Privy Council Appeal No. 94 *of* 1945

Kadappa Bapurao Desai - - - - - - - *Appellant*

v.

Lingappa Ramchandra Desai - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1948.

Present at the Hearing :

LORD UTHWATT
LORD MACDERMOTT
SIR JOHN BEAUMONT.

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the High Court of Judicature at Bombay, dated 8th March, 1940, which reversed a judgment and decree of the Joint First Class Subordinate Judge of Belgaum, dated the 28th October, 1937, dismissing the plaintiff's suit with costs.

The property in suit is an impartible estate governed by the rule of lineal primogeniture and is Deshgat, Patilki and Nadgavdki Watan property. It consists of land subject to Government assessment and is governed by the Bombay Land Revenue Code 1879 and the Bombay Hereditary Offices Act III of 1874 (known as the Watan Act) as amended by Act V of 1886. The parties are Hindus, subject to the Bombay school of the Mitakshara Law.

The question for decision in this appeal is as to the nature of a transaction which took place in the year 1887. On that date Rayappa and his younger brother Mallappa were members of a joint family. Whether the family included the members of a younger branch to which the appellant belongs, it is not necessary to consider. Rayappa as the eldest male member of the family was the Watandar in possession of the suit property. He seems to have been an improvident person, and had incurred debts to the amount of Rs.30,000 to Rs.35,000, some of which were charged on parts of the suit property, and in respect of which creditors were pressing.

On the 8th February, 1887, Rayappa made an application to the Collector of Belgaum (Exh. 114) in which, after explaining his financial difficulties, he informed the Collector that Mallappa had suggested that his name should be entered in the khata in respect of the entire lands as well as in the register of the Patilki Turn to enable him to make arrangements for the entire debts; that Rayappa had accepted this suggestion and accordingly he prayed that the Collector would be pleased to remove his name from the khata and the register for Turns and to enter the name of Mallappa therein.

On the 19th February, 1887, both Rayappa and Mallappa were examined before the Mamlatdar of Athni. Rayappa made a further statement (Exh. 118) confirming his previous request and asking that his statement should be treated as in the nature of their rajinama (conveyance) and arrangements should be made accordingly. Mallappa made a statement (Exh. 115) in which he referred to Rayappa's debts, and stated that he had taken on himself the responsibility regarding the management of all these debts. The statement continued "In accordance with the consent of our

elder brother, his name, which is at present in the Pali register, may be removed therefrom and my name may be entered. We alone are entitled to the 16 annas Goudki (right of Patilki service). Thus is the statement got written. We two brothers are joint." On some date in February, 1887, which is not specified, the wife of Rayappa made an application to the Governor of Bombay (Exh. 120) in which she objected to the proposed transfer to Mallappa on the ground that she might bear a son to Rayappa, who ought to succeed to the estate. On the 23rd February, 1887, the Mamlatdar of Athni was directed (Exh. 167) to ascertain whether there would be any objection to the name of a possible son of Rayappa being entered in the khata. On the 1st March, 1887, Mallappa made a further statement in which he stated:—

> " If hereafter any male issue is born to him (Rayappa) and when that boy comes of age, I will have no objection whatever to get the entry made in his name, considering him to be the direct heir. Knowing that day by day, my brother is involving himself in greater difficulties on account of debts, this method has been adopted for managing everything. But there is no intention to defeat in future the right which would go to Rayappa's direct issue."

Rayappa agreed to this in a statement (Exh. 117) made on the same date. As Rayappa never had any male issue it is not necessary to determine the legal effect of this arrangement. It is clear that under Hindu law it was not competent to confer any interest in the property upon an unborn son of Rayappa, and the highest the case could be put against Mallappa (apart from contract) would be that his interest was made defeasible in an event which did not happen.

On getting these statements the Mamlatdar made a report to the District Deputy Collector, who thereupon reported to the Collector of Belgaum, that Rayappa's request might be accepted and the name of Mallappa entered in the register. On the 3rd June, 1887, the District Deputy Collector was directed by the Collector to issue an order to give effect to his opinion, and such order was issued accordingly to the Mamlatdar (Exh. 167). On the 6th June information was directed to be sent to all the villages debited in the name of the Desai. In the Land Register of the village of Kokatnur where the property was situated (Exh. 127) the name of Mallappa was entered in the place of Rayappa " by reason of consent, under order of Mamlatdar dated 19th June, 1887." Whether that date was a mistake, or whether there was a further order after that of the 6th June, 1887, is not clear. No mutation was entered in the Pali register (Exh. P. 102). On the 18th June, 1887, the two brothers entered into a maintenance agreement (Exh. 126) whereby the sum of Rs.500 was fixed as Rayappa's maintenance, as security for which Rayappa was to be given certain of the family lands during his life.

Mallappa seems to have been unsuccessful in discharging the debts upon the estate, and in the year 1906 he and Rayappa made a joint application to the Governor of Bombay, asking that the Court of Wards take over the management of the estate. The application stated

> " That the Desgati consists of an undivisable property held according to the law of primogeniture that it is held for the present by the youngest brother Mallappa Petitioner No. 1 only on condition that he should resign his claims to khata in the name of a male issue of Petitioner No. 2 (Rayappa) that in case Petitioner No. 2 dies without male issue the property should continue in the name of its present holder, and that thus they both have an equal interest in the property and hence the petition in the name of the two."

The application was supported by a statement (Exh. 126) made by Rayappa. The resolution of Government dated 15th June, 1906, assuming control by the Court of Wards (Exh. 131) referred to the property as that of Mallappa and Rayappa.

Rayappa died on the 23rd November, 1914, without any male issue, leaving surviving him two widows. Mallappa died on the 16th April, 1917, without male issue, the estate still being under the superintendence of the Court of Wards. The estate was handed over by the Court of Wards to the appellant in the year 1919.

In the year 1927 the senior widow of Rayappa took in adoption the present respondent as a son to her deceased husband Rayappa, and on the 7th December, 1933, the respondent, then a minor 10 years of age, instituted the present suit as a pauper.

In the Courts in India the case was dealt with upon the footing that if Rayappa was the owner of the estate at the date of his death the respondent on his adoption would inherit; but that if Mallappa was the owner, the appellant as his heir under the rule of lineal primogeniture, would be entitled to the property in suit. Mr. Datta, junior counsel for the respondent, desired to argue before the Board that a son of Rayappa would be a nearer heir to Mallappa than the appellant, and that on the adoption of the respondent any estate which the appellant had inherited from Mallappa would be divested in favour of the respondent as heir of Mallappa. This point was not debated in the courts in India, nor was it taken in the case of the respondent, and their Lordships declined to allow it to be raised at so late a stage. Their Lordships will deal with the case on the footing upon which it was dealt with in India, and on this basis the question at issue turns upon whether in 1887 Rayappa relinquished all his interest in favour of Mallappa, or whether Mallappa became merely the manager of the property for the purpose of the payment of the debts. The learned Trial Judge held that Rayappa had relinquished all his interest, and dismissed the suit. In appeal the learned Judges of the High Court (N.J. Wadia and Divatia JJ.) took a different view and decreed the plaintiff's suit except as to certain mesne profits claimed. The learned Judges of the High Court expressed the view that there was no doubt that Rayappa in law had the power to relinquish or alienate the estate, but that the facts proved showed clearly that he did not exercise that power in 1887, and that all that he did was to make an arrangement by which during his lifetime the management of the estate was transferred to Mallappa so as to save the estate from being seized by creditors and to prevent it from being further encumbered by Rayappa himself.

In considering the evidence as to the arrangement arrived at in 1887, two questions must be determined. First what was the intention of the parties? and secondly was such intention carried into effect? On the first question the facts and documents to which reference has been made seem to their Lordships to establish that Rayappa intended to relinquish his interest in the property in favour of Mallappa, rather than to constitute Mallappa a mere agent for the management of the estate and payment of the debts. This view finds strong support from the absence of any arrangement for the return of the estate to Rayappa when the debts were paid, or when the authority of Mallappa came to an end, which at the latest would be at his death. Nor is it easy to see why, if Rayappa remained the owner, it was necessary to provide for Mallappa to ensure the succession of Rayappa's son. In that event the son would inherit under Hindu law, without reference to Mallappa. It was contended for the respondent that, on the hypothesis that Mallappa was only an agent, his agreement to restore the estate to Rayappa's son on his attaining majority would take effect if that event occurred during the period of Mallappa's managership; but Exh. 116 certainly does not suggest that that was all that the parties had in view.

The second question, whether Rayappa in fact and in law did relinquish his interest in the property in favour of Mallappa, is the vital one, and depends upon the effect of Sections 73 and 74 of the Bombay Land Revenue Code as they stood in 1887. Section 73 provided that the right of occupancy should be deemed an heritable and transferable property and should immediately pass to the person whose agreement to become occupant should have been accepted by the collector. Section 74 provided, so far as

material, that an occupant by giving notice to the Mamlatdar or Mahalkari might relinquish his occupancy either absolutely or in favour of a specified person, provided that such relinquishment applied to the entire occupancy or to whole survey numbers, or recognised shares of survey members, and that when there were more occupants than one, notice of relinquishment must be given by the registered occupant, and the person, if any, in whose favour an occupancy was relinquished, must enter into a written agreement to become the registered occupant and his name should thereupon be substituted in the records for that of the previous registered occupant. Under Rule 74 of the Rules framed under the Code the notice of relinquishment required by Section 74 had to be in a certain specified form.

In their Lordships' opinion the statement of Rayappa (Exh. 118) made to the Mamlatdar read with the earlier statement (Exh. 114) was a good notice of relinquishment within Section 74. It is true that it was not in the form prescribed by Rule 74, but it contained all the essentials required by such form, and Government were entitled to accept the notice (as they did) without insisting on the prescribed form. The important matter for determination is whether the statement (Exh. 115) made by Mallappa to the Mamlatdar operated as a written agreement within Section 74. The learned Judges of the High Court thought that it did not, that no agreement by Mallappa could be inferred, and that even if such an agreement existed it would not necessarily have the effect of extinguishing completely the rights of Rayappa in the property, a view for which they relied upon the case of *Rachappa* v. *Ningappa* (1925) 27 *Bom. L.R.* 1253. Their Lordships are unable to agree with this view. Section 74 does not say with whom the written agreement is to be made, but clearly it must be with Government, since the collector has to accept it. Mallappa made a written statement to the Mamlatdar in which he asked that in accordance with the consent of his brother, his brother's name might be removed from the Pali register, and his own name might be entered. In their Lordships' view this constituted a written agreement to accept the relinquishment of which Rayappa had given notice, and it was accepted by the Collector. The right of occupancy therefore passed under Section 73, and nothing remained to be done except for the name of Rayappa to be entered in the register as required by Section 74. Upon their Lordships' view as to the effect of Sections 73 and 74 the transaction so far as the parties were concerned was complete, and their Lordships are unable to accept the view taken by the High Court of Bombay in the case of *Rachappa* v. *Ningappa* (*supra*) that whether or not the property passed under the notice of relinquishment and agreement depended on all the circumstances of the case. The rights of the parties could not be affected by the failure of Government to carry out its statutory duty to substitute the name of Mallappa in the Pali register, or by their action after the death of Rayappa in entering the name of Mallappa in the mutation register as taking by inheritance, a point upon which the appellant relied.

If their Lordships are right in thinking that in 1887 Rayappa duly gave notice of the relinquishment of his interest, and that Mallappa duly entered into a written agreement to accept such relinquishment and that the title accordingly passed to Mallappa, no importance attaches to subsequent equivocal acts on the part of the brothers after that date, which did not alter the legal position, but on which the learned Judges of the High Court relied. The learned Judges attached particular importance to the fact that the application in 1906 for the Court of Wards to assume control of the property was made by the two brothers and not by Mallappa alone, and that Government took a statement from Rayappa in preference to one by Mallappa. Their Lordships would in any case attach no great importance to this. The application to the Court of Wards was made nearly 20 years after the arrangement of 1887, and Government finding the younger brother in possession of the watan property and proposing to hand it over, would naturally desire to make sure that the elder brother approved of the proposal and would not make trouble in the future.

It was further contended by the respondent that the transfer from Rayappa to Mallappa was illegal under Section 5 of the Watan Act, which provides that without the sanction of the Government it shall not be competent to a Watandar to alienate for a period beyond the term of his natural life, any watan or any part thereof, or any interest therein to or for the benefit of any person who is not a watandar of the same watan. It is said that since the property in this case was subject to the rule of lineal primogeniture Rayappa was the only watandar and Mallappa had no more than a spes successionis and for that proposition reliance was placed on *Chinava* v. *Bhimangauda I.L.R.* 21 *Bom.* 787 and *Tarabai* v. *Murtacharya* 41 *Bom. L.R.* 924. The answer to this argument is that the Collector did sanction the alienation, and at this distance of time their Lordships must presume that the Collector had authority on behalf of Government so to do, a presumption made the more readily because this point was not pleaded, nor debated in the Courts in India, and, if it had been, evidence on the subject might have been adduced.

With regard to costs, the respondent obtained leave to sue as a pauper, but notwithstanding this fact, and the further fact that he succeeded on the issues as to his adoption, he was ordered to pay the costs of the suit. He obtained leave to appeal to the High Court as a pauper, and as his appeal succeeded he was given his costs. He did not obtain leave to defend this appeal as a pauper. Whilst the trial judge no doubt had a discretion as to the manner in which he would deal with the costs, their Lordships think that it was not a sound exercise of his discretion to order costs to be paid by a minor suing as a pauper. Obviously such an order was not likely to be effective. Their Lordships think that the proper course is to make no order as to the costs of the suit and of the appeal to the High Court, but to direct the respondent to pay the costs of the appellant of this appeal.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that the decree of the High Court of Bombay dated 8th March 1940 be set aside and that the decree of the Joint First Class Subordinate Judge of Belgaum dated the 28th October 1937 be restored except so far as it ordered costs of the defendant to be paid by the plaintiff. The respondent must pay the costs of this appeal.

(60253) Wt. 8062—31 180 7/48 D.L. G. 338

In the Privy Council

KADAPPA BAPURAO DESAI

v.

LINGAPPA RAMCHANDRA DESAI

[DELIVERED BY SIR JOHN BEAUMONT]

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