Privy Council Appeal No. 36 *of* 1927.

Muddana Virayya - - - - - - - - *Appellant*

v.

Muddana Adenna, since deceased, and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH NOVEMBER, 1929.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD DARLING.
LORD TOMLIN.
SIR GEORGE LOWNDES.

[*Delivered by* LORD TOMLIN.]

This is an appeal against a decree dated the 18th November, 1924, of the High Court of Judicature at Madras, modifying a decree dated the 19th January, 1922, and made by the Additional Subordinate Judge of Guntur on the trial of the suit.

The questions in the suit relate to the affairs of a joint Hindoo family belonging to the Kamma sect of the Sudra caste and resident and holding lands in the Narasaraopet *taluk* of the Guntur district.

The family consisted of four brothers. The eldest brother had long before the material events separated himself from the family, and is therefore out of the case.

The second brother, Ramanna, whose death led to the litigation, had an only son, Naganna, who predeceased him in April, 1908, childless, but leaving a widow.

The third brother, Subbanna, the plaintiff in the suit and since deceased, had two sons, one of whom died in 1914, and the other of whom, named Virayya, is the present appellant.

The fourth brother, Adenna, had three sons, of whom the second was named Narasayya. Adenna and his three sons are the respondents on this appeal.

Ramanna died on the 27th October, 1908, leaving no natural son him surviving.

The present suit was launched on the 17th August, 1920, in the Court of the Additional Subordinate Judge of Guntur, by the third brother, Subbanna, the father of the appellant, against all the other members of the joint family, including the appellant and the widows of Ramanna and Naganna.

In his plaint Subbanna alleged that there had been a division of status between the three brothers in 1908, after the death of Naganna, and a partition between them of certain immovable property. He further alleged that Ramanna, shortly before his death, had adopted the appellant and had subsequently made a will dated the 25th October, 1908, in which he referred to and recognized (*a*) the division in status which had taken place between himself and his brothers ; (*b*) the partial division of this joint property, and (*c*) the adoption of the appellant, and by which also he gave directions for the appellant to receive the testator's one-third share of the undivided family property and imposed upon him certain obligations in respect of the proper maintenance of the testator's widow, daughter-in-law and daughter.

Upon the basis of these allegations of fact Subbanna claimed that he was entitled to one-third share of the undivided family property or, alternatively, if the adoption was not established, to one-half share of such property. He further made a claim against his brother Adenna as manager of the joint property in respect of certain family outstandings alleged to have been collected and misappropriated by the latter.

Adenna and his sons denied the division in status, the adoption of the appellant, and the genuineness of the will, and claimed that they were entitled to one-half of the family property, the other half falling to Subbanna and the appellant. Adenna further alleged that he had collected and applied for family purposes the family outstandings.

The appellant and the other defendants all relied upon the alleged division in status, adoption and will, and in effect supported the case of Subbanna, the plaintiff in the suit.

Before setting out the subsequent history of this litigation, it is necessary to state that Adenna had in 1910, in the name of his son Narasayya, then a minor, launched a suit for a partition of the family property on the footing that his son Narasayya had been adopted by Ramanna.

This earlier suit was dismissed by the trial Court on the ground that there had not been any adoption of Narasayya, and the judgment was affirmed on appeal.

In his judgment in the earlier suit, the trial Judge, in addition to determining the matter before him, had expressed the opinion that there had been no division in status between Ramanna and his brothers, that the present appellant had not been adopted by Ramanna, and that the alleged will of Ramanna was not a true will. On appeal, however, the appeal Judge held that these were matters with which the trial Judge was not concerned in that suit.

The history of the present suit may now be resumed.

Issues were in due course framed, directed to determine (*inter alia*) whether there had been a division in status between the three brothers, whether the appellant had been adopted by Ramanna, and whether the alleged will was genuine.

At the trial the depositions of the witnesses called in the earlier suit were by consent admitted in evidence. In addition to the evidence afforded by the depositions, the case of Subbanna and the appellant was supported by the oral evidence of certain witnesses who spoke only to matters of the account, and also by that of four witnesses who had given evidence in the previous suit, and who spoke to the main issues. These four witnesses were (1) the village *Munsif*, one of the thirteen witnesses to the will, (2) one Dodda Subbanna, another witness to the will, (3) Ramanna's daughter-in-law, and (4) the appellant.

For Adenna and his sons no oral evidence was given except that of Adenna himself. The trial Judge delivered his judgment on the 19th January, 1922. In that judgment he examined the evidence in detail and found that there had been a division in status between Ramanna and his brothers, that the appellant had been adopted by Ramanna 15 days before his death, and that the will was genuine. He further found that Adenna had not applied the proceeds of family outstandings for joint family purposes. The learned trial Judge gave appropriate relief upon the footing of these findings of fact.

Adenna and his sons other than Narasayya preferred an appeal to the High Court of Judicature at Madras against the decision of the trial Judge.

During the pendency of the appeal the plaintiff Subbanna died, and his son, the appellant, who was already on the record in his personal capacity, was ordered also to represent the estate of the deceased plaintiff.

The appeal was heard on the 23rd September, 1924, by Ramesam and Reilly JJ. Both judges held that neither the division in status nor the adoption of the appellant, nor the genuineness of the will, had been established. They further held that, though Adenna had failed to prove that the family outstandings had been applied for family purposes, the claim against him in respect thereof was statute barred. The High Court

accordingly modified the decree of the trial Judge so as to give relief appropriate to their findings in fact and law.

The appellant having obtained the necessary leave, appealed to His Majesty in Council.

Their Lordships, after examination of the evidence, with the assistance of counsel on both sides, are satisfied that the High Court was not justified in reversing any of the findings of fact of the trial Judge in relation to the division in status, the adoption, and the will.

In their Lordships' view, there are relevant matters to which the Judges of the High Court omitted to attach weight or sufficient weight, and there are other matters taken by the Judges into consideration which ought not to have been regarded, or to which weight ought not to have been attached.

On the one hand, sufficient weight was not, in their Lordships' opinion, given to any of the following matters :—

(1) That the trial Judge had seen in the box some of the witnesses, including the appellant and two of the persons who witnessed the will, and had stated in his judgment that the witnesses to the will had given their evidence in an unambiguous manner and there was nothing to justify him in rejecting their evidence as false.

(2) That the support given to the appellant's case by Ramanna's widow was against her own interest.

(3) That both sides admitted that Ramanna desired to adopt a son.

(4) That the story that Ramanna had adopted Narasayya, the son of Adenna, had been already found to be a false story concocted by Adenna.

(5) That the appellant in the box stated that he had performed the funeral ceremonies of Ramanna and was not cross-examined to the matter, and that this evidence could not be displaced by the statement of Adenna that he had performed the ceremonies on behalf of his son Narasayya, the story of whose adoption was a fiction.

(6) That at the earliest possible moment, namely, on the termination of the funeral ceremonies, the facts as alleged by the appellant were communicated to and recorded by the village officers and the necessary steps were taken to secure the entry in the Revenue records in substitution for Ramanna's name, of the name of the appellant as the adopted son of Ramanna.

On the other hand, their Lordships think that the Judges of the High Court were wrong in taking into consideration as they did the opinion which had been expressed *obiter* by the trial Judge in the earlier suit.

Further, their Lordships are of opinion that the learned Judges in the High Court have been unduly influenced by (1) discrepancies in the evidence of the appellant's witnesses as to the date at which the division in status took place ; (2) the non-production before the *Tahsildar* in connection with the entry of the appellant's name in the Revenue records of the Exhibit XXXIII, being a list of property alleged to have been made at the time of the division in status, and (3) the fact that some of the witnesses had been witnesses or otherwise concerned with the prosecution in a murder charge which at some date prior to the transactions under consideration had been brought against Adenna and had failed.

In their Lordships' view, discrepancy between witnesses as to dates is not in such a case as the present unnatural, and so far from being necessarily a badge of fraud, may even be some indication of *bona fides*.

Exhibit XXXIII was not a relevant document before the *Tahsildar* and its non-production seems to their Lordships to have no significance.

The inference which the Judges of the High Court appear to have drawn from the somewhat slender material as to the connection of some of the witnesses with the murder charge was that, in order to injure Adenna, the appellant and his friends in the family and all the thirteen witnesses to the will (who included the village *Munsif*) entered into a conspiracy to concoct a false story of the division in status and of the adoption of the appellant, and to forge at some time after Ramanna's death a false will. It is to be observed that, with the exception of a few questions directed to showing that witnesses had some part, voluntary or involuntary, in the murder charge proceedings, not a word was put to any witness in cross-examination to support the story of such a conspiracy. The material available does not, in their Lordships' judgment, justify the inference which has been drawn or render it permissible to reject the evidence of witnesses whom the trial Judge has seen and believed.

In their Lordships' judgment, the will was a genuine will, and, being genuine, is cogent evidence of the division in status and of the adoption of the appellant.

With regard to the family outstandings, their Lordships are unable to agree with the conclusion of the High Court.

It is true that the Limitation Act was mentioned in Adenna's written statement and in his grounds of appeal, but before the trial Judge no issue was directed to bear upon the question, nor does the point appear to have been taken at the bar during the trial. In these circumstances their Lordships do not think the point was open on appeal. If, however, it was open, their Lordships are of opinion that the article of the Limitation Act applicable is Article 89. No demand from which under

that article time would run was proved at the trial, and in their Lordships' view the defence of the statute fails.

In the result, therefore, the appeal must be allowed. The decree of the High Court should be discharged and that of the Court of first instance restored, but with the modification (to which the appellant assents) that interest on the sums for which Adenna is accountable shall be at the rate of 6 per cent. per annum only.

The appellant should have the costs of the appeal to the High Court.

Their Lordships will humbly advise His Majesty accordingly.

The appellant will have his costs of the appeal to His Majesty in Council.

In the Privy Council.

MUDDANA VIRAYYA

v.

MUDDANA ADENNA, SINCE DECEASED,
AND OTHERS.

DELIVERED BY LORD TOMLIN.

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