Privy Council Appeals Nos. 84 *and* 113 *of* 1936

Balasubrahmanya Pandya Thalaivar - - - - *Appellants*

v.

M. Subbayya Tevar and another - - - - *Respondents*

M. Subbayya Tevar Avargal Zamindar of Uttumalai - *Appellant*

v.

Murugayya Tevar (wrongly describing himself as Navanithakrishna Marudappa Tevar) and another - *Respondents*

Navanithakrishna Marudappa Tevar - - - - *Appellant*

v.

M. Subbayya Tevar and another - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER, 1937.

Present at the Hearing:

LORD WRIGHT.
SIR GEORGE LOWNDES.
SIR GEORGE RANKIN.

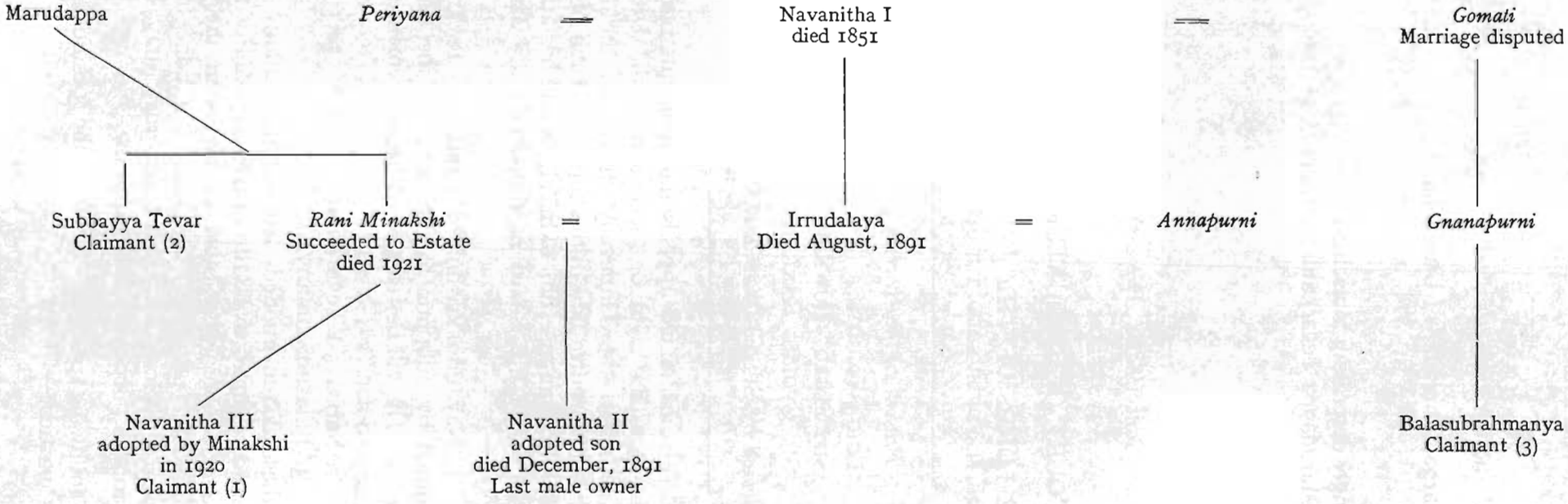
[*Delivered by* SIR GEORGE LOWNDES.]

In these consolidated appeals the main question to be decided is as to the right of succession to the Uttumalai Estate situated in the Tinnevelly district of the Madras Presidency. There are now three claimants each of whom filed separate suits in assertion of his claim and has appeared by counsel before the Board in support of it. They are respectively:—

1. Navanithakrishna Marudappa Tevar, who claimed by adoption to the father of the last male holder. He will be referred to for convenience as the "adopted son";
2. Subbayya Tevar, and
3. Balasubrahmanya,

each of these last-mentioned denying the validity of the adoption and claiming to be the nearest *sapinda* of the last male holder. There were other claimants in the Indian Courts and other parties to the suits, but none of them have appeared before the Board and they may be disregarded for the purpose of these appeals.

The following pedigree sets out the position of the respective parties:—



N.B.—The names of females are printed in italics.

Navanitha II, the last male owner, was duly adopted by Irrudalaya and his second wife Minakshi to the exclusion of the first wife Annapurni, and after his death his adoptive mother Minakshi (hereinafter for convenience referred to as the "Rani") was held entitled to succeed for a Hindu widows' estate (see *Annapurni* v. *Forbes* 26 I.A. 246). In 1901 she handed over the management of the Uttumalai Estate to the Court of Wards, who remained in possession until her death in 1921, when the disputed succession opened. On the 28th January, 1920, the Rani purported to adopt Navanitha III. She also made certain testamentary dispositions in his favour which are disputed by the other claimants and which will be considered by their Lordships in a later part of this judgment.

As regards the main question, the succession to the estate, it is obvious that if the adoption of Navanitha III is valid no other question will arise. Their Lordships will, therefore, proceed in the first instance to deal with his claim.

The *factum* of the adoption, though at first in dispute, is now admitted, but, under the interpretation of the Mitakshara law as generally accepted in the Madras Presidency and by which the parties are governed, it would only be valid if made under the authority of the lady's husband, or failing that, with the assent of his kinsmen. In the present case the express authority of the husband was alleged, but it has been negatived by both Courts in India, and in accordance with the established practice of the Board these concurrent findings on what is a pure question of fact must be held conclusive.

It was, however, contended in the Indian Courts that in the circumstances of this case, an implied authority should be inferred. The argument was that the association by Irrudalaya of the Rani with himself in the adoption of Navanitha II (the last male holder) which put her in the position of his adoptive mother, necessarily implied authority to make a second adoption if the first boy died (as he did) in infancy.

This contention was repelled by the Indian Courts. Both the District Judge by whom the suits were tried and the High Court on appeal held that the mere association of one wife in an adoption by the husband was no indication of an authority to her to make a second adoption. They therefore held that the adoption of Navanitha III was without authority.

There is nothing to show that the husband ever contemplated a second adoption or that he was prepared to leave the selection of another boy to his wife. Their Lordships are not laying down that the requisite authority must necessarily be express, but they agree with the District Judge that "in order to constitute an implied authority there must be circumstantial evidence of a cogent character," and they are satisfied that no such evidence was forthcoming in the present case.

Whether a particular intention can be inferred from a particular set of circumstances is, their Lordships think, rather a question of fact than of law, and on this question the Courts in India have concurred in their findings. But apart from this their Lordships see no reason to differ from the conclusion at which they arrived.

A further question was debated in the Indian Courts as to the necessity of the consent of the Court of Wards to the adoption, but having regard to what has been said above, it is not now material to discuss it.

No assent of kinsmen is alleged, but in the plaint a somewhat novel point was taken, that there being no *agnates* of Irrudalaya in existence at the time of the adoption, whose assent could be sought, the lady had an inherent authority to adopt of her own volition. An issue was raised as to this in the trial Court but the contention was subsequently abandoned. It found no place in the argument before the High Court and is not referred to in the printed case filed on behalf of the adopted son before the Board, but the contention is sought to be revived before it by his Counsel. Their Lordships would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates, nor is there any evidence as to what sapindas of Irrudalaya were in existence at the date of the Rani's adoption. Their Lordships think, moreover, that it would be equally difficult for them to hold that under the Madras law there would be any residuary power in the widow to adopt in the absence of sapindas, but the contention was so clearly abandoned in India that it is not necessary to consider it further.

For these reasons their Lordships are of opinion that the judgments of the District Judge and the High Court on the claim of the adopted son to the estate were right and that his appeal upon this part of the case fails.

Their Lordships now turn to the contentions of the other two claimants, Subbayya and Balasubrahmanya. They are respectively the mother's brother, and the son of an alleged half sister of the father, of the last male owner.

The marriage of Gomati (see the pedigree above) to Navanitha I is not admitted. The District Judge held that it was not proved and the High Court did not think it necessary to decide the question as, assuming it to be established, they affirmed the superiority of Subbayya's claim. Their Lordships for the purpose of this judgment will make the same assumption.

Both of these claimants admittedly belong to the class of cognates known to the Hindu law as *atma bandhus*, i.e., cognates of the propositus (the last male owner) who have precedence in questions of succession over *patri bandhus*, i.e. cognates of his father, and *matri bandhus* the cognates of his mother. The question between the claimants is as to the rights of such *atma bandhus inter se*. It is not disputed

that Subbayya as the maternal uncle is a step nearer in degree to the propositus than the rival claimant as father's sister's son. But for the latter it is contended that nearness in degree is no test as between *atma bandhus,* and that the sole criterion should be religious efficacy, i.e. which of the two claimants would by his religious offerings confer most benefit upon the propositus in the other world, and it is admitted that upon this test Balasubrahmanya's claim would prevail. The question between them therefore seems to be a clear cut one, namely, which of the two is the proper test to apply.

At first sight it would appear that the question is covered by the direct authority of the Board (*Jatindra Nath Roy* v. *Nagendra Nath Roy,* 58 I.A., 372). In this case it was laid down that the test of religious efficacy was applicable between *atma bandhus* only when the parties were equal in degree.

At the time the District Judge gave his judgment this case had not come up to the Board, but a decision given ten years previously (*Vedachela Mudaliar* v. *Sabramania Mudaliar,* 48 I.A., 349), in which a question as to the right of succession between *atma bandhus* was discussed, was before him, and relying upon it and upon the view taken in Mayne's Hindu law he held that Subbayya was the preferential heir.

It was not until six years later—a delay which their Lordships greatly regret—that the appeal was heard in the High Court, and by that time the report in *Jatindra's* case was available. The learned Judges thought that any possible doubt as to the rule to be applied was set at rest by this later decision, and they accordingly affirmed the judgment of the District Judge on this point.

Balasubrahmanya has nevertheless appealed to His Majesty in Council against the rejection of his claim. In his petition to the High Court for leave to appeal it was urged that the learned Judges of the High Court had misinterpreted *Jatindra's* case. But before their Lordships, Mr. Dunne, with characteristic courage, admits that he cannot distinguish it, but attacks the decision as unsound and in conflict with the reasoning in the earlier case (48 I.A. 349).

It might be sufficient in the present case to say that the question is clearly covered by the latest decision of the Board, but in view of the able argument of Mr. Dunne it may perhaps be desirable to examine the position a little more closely.

The argument put shortly is that in *Vedachela* v. *Subramania* 48 I.A. 349, in which the contest was between the father's sister's son's son and the maternal uncle, the Board expressly affirmed certain rules which had been enunciated by Muttusami Ayyar J. in a previous Madras case (*Muttusami* v. *Muttukumarasami,* I.L.R. 16 Mad. 23 at page 30). The last of these rules was " that as between

bandhus of the same class the spiritual benefit they confer upon the propositus is as stated in the Viramitrodaya a ground of preference." The affirmation of this rule, it was contended, made spiritual benefit the sole test as between members of the class and treated nearness of degree as irrelevant. Mr. Dunne admitted that agnatic succession under the Mitakshara law as interpreted in Madras depends solely upon proximity of blood connection, and that the Bengal doctrine of religious efficacy has no application, but he claimed that the rule quoted above established that among cognates the exact opposite was the case, i.e., that proximity of blood relationship went out altogether and religious efficacy came in as the sole test.

Their Lordships think that such a change over would be, to say the least of it, remarkable. Mr. Mayne, in a passage that has often been quoted before the Board, after a detailed discussion of the Bengal law, says (section 509):—

> "When we go a stage back to the Mitakshara, and still more to the actual usage of those districts where Bhramanical influence was less felt, the whole doctrine of religious efficacy seems to disappear. In the chapters which deal with succession, the Daya Bhaga and the Dayakrahma Sangraha appeal to that doctrine at every step, testing the claims of rival heirs by the numbers and nature of their respective offerings. The Mitakshara never once alludes to such a test."

It is also clear that the Vitromirtradaya, Ch. III, pt. VII (5), which is the principal authority for the well recognised priority of *atma bandhus* over the two other classes, clearly bases it on propinquity. Their Lordships think therefore that it would be impossible to say that under the Mitakshara the principle of propinquity does not apply beyond agnatic succession.

A reference to the judgment delivered by Mr. Ameer Ali in *Vedachela's* case (48 I.A. 354) makes it clear that no such change over in the case of cognates was contemplated, and the rule above referred to, which was affirmed towards the end of the judgment, obviously does not make religious efficacy the only test among *bandhus* of the same class, though it does make it an admissible test, and it is perhaps worth noting that the view taken by the Subordinate Judge, to whose judgment their Lordships have referred and which was held to be well founded, was that the religious test was only applicable if the proximity test failed. The final conclusion at which the judgment of the Board then arrived is stated as follows (page 364):—

> "In the present case before their Lordships, the appellant and the deceased were sapindas to each other; and he (the appellant) is undoubtedly nearer in degree to the deceased than Subramania (the respondent). He also offers oblations to his father and grandfather to whom the deceased was also bound to offer pinda. The deceased thus shares the merit, resulting from the appellant's oblations to the manes of his ancestors, whereas the father's sister's son's son offers no pinda to the deceased's ancestors. On all these grounds their Lordships think that the view taken by the Subordinate judge was well founded."

It is difficult to suggest that the Board here discarded the test of nearness of degree, and adopted only that of religious efficacy; they clearly applied both, and it is perhaps not without significance, in view of what the Subordinate Judge had said, that nearness of degree is put first.

In 58 I.A. the question was between *atma bandhus,* admittedly equal in degree so that the test of proximity was no guide, and it was laid down, strictly as their Lordships think in accordance with the general scheme of the Mitakshara, that it was only when the test of proximity failed that religious efficacy came in. Their Lordships can see no inconsistency between the two decisions of the Board, and no antagonism between the later decision and the rule enunciated by Muttusami Ayyar J. upon which Mr. Dunne relies so strongly. They must therefore confirm the decision of both Courts in India that, as between claimants 2 and 3, Subbayya as nearer in degree to the last male owner is entitled to succeed to the estate.

There remains to be considered the testamentary dispositions made by the Rani in favour of her adopted son. By her will dated 9th May, 1921, the due execution of which is not now disputed, she bequeathed to him the accumulations of the income of the estate amounting to Rs.89,000 and her jewels, vessels, etc. The District Judge held that the savings were not her property but went with the estate, and that it was not established that the jewels, etc., in her possession at the time of her death were her personal property. He therefore rejected the claim of the adopted son. The High Court on appeal came to a different conclusion. They held that the savings which were found to be a sum of Rs.80,900 in the hands of the Court of Wards and Rs.9,244 in the lady's own possession, were the personal property of the Rani and would pass under her will. With regard to the jewels, etc., they came to the same conclusion. Subbayya has appealed against this decision, but the correctness of the High Court's finding has not been seriously contested before the Board in either case, and their Lordships see no reason to differ from the High Court's findings.

A further point, however, remains. The Rani's estate being in the hands of the Court of Wards, she was not qualified to dispose of her property by will without the consent of the Court, provided, nevertheless, that the Court could confirm a will made without its previous consent (Madras Court of Wards Act, 1902, s.34). In this case there was admittedly no previous consent, but the Court of Wards, which had been a party in each of the suits, intimated its readiness to confirm the will so far as the dispositions made by it were otherwise legally valid. The High Court accordingly after affirming the validity of the bequests referred to above, invited the Court of Wards to confirm them, and the Court's confirmation has been given. It is however contended that no confirmation could be given after the death of the Rani, or after the Court of Wards had given up possession of the estate, which they admittedly did in June, 1921.

Their Lordships think that there is no substance in this contention, the proviso to s.34 fixed no limit of time within which such confirmation must be made, and their Lordships think that in this respect the confirmation is sufficient.

Another and possibly a more serious objection was taken to the confirmation as given, namely that it confirmed part only of the will. Besides the bequests of the savings and jewels, the Rani also purported by her will to make over to the adopted son the management of a temple on the estate with a certain endowment for the idol. No issue had been raised as to this in the lower Court and the High Court had refused to deal with it, leaving the question to be decided, if necessary, in another suit, and the confirmation by the Court of Wards does not purport to cover this part of the will. At the hearing of the appeal, however, both parties were satisfied that all questions as to the temple should be left over, and the Court of Wards' confirmation treated as sufficient for the purposes of the present appeal. Their Lordships are therefore relieved from the further consideration of this objection.

For the reasons stated above their Lordships will humbly advise His Majesty that each of the present consolidated appeals should be dismissed, that the decrees of the High Court so far as they affect the parties to these appeals should be affirmed, including such orders as have been made thereunder as to costs. Their Lordships think that there should be no order as to costs before the Board. A petition to adduce further evidence lodged by M. Subbayya Tevar was not supported and stands formally dismissed.

(46398—3A) Wt. 8151—17 180 12/37 P. St. G. 33

In the Privy Council

BALASUBRAHMANYA PANDYA THALAIVAR

v.

M. SUBBAYYA TEVAR AND ANOTHER

M. SUBBAYYA TEVAR AVARGAL ZAMINDAR OF UTTUMALAI

v.

MURUGAYYA TEVAR (wrongly describing himself as Navanithakrishna Marudappa Tevar) AND ANOTHER

NAVANITHAKRISHNA MARUDAPPA TEVAR

v.

M. SUBBAYYA TEVAR AND ANOTHER

Consolidated Appeals

DELIVERED BY SIR GEORGE LOWNDES

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1937