

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sri Ammi Devi Garu v. Sri Vikrama Devu Garu (a minor, represented by the Collector and Agent to the Court of Wards), from the Court of Judicature at Madras; delivered 21st April 1888.

Present :

LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Zemindar of Madgole died on the 25th of December 1875. He left two widows, but no male issue. On the 8th of November 1876 the senior widow adopted a son to her deceased husband.

In 1881 the junior widow brought the present suit to have the adoption set aside, on the ground that the senior widow had no authority from her husband to make an adoption, and also on the ground that the adoption was invalid by Hindoo law, because the infant who was adopted was the only son of his natural father.

The question of Hindoo law was not argued before their Lordships. In the view which they took of the evidence, it became unnecessary to have it discussed. But as this question seems to have been determined by the High Court in deference to a decision, or supposed decision, of this Board, it may be as well to state that the learned Counsel on both sides informed their

Lordships that they had been unable to find the decision by which the High Court conceived themselves bound.

The case presented on behalf of the senior widow and the adopted child was this:—On Monday, the 20th of December 1875, the Zemindar verbally authorized the senior Rani to make an adoption; on the following day he executed a will expressly conferring upon her authority to adopt, and at the same time he dictated a letter and sent it to the Collector at Vizagapatam intimating the fact of his having executed a will to that effect. Each of these allegations was traversed by the junior widow.

Apart from the matters directly at issue, the circumstances of the case are not in dispute.

The Zemindars of Madgole belonged to a family of some antiquity, with pretensions to a mythical descent. In token of their descent they used the badge or emblem of a fish on their banners, and on the seal of the zemindari, and they were in the habit of authenticating documents by a drawing intended to represent the same device, and called the Matsia Santikam, or fish signature.

The late Zemindar succeeded to the family estate in 1833. The property was then much embarrassed. It became still further involved during his tenure. The principal creditor was the Maharaja of Jeypore, who was in possession as mortgagor. A person of the name of Laksh-maji was the Zemindar's mukhtiar, and he received a similar appointment from the Maharaja. In 1875 Lakshmajji took a lease of the zemindari. The control of affairs was thus in his hands, and all the officials of the estate were under his orders. Lakshmajji is said by the High Court to have been a clever but unscrupulous person. Probably this statement does him no great injustice. At the date of the judgement of the High Court

he appears to have been undergoing a sentence of imprisonment for forgery.

For some 13 years or more before his death the Zemindar was a helpless cripple from rheumatism. He became seriously ill about a month or six weeks before he died. In a letter from the Sub-Magistrate to the Collector of Vizagapatam, dated the 25th of December 1875, announcing the Zemindar's death, it is stated that he had been bedridden for three days before the 21st, "owing to excessive heat, swelling of the body, and diarrhoea, and the weakness resulting therefrom." On Monday, the 20th of December, he was seized with a violent attack of vomiting, and it is said that "the burning in his limbs increased largely." Under that attack, from which he never rallied, he sank on Saturday, the 25th of December.

There seems to have been among the Zemindar's dependants a faction opposed to Lakshmajji, and nominally, at any rate, in the interest of the senior Rani. The head of this faction was one Gopala, an illegitimate brother of the Zemindar. As the illness of the Zemindar increased and his death was evidently approaching Gopala's faction grew bolder, and there were disturbances between the adherents of Gopala and those of Lakshmajji. The Sub-Magistrate was informed that rioting was apprehended. On the evening of Friday, the 24th of December, the Sub-Magistrate received a summons from Gopala, requesting him to enter the fort where the Zemindar resided and quell a disturbance. He went there accompanied by the inspector of police. On entering the fort, Gopala took him to the senior Rani, who was in her husband's room. The Rani exclaimed, "This is just the time for preserving the Matsia race," and told one of the servants to bring "that paper." A paper was brought and placed in the hand of the Rani, who gave it to the

Sub-Magistrate, saying it was the will of the Raja. The Sub-Magistrate went up to the Zemindar to ask him if it was so. The Zemindar's eyes were open. He seems to have made an effort to speak, but failed. He gave no sign with his hands or with his head. The Sub-Magistrate then had the document read aloud. When the will was read out Lakshmaji said, "Raja did not execute it. It is a forgery." The Sub-Magistrate then sealed up the Zemindar's property as far as was practicable. He tried to find the seal of the zemindari. The Rani said it was with Lakshmaji. Lakshmaji denied that he had it. The Sub-Magistrate then went to the house of the manager Narasimham. He was examined in the absence of Lakshmaji, and he stated that he had sent the seal to Lakshmaji three or four days before. The seal, however, could not be found, and it has not been discovered since. The Sub-Magistrate took possession of the document which was represented to be the Zemindar's will, and sent it on the following day to the Collector. There is no doubt that it was produced at the trial in the same state in which it was on the night of the 24th of December. It is sealed with the seal of the Zemindari, and also bears the fish signature. It purports to be attested by 20 witnesses, and to be subscribed by one Lingaya as the writer of the document.

The Zemindar did not recover consciousness, and died as already stated on the 25th of December.

In March 1876 the alleged will was presented for registration. In support of the application thirteen witnesses, of whom the senior Rani was not one, were examined. The Acting Registrar refused registration. Among the reasons which he gave for the refusal, he referred to the discrepancies in the evidence of the witnesses and to their demeanour. On that occasion the wit-

nesses who deposed to the execution stated that the zemindar sat up and signed the document in their presence. They did not, they said, see it sealed or delivered to the senior Rani, but they understood that it was sent to the manager to be sealed, and that it was afterwards delivered to her.

An appeal was presented from the decision of the Acting Registrar. In view of this appeal the senior Rani was examined herself. Her statement was this:—On Monday, the 20th of December, her husband was in a critical state. She went into his room about 9 a.m. She asked, “What is to be my fate? I have no children, and what is to become of me?” He told her to make one or two adoptions, to reign over the country, protect the second wife and concubines just as he did, and conduct the administration. On Tuesday, about 3 p.m., at the time of meals, he gave her the will. No one was in the room at the time but herself and the Raja. On the very day he gave her the will he said he had sent either a will or a letter to the Collector. He signed the will in her presence, and also smeared the ink on the seal, and affixed the seal himself. No one attested the will while she was there. She took the will and left it in her box for three days, and gave it to the Sub-Magistrate on the Friday.

After this evidence was given the appeal from the Acting Registrar’s decision was allowed to drop. The Rani’s statement to Mr. Goodrich, the Acting Collector, who made inquiries into the matter at the instance of the Board of Revenue, in July 1877, was that she was advised that it was unnecessary to establish the genuineness of the will, as the Zemindar had given her authority to adopt. Mr. Goodrich’s report was put in evidence by the Rani. It may be observed, in passing, that Mr. Goodrich remarks,—“Unfortunately, there has been keen contention all

“ through the business; many have changed sides, some more than once; and the amount of perjured evidence at the disposal of each faction has been great.”

In October 1877 the Governor in Council directed the Board of Revenue to intervene, in their capacity of Court of Wards, for the protection of the rights of the two widows, who were registered as proprietresses of the Madgole estate.

In December 1879 the junior widow was relieved from the guardianship of the Court of Wards.

This suit was instituted on the 8th of August 1881. The senior widow and ten other persons, four of whom had been witnesses in the registration proceedings, were examined for the defence. The senior widow was the first witness. Her account of the conversation on Monday was much the same as that which she gave on the former occasion, except that she placed the conversation at 2 jhams or 12 o'clock, and said that when she went to her husband's room there were males in the room, who were ordered to leave, and she added that the people outside could have heard her conversation with her husband, and that the interview ended by her husband saying, “ You had better go now. I shall execute a will to-morrow and give you.” As regards the interview on Tuesday, she adhered to her statement that she went at 3 jhams, or 3 o'clock, to see her husband, at meal time, and that her husband both signed and sealed the will in her presence. She added that she stayed alone with her husband about an hour, talking over their past griefs and joys.

The room in which the sick man was lying was an apartment without windows. The door opened into a verandah 3 cubits wide. The room is said to have been about 7 or 8 cubits wide,

and 10 or 18 cubits long from north to south. The cot on which the sick man lay was close by the southern wall.

Several witnesses speak to being in the room on Monday when the Rani came in. They say they went out, sat down on the verandah, and heard the whole conversation. The persons outside were about twenty in all. After the Rani left, the sick man repeated the conversation to them, and they congratulated him on having authorized his wife to make an adoption. He told them he was going to execute a will on the following morning, and asked them all to come quickly. Accordingly they came. Lingaya was among the first to arrive. The Zemindar handed him a draft, and told him to copy it. He was about an hour copying. He did not know in whose handwriting the draft was. It was in the handwriting of some Madgole man. When the will was copied it was read out once or twice, and then the Zemindar sat up and signed it, and handed it back to be witnessed by those present. While the will was being signed, the Zemindar dictated a letter to the Agent of the Government at Vizagapatam. It was written by Venkenna, not by Lingaya the writer of the will. When the letter was finished, it was handed to the Zemindar, and then the Rani came in. Those present then left the room. Some went away at once; others waited in the verandah for about an hour. During that time they were not peeping in. Then they peeped through the door, which was ajar about a span, and just at that moment it happened that the Zemindar called for his seal. It was taken from his box. He signed the letter. He sealed the letter and the will, and gave the will to the Rani.

Such, in substance, is the account given by the witnesses for the defence on whom the learned Counsel for the Respondent relied. On

the other hand, there are witnesses for the defence from whose evidence it may be collected that a person standing at the door of the sick man's room could not see him where he was lying; that nobody peeped through the door, and that, in fact, it was not possible to do so, and also that the conversation could not be heard outside, that the sick man's voice was feeble, and that the Rani spoke low. And it is to be observed that Narasimham, the manager, ninth witness for the defence, who does not seem to have had any motive for stating that which was untrue, says that he saw the Zemindar daily from the 20th to the 24th of December inclusive, and he adds, "I did not get any papers signed by him. He was too weak to transact business or to sign papers during those days. His hand was swollen. He postponed signing chitta for a fortnight as he could not sign."

Taking the evidence of the accepted witnesses, there are discrepancies to which the Subordinate Judge has perhaps attached too much importance. There are contradictions of more importance between the statements made by Lingaya, Venkenna, and a third witness, Bhupala Raj, in this suit, and their former depositions, which were put in evidence. The account of the transaction adopted by the learned Counsel for the Respondent presents many improbabilities. The story of the assembly in the sick man's room on Monday morning, of the persons present going into the verandah and hearing there the conversation between the Zemindar and the Rani, and the Zemindar's promise to execute a will on the following day, seems improbable. It is not a little remarkable that there appears to be no trace whatever of this story in the evidence given on the registration proceedings. It is also remarkable that the time of the Rani's visit to her husband on Monday is now placed

much later in the day than it was in her evidence in 1876. In 1876 the visit is stated to have taken place at 9 a.m., a time at which it is not likely that the Zemindar would have had visitors, if one may judge from what is said to have occurred on the following day. People were asked, it is said, to come early on the following day to witness the will, and yet no one seems to have come before 10. The account of the scene when the will is said to have been copied, signed, and attested also seems improbable. It is improbable that a person admittedly in the state in which the Zemindar was should have been able to trace the fish signature with his own hand and to take so active a part in the transaction,—sitting up without assistance, giving directions, and, above all, dictating a letter of some length to the Collector, which explained his will as regards adoption, and asked the favourable consideration of the Government. It is most improbable that this scene, for which arrangements were openly made the day before, should have gone on for so many hours without attracting the notice of Lakshmajji, who is said never to have left the fort during the Zemindar's illness, and to have kept a vigilant watch on the proceedings of the opposite faction.

But these improbabilities are trifling compared with the improbability presented by the document itself, and by the circumstances under which it was first introduced on the stage.

The alleged will is a remarkable document. It is clear and concise, and singularly well arranged. It provides for many things besides providing for adoption, which is said to have been the reason for its execution. It provides for an allowance for the second wife, for the testator's daughter, for his concubines, and, above all, it provides for placing the administration of the estate in the hands of

Gopala. Now, Gopala, as we know from the statement of the senior Rani herself, was in disgrace at the time. She says, in her final examination, "At the time of the Raja's death Gopala Bhupati was banished from the fort. It was the Raja himself who precluded him from coming into the fort." In the judgement of the High Court it is stated that he had not been allowed access to the palace for some years. Whether this statement be founded on an admission at the hearing or not, Gopala's banishment, as it was the act of the Zemindar himself, must in all probability have occurred before the Zemindar's last illness. It is almost incredible that the Zemindar could have meant to commit the management of his estate to a person whom he had himself banished from his presence. Then there is nothing in the evidence to show that the dispositions in the alleged will emanated from the mind of the alleged testator, or that he had anything whatever to do with the instructions from which the will was prepared. Lingaya says that he wrote the will on the Tuesday morning from a draft handed to him by the Zemindar. The draft is not forthcoming, which is perhaps not to be wondered at. But the person who wrote the draft, who is said to have been a Madgole man, is not produced. No one seems to know who he was. As the Zemindar could not leave his room, the writer must have come to the Zemindar. There could have been no difficulty in finding the writer, and it is to be observed that the will was challenged as a forgery when first it was produced, and that Lingaya was questioned as to the writer of the draft on his first examination in 1876, so there can be no ground for suggesting that this point, which is obviously of the utmost importance, comes as a surprise to the supporters of the will. Again, there is nothing to show that the

Zemindar had anything to do with procuring the seal from the manager, in whose custody it was until three days before the death. It seems to have been obtained from him by a trick. Two messengers were sent for the seal. They each said the Zemindar wanted the seal, and that Lakshmaji was with him at the time. It was given to the second man, because his story corresponded with that of the first. The second messenger is said not to be alive, but there was no suggestion that the first messenger was dead, and he is not produced.

On the whole, therefore, the irresistible inference seems to be that the alleged will, whether it was prepared before or after Monday the 20th, was not prepared by the instructions of the Zemindar, and that the seal by which it purports to be authenticated was not procured from the manager by the Zemindar's directions.

Under these circumstances, their Lordships are of opinion that it would not be safe to rely on the oral evidence as proof that the document propounded by the Respondent does contain the last will and testament of the deceased. The burden of proof rests with the propounder of the will, and, in their Lordships' opinion, the Respondent has not discharged that burden. In their opinion, no reliance can be placed on the alleged conversation on Monday, or on the letter which is said to have been signed by the testator on the 21st, but which, from a pencil memorandum upon it, does not appear to have been received until after the Zemindar's death. It was for those who produced that letter to give an explanation of the date endorsed if they meant to contend that that date was not, as it presumably was, the date of receipt.

In the result, their Lordships agree with the findings of the Subordinate Judge, though much of his reasoning appears to be far fetched and

ill founded. In particular, there seems to be no ground for his strictures upon the conduct of the Sub-Magistrate.

Their Lordships will humbly advise Her Majesty that the appeal ought to be allowed and that the Respondent ought to pay the costs in the High Court and in the Court of the Subordinate Judge, whose judgement will be restored except as regards the payment of costs. The Respondent must pay the costs of the appeal.
