Privy Council Appeal No. 66 *of* 1944

M. A. Rajagopala Ayyar - - - - - - *Appellant*

v.

M. A. Venkataraman minor and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MARCH, 1947

Present at the Hearing:

LORD THANKERTON
LORD DU PARCQ
SIR JOHN BEAUMONT

[*Delivered by* LORD THANKERTON]

The present appeal arises out of a suit brought in December, 1937, by the first respondent through his mother, as his next friend and guardian, against his brother, the appellant, as first defendant, and other defendants, who have not appeared in the appeal.

Ayyaswami Ayyar, a Hindu of Mannargudi in the Tanjore District, who may be referred to as the testator, was married twice. By his first wife he had a son, who is the appellant, and a daughter, who was the third defendant, her husband being the second defendant. After the death of his first wife, he married again in 1919, and by his second wife he had a son, the plaintiff-respondent, who was born in 1926, and a daughter, the 4th defendant, who was born in 1922.

It is no longer disputed that, as from the 2nd May, 1927, the undivided Hindu joint family, then consisting of the testator, the present appellant and the respondent, was disrupted by a document of that date, in the following terms:—

> " We, the undersigned who have been up till now members of an undivided Hindu joint family, do hereby declare that we are from this day divided members and have separated from one another. Each of us has from this date become possessed of a third share in the properties belonging to the family.
>
> G. Ayyaswami Ayyar.
>
> A. Rajagopalan, 2nd May, 1927.
>
> G. G. Ayyaswami Ayyar, as guardian of minor Venkataraman."

The signatures of two witnesses are appended.

After the above declaration, and on the same day, the testator made the following will:—

" I, G. Ayyaswami Ayyar, son of Gopala Ayyar, Agraharam, First Street, Mannargudi, do hereby make this last will and testament.

I have already become divided from my two sons Rajagopalan and Venkataraman. I make the following dispositions of the properties that have come to my share.

1. After paying the debts I have to pay under the partition arrangement, I bequeath to my daughter Alamelu *alias* Pattu, all lands I own in Nalanchetti about 5½ velis and cash Rs.10,000 with power of disposition over the same.

2. To my daughter Jambakam a sum of Rs.10,000 with power of disposition over the same.

3. To my wife Sarada the amount due under my policy of life insurance.

4. I also direct that a sum of Rs.10,000 (ten thousand) be set apart the interest from which is to be enjoyed by my mother Janaki Ammal and my three sisters during their lifetime and after them the principle amount is to go to my son Rajagopalan.

5. The residue left after meeting the above dispositions is to be taken by my son Rajagopalan whom I appoint as the sole executor to my will.

6. I appoint my son Rajagopalan and my brother-in-law P. Ayyaswami Sastri as the guardians of my minor son Venkataraman."

In the suit, as originally brought, the respondent challenged the validity of both the declaration and the will on various grounds, and also maintained that the declaration was detrimental to his interests and not binding on him in his minority. He claimed a half share of the joint family property. The Subordinate Judge rejected all these grounds, and found that the respondent was entitled to a one-third share only, and ordered the appointment of a commissioner to carry out the partition.

The respondent appealed to the High Court, who agreed with the Subordinate Judge in the rejection of his challenge of the declaration and the will, but found in his favour on a matter of construction of the will, which had not been maintained by the respondent in his pleadings, or in the trial Court, and was not mentioned in his memorandum of appeal. The High Court also varied the decree of the Subordinate Judge on some subsidiary matters, but in other respects confirmed his decree. The appellant has now appealed against the decision of the High Court on the question of construction of the will, and also as regards certain of these subsidiary matters. There is no cross-appeal, and there is therefore no longer any question as to the validity of the declaration and of the will.

In their decree dated the 4th December, 1942, the High Court declare and decree, *inter alia*, as follows,

" (1) That the fifth clause in Exhibit II (the will) refers to the one-third share of the outstandings that had fallen to the testator's (Ayyarswami Ayyar's) share at the time of the partition; and that it has nothing to do with the immovable property which he was not disposing of at the time and that the plaintiff is entitled to one-half of the one-third share of the immovable properties of Ayyaswami Ayyar and that the same be divided with reference to good and bad soil and one-half of the same be allotted to the plaintiff (in addition to the third share decreed by the lower Court) excluding the 5½ velis in Nalansethi which will be allotted to the third defendant."

While generally agreeing with the statement of the principles of construction of a will and of the circumstances under which extraneous evidence may be admissible by Abdur Rahman. J., in delivering the judgment of the Court, their Lordships are unable to agree with his application of these principles in the present case.

In the opinion of their Lordships there is no ambiguity in the terms of the will, or as to the intention of the testator in the fifth clause of the will. In the initial paragraph of the will the testator says, " I make the following dispositions of the properties that have come to my share." There can be no doubt that " my share " refers to the one-third share which came to him under the declaration of the same date, and that that one-third share included both immovables and movables. The first clause of the will confirms this, as admittedly the 5½ velis formed part of the joint property, a fact which the learned Judge has omitted to notice. Further, " the following dispositions " included all five clauses of the will, which between them made a complete disposal of the one-third share, both as regards immovables and movables. It is difficult to appreciate the relevance of the pecuniary legacies, on which the learned Judge lays chief stress, when the testator has already stated the subject matter of his testamentary dispositions, vizt., his one-third share.

Their Lordships are unable to find any ambiguity in the terms of the will or as to the identity of the subject matter of any bequest or as to the identity of any beneficiary. There is no justification for the admission of extrinsic evidence. In their Lordships' opinion, the appeal succeeds on this point, and the respondent is not entitled to more than the one-third share decreed to him by the Subordinate Judge.

The appellant raised four subsidiary contentions. Of these the first two, which related to heads (2) and (6) of the declaratory decree of the High Court, were not pressed by him, and need not be dealt with. The third contention referred to the rate of interest on the daughters' pecuniary legacies, which was raised to six per cent. by the High Court in heads (7) and (8) of the decree, the Subordinate Judge having awarded 3 per cent. Their Lordships agree with the decision of the Hight Court; section 353 of the Indian Succession Act may be referred to. The appellant's last subsidiary contention related to head (9) of the decree, by which provision was ordered to be made at the time of partition for the payment of the sum of Rs.8,000 towards the fourth defendant's marriage expenses and that this sum should be borne in equal moieties by the present appellant and the present respondent. The fourth defendant was about five years old at the date of the disruption of the joint family, and, as stated by Sir Dinshah Mulla, (Hindu Law, 7th ed., page 376,) " The case of an unmarried daughter stands on a different footing. Her right to maintenance and marriage expenses out of the joint family property is in lieu of a share on partition; provision should accordingly be made for her marriage expenses in the decree." The sum of Rs.8,000 was given in evidence by the mother of the fourth defendant; she was not cross-examined on the amount, and the Subordinate Judge disallowed this claim by the fourth defendant on the ground that the marriage had already taken place and the money had already been spent by her mother. Their Lordships agree with the High Court that the Subordinate Judge was not justified in refusing reimbursement, and they agree with head (8) of the decree. The appellant, therefore, fails in his subsidiary contentions.

Their Lordships, accordingly are of opinion that the appeal should be allowed, and that the decree of the High Court should be varied by substituting for head (1) the following, vizt., " (1) That the fifth clause in Exhibit II (the will) refers to the residue of the one-third share of the joint estate, including immovable and movable properties, which had fallen to the testator (Ayyaswami Ayyar) at the time of partition," and that in other respects the decree of the High Court should be affirmed. Their Lordships will humbly advise His Majesty accordingly. The decree of the High Court as to costs will be set aside, thus restoring the finding of the Subordinate Judge as to costs. The respondent will pay the costs of the appellant in this appeal, subject to deduction of one-fourth thereof, and his costs in the High Court, subject to a like deduction.

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In the Privy Council

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AND OTHERS

DELIVERED BY LORD THANKERTON

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