

Privy Council Appeal No. 122 of 1918.

Mirza Yadalli Beg - - - - - *Appellant*

v.

Tukaram and another - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 8TH JUNE, 1920.

Present at the Hearing :

VISCOUNT HALDANE.

VISCOUNT FINLAY.

LORD MOULTON.

LORD SUMNER.

LORD PARMOOR.

[*Delivered by* VISCOUNT HALDANE.]

The relevant facts in this case can be briefly stated. In 1893 the owner of sixteen fields in Berar mortgaged them to the appellant. In 1896 the mortgagor conveyed one of these fields to the respondents. In 1899 the appellant brought a suit against the original mortgagor alone to enforce the mortgage, and obtained a decree by consent. Under this decree (which was afterwards made absolute) in default of payment within a definite time, nine of the mortgaged fields, including that conveyed to the respondents, were to be foreclosed and to be handed over in possession to the appellant. The respondents not having been made parties to the suit were not affected by it. The appellant went into possession. He kept no accounts. The officiating Judicial Commissioner in the Central Provinces, Berar Jurisdiction, has decided that the respondents as owners of an interest in the equity of redemption as it originally stood, an interest which although only fractional remains undisturbed, are entitled to redeem the mortgage on the footing of paying the balance left of the mortgage debt after debiting the mortgagee with a fair occupation rent during the period

of his possession, and crediting him with simple interest on the debt due to him under the mortgage deed. If the respondents have the right to redeem the entirety, their Lordships think that this direction as to the form of account was right. The only question that arises is whether they are entitled to redeem the whole of the nine fields, or only the field conveyed to them subject to the mortgage over the whole. According to English law the respondents would have been entitled to redeem the mortgage in its entirety, subject only to the safeguarding of the equal title to redeem of any other person who had a right of redemption, a point which has not arisen so far in the present case. The respondents, being transferees of part of the security, by English law, if it applied, would on the one hand be entitled to redeem the entire mortgage on the properties generally, and correlatively could not compel the mortgagee to allow them to redeem their part by itself. This would be so as the result of principle unless something had happened which extinguished the mortgage in whole or in part, such as an exercise of a power of sale originally conferred on the mortgagee by his security, or such conduct on the part of the transferees as would estop them from asserting what normally would have been their right. Nothing of this kind is alleged in the case before their Lordships.

The Judge in the original Court thought that the decisions of the Courts in India had established that one of several mortgagors cannot redeem more than his share unless the owners of the other shares consent or do not object. Subject to proper safeguarding of the rights to redeem, which these owners may possess, their Lordships are of opinion that this is not so in India any more than in England. The decisions referred to when scrutinised turn out to be based not on any general principle different from that adverted to, but on the special circumstances of the transactions to which they related, circumstances which have nothing analogous to them in the facts now under review. It need only be added on this point that the right to redeem in the present case is not affected, as was suggested by the concluding part of Section 60 of the Transfer of Property Act, 1882, which is as follows:—

“Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.”

This did not apply to Berar at the time the foreclosure decree was made in 1900, and moreover, if it had applied, it would have done no more than declare applicable what is just the law as established in England. Their Lordships agree with the view taken by the officiating Judicial Commissioner on Appeal, and they see no reason to alter the decree which he has made.

They will humbly advise His Majesty that this appeal should be dismissed.

In the Privy Council.

MIRZA YADALI BEG

v.

TUKARAM AND ANOTHER.

DELIVERED BY VISCOUNT HAIDANE.

Privy Council Appeal No. 106 of 1918.

Tirugnanapal - - - - - *Appellant*

v.

Ponnammai Nadathi 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 8TH JUNE, 1920.

Present at the Hearing :

VISCOUNT HALDANE.

VISCOUNT FINLAY.

LORD MOULTON.

[*Delivered by* LORD MOULTON.]

This is an appeal against the judgment and decree of the High Court of Judicature at Madras dated the 28th October, 1915, which affirmed the decree of the Subordinate Judge of Tuticorin dated the 15th April, 1913. The suit was brought by the plaintiff to recover possession of certain properties and for declarations of the invalidity of the mortgages upon them, and the defendants are persons claiming right to the said properties or interests therein under the said mortgages.

The sole question before their Lordships is as to the plaintiff's title to the lands in question. It rests solely upon a certain document described as a will. Both the Courts below have held that this document is not a will but is wholly of a non-testamentary character. It is not contested that if this is the case the document is invalid and gives no title to the plaintiff, because it was not registered and did not bear the stamp which would be necessary if it was a transference of the property in question *inter vivos*. The sole question therefore that their Lordships have to decide is as to the nature of this document which bears date the 8th March, 1892.

At that date Vaikunta Nadar was the owner of the properties and as he had no male child he had resolved to adopt a boy somewhat distantly related to him, who is the present plaintiff, Tirugnanapal, and it was in connection with this proposed adoption that the document was written. It styles itself a will, and so far as is relevant is in the following terms :—

“ The Will executed this day, the 8th March, 1892, corresponding to 27th Masi of Andu 1067 by Vaikunta Nadar, son of Vaikunta Nadar of Nattati village, Tenkarai taluq, Tinnevely district, to the boy adopted by me, whose name I have this day changed into Vaikunta Nadar from that known as Tirugnanapal, son of Periasami Nadar of the said village is as follows : As I have no male heir though I married two wives, as I have been falling ill very frequently, as my family is a respectable family entitled for several generations to respect (greatness) and to the income of the headship of the caste, including Nattamai and title to worship by my castemen, for that purpose and for enjoying the property and in regard to another consideration, viz., that for obtaining the fruit of this birth, according to the Hindu Sastras, it would not do without a male child, I have, out of my free will, executed this Will pursuant to the request of my castemen and after consultation with my mother and my wives. And you are to conduct yourself according to it as follows :

“ From this day forward you shall be my child and live with me ; and out of the properties belonging to me and included in my patta and situate in the villages of Nattati, Perunkulam, Sayalapuram and Kattalankulam in Tenkarai Sub-district and taluq, Tinnevely district and in Allikulam, Ottapidaram taluq, the lands in Schedule I belonging to my mother as her *Stridhanam* and enjoyed by her, but included in my patta according to the original old usage, and the properties in Schedule II which had been assigned to her for the income of the *Stridhanam* (property) according to the direction of my father and which are in her enjoyment, she should enjoy as usual ; the properties in Schedule III which were gifted by me to my young sister Ponnammai Nadathi as *Stridhanam* at her marriage, according to father's direction, and which she has been enjoying, she should enjoy as usual ; excluding the properties which shall belong to them all the other properties in Schedule IV and included in my patta you are to live with me and enjoy ; if perhaps, I should die (attain Sivaloka) you are to live with my mother and first wife and you are to perform the funeral ceremonies for me, my mother and my wives, spending money according to our position ; you are to obey my mother, who has been from the beginning the protector (manager) of the family, and be under her protection and conduct yourself according to her wishes (will) ; if perhaps, there should be disagreement between my mother and my wife and they should not pull on together amicably then you shall be under my mother's protection, and shall give my daughter *Stridhanam* similar to that given to my sister and, like unto her, present her jewels for Rs. 2,000, get her married to my sister's son, and shall incur the expenses subsequent to marriage, without derogation (to position) according to the caste usage ; though my junior wife has left me (deserted me) you shall perform her funeral ceremonies and incur the expenses therefor ; if my senior wife is not willing to live with you and my mother, then you shall allot to her land and palmyras yielding an annual income of Rs. 200 to be enjoyed by her, to meet her expenses ; the palmyras, *odais* and other trees standing on the lands in the above schedule shall be enjoyed by each according to his or her enjoyment of the lands ; in addition to your acting as stated above, in regard to my creditors you shall pay them from the profits of the properties without any diminution to the original properties themselves, and if they are not sufficient, then you shall make up for it by hypothecating the property (Senkulivayal) according to my mother's wishes.”

Then follow the four schedules of properties referred to in the document.

The only circumstance which need be borne in mind in construing this document is that it is admitted that it was the intention at that time of Vikunta Nadar to adopt the plaintiff, but that this intention was never carried out.

The first point to be remarked is that although the document is called a will it is addressed to the plaintiff, and it speaks of him as having been already adopted, and directs him to conduct himself according to the will. In substance, therefore, it purports to be a direction to the plaintiff as to his personal conduct in his new position. The impression thus made by the early words of the document is confirmed by the whole of the rest of it. Its directions apply from the moment of its execution, and relate first to his behaviour during the life-time of Vikunta Nadar, and afterwards to his behaviour after the death of Vikunta Nadar, but there is nothing whatever in the nature of a testamentary devise to take effect on the death of Vikunta Nadar and not until then.

But on examination, the direct evidence that it was intended to operate *de presenti* is clear and unmistakable. It commences by the statement "from this day forward you shall be my child and live with me," and after directing that the allowances to his mother and younger sister should continue, it says, "all the other properties in Schedule 4 and included in my patta you are to live with me and enjoy." Then follows the only reference to Vikunta Nadar's death that appears in the document. So far from indicating that the document is then first to take effect it refers to the death almost incidentally in the words "if perhaps I should die," and follows that up with directions as to his living with his mother and conducting himself according to her wishes. It is true that it also contains directions as to his giving allowances to Vikunta's daughter, and other persons, but considering that by the adoption the plaintiff would become the head of the house after the death of Vikunta Nadar, there is nothing in these directions which is inconsistent with its being a mere expression of his wishes as to the conduct of the newly adopted son in the position which he was to occupy.

To sum up, in their Lordships' opinion the only words contained in the document which would support its being regarded as a document of a testamentary character are that in some places it styles itself a will. But calling a document a will does not make it so, and in their Lordships' opinion it is not of a testamentary character in any respect, and that if it has any legal effect whatever it is of the nature of a transaction *inter vivos*, and as such has admittedly no validity. But their Lordships have great doubts whether it purports to be anything more than a declaration of the intended adoption of the plaintiff and a statement of the wishes of Vikunta Nadar thereafter.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, and that the appellants should pay the costs.

In the Privy Council.

TIRUGNANAPAL

a.

PONNAMMAI NADATHI AND OTHERS.

DELIVERED BY LORD MOULTON.

Printed by Harrison & Sons, St. Martin's Lane, W. C.
1920.