Privy Council Appeal No. 127 *of* 1931.

Jagannath Rao Dani - - - - - - - *Appellant*

v.

Rambharosa and another - - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH NOVEMBER, 1932.

Present at the Hearing:
LORD THANKERTON.
SIR GEORGE LOWNDES.
SIR DINSHAH MULLA.

[*Delivered by* SIR GEORGE LOWNDES.]

The appellant and the second respondent are the reversionary heirs of Baboo Rao Dani who died on the 6th November 1918, leaving him surviving his widow, Anandabai, and no issue. Anandabai died on the 27th November, 1924, and on the 7th April, 1926, the suit out of which this Appeal arises, was instituted by the reversioners claiming his estate. The defendant to the suit, the first respondent before the Board, denied their right, alleging title in himself as the duly adopted son of Baboo Rao Dani. The factum of his adoption by Anandabai on the 25th April, 1920, is not seriously disputed. The issue between the parties is as to its validity in law. The family was found by the trial Judge and was admitted in the Court of the Judicial Commissioner to be governed by the Bombay School of Hindu law, under which a widow has in herself power to adopt, subject only to such restriction, if any, as may have been imposed upon her by her husband. The appellant's contention in the present case is that Anandabai's power was so restricted by Baboo Rao Dani's will made on the 26th November,

1911, and that the adoption of the first respondent was in violation of its terms.

The provisions of the will, the due execution of which is not in dispute, so far as regarded adoption were as follows :—

"After all this is done (*i.e.*, after certain dispositions of the will have been carried out) a boy should be taken in adoption to perpetuate the name of ancestors and manage the estate. No boy has been yet taken in adoption. It is expected that (any) of my paternal uncles' sons may get a son. If he gives (the boy) my wife should take him in adoption. Seven years' time is allowed for this. After seven years Jiwaji's younger son Bhagwati should be taken in adoption.

* * * * *

"Seven years' time has been allowed for adoption, but if Vyenkat Rao Naik, Rao Bahadur Mahdik, Gagraj Singh and Sadashiv Rao Garad, think that (a boy) should forthwith be taken in adoption, there is no objection to my wife's (adopting a boy immediately) according as they may advise. However, the debts should be satisfied and property of an income of five hundred rupees should be set aside for the School Department, first, and a boy should be taken in adoption for the remaining property. If it is decided to take (a boy) in adoption, *mauza* Kolar should be reserved for my wife and for the maintenance of the adopted boy (the property) should afterwards be placed under the management of the Court of Wards or of *panches* of whom Vyenkat Rao Naik should be the *sir panch*. The boy should be very well educated. He should be sent to England if possible. If this boy does not exist, which God may forbid, any boy can be taken in adoption."

Various defences were raised by the first respondent which were embodied in the issues settled by the trial Judge. They seem in the main to have been directed to two points, that the restrictions in the will were not binding upon the widow, or alternatively that they had been substantially complied with.

Under the first head, it was contended that the will, which was executed by the testator on the eve of a journey to Delhi, was to take effect only in the event of his death before his return. He did, in fact, return in safety and lived for another seven years, and if this contention prevailed, the will, and with it the restrictions upon the widow's power of adoption, ceased to have effect automatically upon the testator's return. It was also alleged that the will was revoked orally, and that after his return the testator expressly authorised the adoption of the first respondent. All these defences, upon which a considerable body of oral evidence was adduced, were rejected by the trial Judge.

Under the second head, the trial Judge held it established that Anandabai had asked the mother of Bhagwati, the boy of the testator's choice, to give him in adoption, but that she had refused. Under these circumstances, he was of opinion that the adoption of the first respondent, who was Bhagwati's elder brother, was a substantial compliance with the terms of the will. In this connection, he took the vernacular words, which are rendered in the official translation as "if this boy does not exist," as equivalent to "if he is not available." He also seems to have regarded the seven years' interval which was to elapse

before Bhagwati could be adopted, as to be reckoned from the date of the will.

On all these points his judgment is attacked before the Board, while the adoption is supported on the grounds which the trial Judge rejected.

The result of the suit in the trial court was that the adoption of the first respondent was held to be " valid and unimpeachable," and the suit was dismissed.

The reversioners appealed to the Court of the Judicial Commissioner. The judgment of the appellate court was delivered on the 27th March, 1929, with the result that the appeal was dismissed. The learned Judges dealt only with the question whether the will was a contingent one. On this point they disagreed with the trial Judge, holding that the will was to take effect only in the event of the testator dying during his visit to Delhi, and became inoperative on his return. In the view which they took of the nature of the will, they thought it unnecessary to discuss the other points raised before them.

Their Lordships regard this as most unfortunate. For the reasons presently appearing they are unable to agree with the conclusion reached by the appellate Court, and they find themselves without any assistance from the learned Judges as to the facts upon which the trial Court founded, or as to the contentions upon which the suit was there dismissed.

It has been repeatedly pointed out by this Board that it is the duty of the courts below to pronounce their opinion on all the important points in an appealable case, and that a failure to do so not infrequently necessitates a remand with the consequence of heavy additional costs. The observance of this rule is, their Lordships think, of special importance where the decision of other points depends, as it well may in the present case, upon the sifting of a mass of oral evidence, or upon the proper significance of the language employed in a vernacular document.

The conclusion to which the learned Judicial Commissioners came was based directly upon the opening words of the will, which were as follows :—

> " I am going to Delhi for the Darbar, therefore, I am writing the following conditions about my property. I hope that by the grace of God such an occasion will not arise, but strange is the course of time."

They thought that by the second sentence of the quotation " the testator obviously meant that he hoped that no occasion would arise for the will to come into operation, and as he cannot have meant that he hoped to live for ever," it seemed to them " clear that he intended his will to have a limited operation, and that the reference to the visit to Delhi " showed " that the operation of the will was to be limited to the occurrence of his death during that visit." They found some corroboration of this in the detailed reference in the will to petty debts for the settlement of which directions were given, " a reference which was obviously made in

contemplation of the will coming into operation almost immediately."

Their Lordships are unable to agree with this line of reasoning. The testator's contemplated journey was, no doubt, the occasion, and was probably the reason of his making the will, but there is, in their Lordships' opinion, nothing in the words used by him to indicate that the will was to cease automatically to be operative on his return. He may quite possibly have had it in his mind that the will might require revision after his return, but that would not make it "contingent": the intention in such a case would almost certainly be that it was to remain operative until a new will was made. The question is discussed with much care by the trial Judge and their Lordships agree with his reasoning.

Before the Board support was sought for the view taken by the Judicial Commissioners from portions of the oral evidence adduced in the case. When the testator left his home he handed over the will in a sealed envelope to one Sadasheo Rao Garad, with whom it remained till Sadasheo's death in 1914. It then passed into the possession of Sadasheo's son Ramchandra, who was a witness in the case. He deposed that after his father's death the testator asked him for the will, but that he could not then find it, and that thereupon the testator said that it did not matter because the will was merely to hold good while he was absent at Delhi. The trial Judge said that he did not believe this man, and the appellate court does not even refer to his evidence. Under these circumstances, their Lordships can hardly be asked to place any reliance upon his statement.

Another witness, Thakur Gajraj Singh, said the testator had told him that he had made "a temporary will," and that he would reconsider it later and make another will. This, however, is not inconsistent with the view their Lordships have taken: it does not, they think, suggest that the will was a contingent one. This witness again is not referred to or relied on by the Judicial Commissioners.

One thing, however, is clear, viz., that the testator upon his return from Delhi, took no steps to reclaim the document from Sadasheo's custody or to make another will, and that it was only upon Sadasheo's death that he made any enquiry about it. So far as the testator's intention in making the will can be deduced from his subsequent conduct, there is nothing to suggest that he thought himself to be, from the moment of his return, intestate, and so continued until he died.

For these reasons their Lordships are of opinion that the will was not a contingent one, and that if not revoked, it came into operation on the death of Baboo Rao Dani.

The other questions in the case, upon which the validity of the first respondent's adoption depends are of considerable intricacy and their Lordships think that they ought not to take upon themselves the affirmance or disaffirmance of the findings

of the trial Judge until they have been examined and pronounced upon by the appellate court in the ordinary way. They will, therefore, humbly advise His Majesty that the decree of the Court of the Judicial Commissioner, dated the 27th March, 1929, should be set aside, and the case remanded to that Court for the decision of all other questions arising upon the judgment of the trial Judge. The costs of this appeal must be paid by the first respondent. All other costs will be dealt with by the Court of the Judicial Commissioner.

In the Privy Council.

JAGANNATH RAO DANI

v.

RAMBHAROSA AND ANOTHER.

DELIVERED BY SIR GEORGE LOWNDES.

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