Privy Council Appeal No. 18 *of* 1929.

Sitalakshmi Ammal - - - - - - - *Appellant*

v.

Venkata Subrahmanian - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1930.

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
SIR LANCELOT SANDERSON.
SIR GEORGE LOWNDES.
SIR BINOD MITTER.

[*Delivered by* LORD ATKIN.]

This is an appeal from the High Court of Judicature at Madras in a suit in which the infant plaintiff suing by his next friend, his father, Gopalakrishna Ayyar, claimed from the defendants' possession of the properties of Sitarama Ayyar, who died in January, 1922. The plaintiff claims to be the adopted son of Sitarama Ayyar and also to be devisee under a will of Sitarama Ayyar, said to have been made on the day of the adoption and confirming the adoption. The defendants are the widow of Sitarama, the mother of Sitarama, and one Seeni Nadalwar, a lessee of the property. They deny that there ever was any adoption or any will, and upon those two issues of fact the case turns. The suit was brought in the Court of the Subordinate Judge of Dindigal. The Subordinate Judge, after several days' hearing, found against the adoption and the will: the High Court reversed these findings and decided in favour of the plaintiff in both issues. The defendant widow now appeals.

Sitarama, a man of about 46 at the date of his death, had married three times. His first two wives had predeceased him,

and the only issue, a daughter, had also died in infancy. About a year or two before his death he had married the second defendant, a girl of about 12. In November, 1921, the marriage was consummated; after cohabiting with her husband for three days the girl returned to her father's house, which is said to be about 100 miles from Palni, where Sitarama lived. No inference as to the marital relations is sought to be drawn from this fact. Such a temporary withdrawal from cohabitation by consent is said in such circumstances not to be unusual. Sitarama's health was not satisfactory. He was thought to be suffering from an affection of the throat; and on one occasion at least had vomited blood. He had in consequence consulted doctors at Madras. What their advice was we do not precisely know; but his illness apparently did not interfere with his ordinary avocations: in particular it did not prevent him marrying and consummating his marriage. On the 3rd January, 1922, he died, after an attack of vomiting blood. The conflict between the parties arises as to the events of the last four days of his life. According to the case of the plaintiff Sitarama had an attack of vomiting on Saturday, the 31st December. He became despondent about his life: and determined to adopt a son, a project which he is said to have entertained for two or three months previously. One, Gopalakrishna, who had married a daughter of Sitarama's maternal aunt, had according to his story been living in Sitarama's house for the past five years with one of his sons, the infant plaintiff. Sitarama announced his intention of adopting the son: and on Sunday, the 1st January, between 9.30 a.m. and 12.30, the ceremony took place. About 20 or 30 persons were present: when most had departed, Sitarama stopped a few that remained, said that he intended to make a will, and asked them to return in the afternoon. They did so: a writer was present who prepared a draft from the dictation of Sitarama and a fair copy: and the latter was signed by the testator and witnessed. One of the witnesses was asked not to sign until after the arrival of some expected witnesses from the neighbourhood. They did not arrive, and he appended his signature the next day or the day after. It had been intended to register the will; but on the Monday Sitarama was unconscious and too ill to attend to business: on Tuesday morning he died. The infant plaintiff performed the funeral obsequies in his capacity as adopted son.

The plaintiff called ten witnesses to speak to these facts, nine of whom said they were present at the adoption, of whom four also attested the will, while a fifth was the writer of the will who had not attested.

The defendants called four witnesses: they deposed that Gopalakrishna and his son were not living in the testator's house: on the contrary, there was ill-feeling between them. One, Ramakrishna Ayyar, also a cousin of the testator, said that he had been living in the testator's house for four months before his death, and no adoption had taken place on the Sunday, and he

and not the infant plaintiff had, at the request of the mother, performed the funeral obsequies. This was confirmed by the other two witnesses, who also said that they visited the house regularly: that there was no adoption and that Sitarama had been in his usual health until the Tuesday morning, when he died suddenly after a return from a walk.

The witnesses were examined and cross-examined in some detail in reference to the occurrences of the 1st to 3rd January, and to the conduct of the parties after the testator's death. It is obvious that one set of witnesses or the other was committing perjury. The learned Subordinate Judge in giving a considered judgment ten days after the last hearing in Court found that the story of the adoption was untrue, that the alleged will was fictitious, and dismissed the suit. He founded his decision partly on the demeanour of the plaintiff's witnesses, partly on inconsistencies in their testimony, partly on the improbabilities of their story as tested by subsequent conduct. He believed the witnesses for the defendants. In these circumstances a heavy burden is thrown upon the unsuccessful litigant who seeks to reverse the decision.

Their Lordships will refer to one passage in the judgment of this Board in *Khoo Sit Hoh* v. *Lim Thean Tong* [1912] A.C. at p. 325. The issue was whether the respondent's mother was the natural daughter of the testator or only an adopted daughter. The trial Judge had found she was not the natural daughter: the majority of the Court of Appeal of the Straits Settlements had reversed the decision. Lord Robson, in delivering the decision of the Board, consisting of Lord Macnaghten, Lord Mersey and himself, said as follows:—

> "The case was tried before the Judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the Judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony."

The principle laid down in the passage in question has been followed by this Board on numerous occasions, and is of general application. Their Lordships are of opinion that it has not received sufficient attention from the learned Judges of the High Court. They cannot find in their judgments or the criticisms of the findings and evidence below sufficient ground for discharging the onus which lay so heavily on the then appellant. On the contrary, they consider that the learned Judge had substantial ground for his decision, the value of which is enhanced by his careful survey of the probabilities.

Their Lordships will summarize what they understand to be the matters which led the Subordinate Judge to his conclusion. As to the adoption he is not prepared to accept the foundation of the plaintiff's case that the testator became seriously ill on the Saturday or Sunday and decided on adoption because he believed he had a short time to live. He accepts the evidence for the defendants, and comments on the absence of any evidence by the doctor, who admittedly was in attendance on all material days. He points out that the circumstances of the adoption are unusual : there is unsatisfactory evidence of the usual preparation : there is no satisfactory evidence of publicity : the testators own relations living in the village are not called in : there is no customary feast. The witnesses to the ceremony are for the most part very vague as to what actually took place. There is very unsatisfactory evidence that the vital ceremony of giving in adoption occurred at all. The wife was not consulted : no steps were taken by the husband before or after the ceremony to inform her or her father : there are inconsistent explanations of this said to have been given by the testator. If there had been an adoption the adopted son would have taken the proper part in the funeral ceremony. The Judge accepts the evidence of Ramakrishna that the witness performed it, and finds his evidence corroborated by the money bond which shows money borrowed by the lessee, the defendant's first witness, expressly for the funeral expenses, money which the lessee handed to the mother, from whom Ramakrishna says he received it.

As to the will, the Judge refers to suspicious circumstances in connection with its preparation, attestation, and subsequent custody. The witnesses are not agreed as to whether the testator dictated it to the writer, or wrote the draft himself in pencil. Their Lordships may add for themselves that the wording of the will is in itself such as it would be not probable that a man in the position of the testator would produce impromptu without some legal assistance. Moreover, one attesting witness appears to have said that he signed after the death of the testator : in any case he did not sign till the next day when, according to another witness the testator was unconscious : and his signature is not the last, so that another witness seems also to have signed later than the Sunday, though again one of the witnesses says all signed on the same day. The story of the custody of the will

which at the trial came from the possession of the plaintiff's father is remarkable. It is said to have been handed to the testator's mother, who at a later date handed it for safe custody to the village *munsif*, who was later induced by one of the witnesses to give it to him for transmission to the plaintiff's father without any authority from the testator's mother. The village *munsif* was not called.

The learned Judge attached importance to the form of the testator's alleged signature to the will. He had evidence before him that the signature was not the usual signature of the testator, and he had three authenticated signatures before him with which to make comparisons. Their Lordships have also had the originals before them and they content themselves with saying that they afford ground for supporting the trial Judge's finding.

Finally, on two occasions upon which the plaintiff's father set up the adoption, an application by him to be appointed village *karnam* in succession to the testator in right of the adopted son and an application to the Court to have the infant plaintiff substituted in a pending suit for the testator, the plaintiff's father, on the adoption being challenged, took no further steps: and significantly, on the occasions when he did allege adoption in writing assigned no date either for the adoption or the will. The first written reference to the date appears in the plaint in November, 1923.

It is not necessary for their Lordships to express agreement with every single argument adduced by the learned Judge. But after taking every consideration into account there appears to be ample evidence which would justify the learned Judge in coming to the conclusion that the plaintiff had not made out his case and that the suit should be dismissed. Their Lordships are of opinion that the appeal should be allowed and that the decree of the trial Judge should be restored, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of the appeal and of the appeal to the High Court.

Their Lordships regret that they cannot leave this case without adverting to the judgment of one of the learned Judges in the High Court who allowed himself to say of the judgment of the Subordinate Judge that from beginning to end it was full of misstatements and special pleading. The learned Judge did not proceed to specify any of the alleged misstatements; and counsel for the respondent was unable to refer their Lordships to any.

Their Lordships feel bound to express disapproval of judicial criticism couched in such a form. It is no doubt the right and the duty of an appellate Judge to criticise fearlessly where necessity arises by pointing out judicial shortcomings in a lower Court, but respect for the judicial office and common fairness require both that the criticisms should be expressed temperately and that the grounds for the criticism should be stated.

In the Privy Council.

SITALAKSHMI AMMAL

v.

VENKATA SUBRAHMANIAN.

DELIVERED BY LORD ATKIN.

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