cannot be undone; it cannot, therefore, be conditional.

It will be seen from these views that in their Lordships' opinion the only ground on which such arrangement can be sanctioned is custom. They are of opinion that there is such a consensus of decision in the cases with the exception of the case of *Jagannadha* v. *Papamma*, that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such an arrangement should be the consent of the natural father. But if this is looked at narrowly, it is only because it is a part of the custom that it is either here or there. This leads to the remark that there is a good deal of looseness in the discussions in the judgments as to reasonableness. Some look at it from the point of view if whether, in view of the adoption only being granted on condition of the arrangement, this is, in the circumstances, reasonable for the boy. It would seem that it might well be assumed that if a natural father consented to give his son in adoption, he would only do it if it were reasonable, *i.e.*, for the boy's benefit in the circumstances. Others look at it from the point of view whether the adoption will put the boy in a reasonable position, *i.e.*, not subject him to the duties of a son to do worship for his adoptive father without giving him sufficient advantages to enable him to do so. But the consensus of judgments seems to solve these two questions in this way, namely, that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements.

As soon, however, as the arrangements go beyond that, *i.e.*, either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu law. Their Lordships are, therefore, against the idea of a general proposition that all arrangements consented to by a natural father, and of benefit to the boy in the sense that half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid. They would further say that the remark made by some learned Judges that there is no text prohibiting such arrangements seems to them to go exactly to the opposite effect. Inasmuch as what is sought to be done is admittedly contrary to the strict and natural view of the Hindu law as to the true position of the adopted son in his new family, it would seem more to the point to say that there is no text which sanctions any contrary arrangement.

Applying these views to the present case, it follows that their Lordships consider that the will here can have no effect, and that the appeal must be allowed and the suit dismissed. The appellant must have his costs before this Board and in the Courts below.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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