Privy Council Appeal No. 13 *of* 1917.

Raja Rajeswara Dorai, Rajah of Ramnad - - - - *Appellant*

v.

V. Sundara Pandiyasami Tevar - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE OF MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH NOVEMBER, 1918.

Present at the Hearing:

LORD PHILLIMORE.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD PHILLIMORE.]

This is an appeal from the decree of the High Court of Judicature at Madras, affirming, with a modification, the decree of the District Judge of Madura, who ordered that the second defendant, that is the present appellant, should pay out of the income of the Ramnad Zemindari to the third plaintiff, the present respondent, the sum of Rs. 24,126 10a. 8p. with interest, and should also pay future instalments from the date of the plaint at the rate of Rs. 700 a month, and gave that plaintiff the costs of the suit.

The first question which the Board has to decide is upon the construction of a deed of compromise, which is the root of the title of the third plaintiff. That compromise passed between the ancestor of the appellant and the ancestor, though not the lineal ancestor, of the respondent, and by that compromise between two parties claiming the impartible Zemindari, the ancestor of the present appellant retained the Zemindari subject to his giving up one

village and paying an annual sum of Rs. 700 per month to the ancestor of the present respondent. It has been contended that the effect of that compromise was to limit the payment of the Rs. 700 to the lineal heirs of the grantee and that, as the present respondent is only a collateral heir and only represents, by virtue of the assignment under which he claimed, a nearer collateral heir of the grantee, he is not within the terms of the deed. Both Courts below have taken the opposite view and their Lordships see no reason to differ from that view. The ground may be put quite shortly: It was a compromise dividing the estate—not dividing the estate equally by any means, but giving a share to the grantee of this annuity, and a larger share to the other party. The less successful party got a village and an annuity, the more successful party got all the rest of the property. There is every reason to suppose that the intention of the parties was that, just as one side was to keep the majority of the property for himself and his heirs, lineal or collateral as the case might be, so the other side was to have the village, and, in the same way, the annuity, for himself and his heirs lineal or collateral as the case might be. If the question of construction be determined with reference to the village, the sense of this view is even more marked. Therefore one of the grounds for the appeal fails.

A second contention was that this was a creation of a kind of perpetuity, which the law did not allow, or an attempt to create a permanent relation which was impossible of creation. Whatever might be said about that, if this agreement lay in covenant, seeing that it lies in charge, there is no difficulty in making it perpetual as long as there are lineal or collateral heirs of the grantee, and in our view the District Judge and Mr. Justice Seshagiri Aiyar, in the High Court, were right in holding that this is a charge. In that respect, and in that respect only, we differ from the view taken by the learned Officiating Chief Justice. If it is a charge the modification which the High Court made in the decree of the District Judge is, by the allowance of counsel for the appellant, not injurious to his client. The decree of the District Judge may well be read as making the annuity a charge on the whole Raj, and it is very much more convenient, and indeed in the interest of the appellant, that it should be limited in the way proposed by the decree of the High Court, that is to say, that it is to be referred back to the District Judge so that he shall settle on what part of the Ramnad Zemindari the charge shall be allowed. That being so, there is no objection to the decree so far.

A point was taken that the third plaintiff, claiming under an assignment from a nearer reversioner, had not made out his title to the assignment; that it was void for want of consideration; that it was obtained by fraud, or some similar objection. It is enough to say that their Lordships agree with the Courts below in saying that there is nothing in any of these points.

The one matter which requires a little more consideration is as to the title of the third plaintiff to maintain his decree for

the arrears of the annuity. Now the suit in the first instance was brought by the first plaintiff, who claimed to be the adopted son of the previous grantee, and the widow of the previous grantee as second plaintiff, and she sued for herself and for her heirs: "Plaintiffs therefore pray"—that is the adopted son and the widow—"for a decree in favour of the first plaintiff and his heirs, or the second plaintiff and heirs as may be found entitled." No doubt the prayer goes on to pray that the declaration may be in favour of the first plaintiff and his heirs or the second plaintiff and reversioners, and that the arrears may be paid to the first plaintiff or the second plaintiff as the case may be. The first plaintiff sued as an adopted son, and his claim was found to be unfounded, and he was dismissed and has not appealed. The second plaintiff, the widow, died in March, 1910, and shortly afterwards the next reversioner sold his rights to the third plaintiff for a small consideration and in order to effect a family settlement. Among the rights which he professed to pass were the widow's claim to the allowances. Thereupon the present third plaintiff petitioned to be substituted in the suit in place of the second plaintiff, so that he might carry it on, and he set out by reference the deed of assignment as part of his title and prayed that he might be "brought on record as legal representative in place of the deceased second plaintiff." The present appellant resisted this application on the ground that the assignment was fraudulent, and perhaps for other reasons; but he took no objection based on the fact that the third plaintiff was claiming to be brought on the record as the legal representative of the deceased second plaintiff; he did not say that, while he might go on the record as the assignee of the next reversioner, and to that extent fulfil part of the position of the deceased second plaintiff, he was not the legal representative of the deceased second plaintiff, and could not exhaust the whole claim by being substituted for her; and, he not taking that point, the learned Judge made an order which declared the third plaintiff to be the legal representative of the deceased second plaintiff, and that the suit do proceed. It may be observed in passing that if the third plaintiff was only a partial legal representative of the second plaintiff the suit which was proceeding as to the arrears would have been defective. It is now said, and very elaborately argued on behalf of the appellant, that the present respondent is not and cannot be the legal representative of the widow so as to be in a position to claim for or give a good discharge for the arrears, which were very considerable, of the annuity, and that therefore the suit fails as regards all that claim, and must be limited to a declaration *de futuro*. Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her

property. The third plaintiff when he petitioned to be substituted in her place relied upon a title which purported to assign to him the widow's arrears of the annuity as well as the right to the annuity *de futuro*, and if there was an accretion to the estate that title would be a good one, the next reversioner could pass it to him and he properly represents the estate in respect of the whole. As no objection was taken, as no issue was raised, as the matter was not even raised on appeal from the District Judge (because we cannot take a general allegation in the memorandum of appeal as pointing to this question), it was too late to raise it after the High Court had decided the matter, and it is therefore not open to their Lordships to consider whether or not a good case could have been made requiring the addition of some other representative of the widow.

Upon the whole, the case for the appellant fails, and their Lordships will humbly advise His Majesty that the decree of the Court below should be affirmed, and that this appeal should be dismissed with costs.

In the Privy Council.

RAJA RAJESWARA DORAI, RAJAH OF RAMNAD

v.

V. SUNDARA PANDIYASAMI TEVAR.

DELIVERED BY LORD PHILLIMORE.

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