Privy Council Appeal No. 44 *of* 1930.

Sri Rajah Ravu Sri Krishnayya Rao *alias* Sri Rajah Ravu Venkata Kumara Mahipathi Krishna Surya Rao Bahadur Garu and another - - - - - - - *Appellants.*

v.

Rajah Saheb Meherban-I-Dostan Sri Rajah Ravu Venkata Kumara Mahipathi Surya Rao Bahadur Garu, Rajah of Pittapur - *Respondent.*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JUNE, 1933.

Present at the Hearing:

LORD BLANESBURGH.
LORD TOMLIN.
LORD RUSSELL OF KILLOWEN.
SIR LANCELOT SANDERSON.
SIR GEORGE LOWNDES.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

In this appeal there arose a point to be primarily argued and decided, viz., the question whether certain evidence recorded in an earlier suit was admissible as evidence in the suit out of which this appeal arises. Their Lordships having already expressed to the parties the conclusion which they had reached, viz., that the evidence in question was admissible, now proceed to state the reasons upon which that conclusion was based.

The relevant facts must first be stated. In the year 1873 the then Rajah of Pittapur, Gangadhara Rama Rao (who may be conveniently referred to as the late Rajah), having had no son born to him, adopted Ramakrishna, the son of the Rajah of Venkatagiri. It is alleged that on the 5th October, 1885, the late Rajah's wife, Mangayamma, gave birth to a son, who is the plaintiff in the present suit and respondent to this appeal, and who will be referred to as the plaintiff. The late Rajah died in the year 1890, leaving his estate to the plaintiff by a will in which he described the plaintiff as his "aurasa" (natural-born) son.

In 1891 Ramakrishna brought a suit (No. 6 of 1891) in the District Court of Godavari against the Court of Wards as first defendant and the plaintiff as second defendant, in which he prayed for the following relief :—

> (1) That it may be declared that the 2nd Defendant is not the son of the deceased Rajah and that the will in his favour is wholly ineffectual and invalid. (2) That if the Court should be of opinion that the 2nd Defendant is the son of the deceased Rajah then that it may be ascertained and declared which of the properties taken possession of by the 1st Defendant are impartible and which are partible, and that it may be further declared that the Plaintiff [i.e. Ramakrishna] by primogeniture is entitled to all such properties as may be declared to be impartible and also that he is, as the eldest surviving member of the late Rajah's family, entitled to possession of all properties which may be declared to be partible. (3) That the 1st Defendant may be decreed to deliver to the Plaintiff [Ramakrishna] possession of the estates and other properties immoveable and moveable in the schedules here under written and more particularly mentioned and all other properties in the possession or enjoyment of the late Rajah of Pittapur at the time of his death taken possession of by the 1st Defendant as in the plaint alleged. (4) That an account be taken of all the properties, immoveable and moveable, the possession of the late Rajah of Pittapur at the time of his death taken possession of by the 1st Defendant. (5) That the 1st Defendant may be decreed to pay to the Plaintiff [Ramakrishna] mesne profits of the properties so taken possession of by the 1st Defendant from the time the said 1st Defendant took possession of such properties till such properties are returned to the Plaintiff [Ramakrishna]. (6) That the Defendants may be decreed to pay the costs of this suit. (7) That Plaintiff [Ramakrishna] may have such further or other relief in the premises as to this Honourable Court shall seem meet and the nature of the case may require.

In that suit the District Judge found that the plaintiff " was not born from the womb of Mangayamma, and that he is not the son of the late Rajah of Pittapur " ; and he held that the plaintiff was not *persona designata* under the will, and, not being the " aurasa " son, there was no gift in his favour. A decree was made declaring that the plaintiff was not the son of the late Rajah, and that the will in his favour was wholly ineffectual and invalid, and directing that possession be delivered to Ramakrishna of the estates and other properties immovable and movable in four schedules mentioned. On appeal, the High Court held that the plaintiff took under the will as *persona designata*, and that the question of his sonship did not arise. On further appeal, their Lordships' Board took the same view. The case is reported in 26 I.A. 83.

The late Rajah had a brother, Venkata Rao, in whose favour he had, in the year 1869, executed a grant of an estate known as Gollaprolu, in settlement of rights to maintenance. Venkata Rao died in the year 1871 childless, but leaving two widows, viz., Ramayamma and Venkayamma. Venkayamma died in the year 1889. On the 15th February, 1914, Ramayamma, who was in possession of Gollaprolu for a widow's estate, adopted as a son to her husband, Venkata Rao, one Krishna (the principal appellant

before the Board), who was one of the younger sons of Ramakrishna and who was born in or about the year 1894.

Thereupon the plaintiff instituted in the Court of the Subordinate Judge of Coconada the suit now under appeal against Ramayamma and Krishna, claiming to be the nearest reversioner entitled to succeed to the properties in the possession of Ramayamma after her death, and praying for a decree declaring that the adoption of Krishna was invalid and not binding on him.

It is obvious that the plaintiff (being not otherwise related) could have no right to maintain such an action if he were not in truth the " aurasa " son of the late Rajah, and accordingly his plaint opens with an allegation to that effect. By their written statement the defendants denied that he was the " aurasa " son of the late Rajah or of his wife Mangayamma, and alleged that he was put forward as such for fraudulent purposes, and that he was not entitled to dispute the adoption. It is unnecessary to state the grounds upon which the adoption was alleged by the plaintiff to be invalid, beyond recording that they include as a reason the alleged fact that Ramayamma " had neither the authority of her husband nor that of the plaintiff who is the head of the family to adopt " Krishna.

Amongst the issues framed, two dealt with the question of the sonship of the plaintiff : they ran thus :—

> 1.—(*a*) Whether the plaintiff is the son born of Rajah Mangayamma Rao Bahadur Garu ?
>
> (*b*) If so, whether he is not the aurasa son of the late Rajah of Pittapur. . . . ?

Some evidence was given in this suit on behalf of the defendants upon these issues, but it was conceded by the appellants' counsel before their Lordships here that upon that evidence alone he could not succeed in establishing that the plaintiff was not the " aurasa " son of the late Rajah. But in addition to that evidence there was tendered on behalf of the defendants before the District Judge of Godavari, to whom the suit had been referred, the evidence recorded in the suit No. 6 of 1891 brought by Ramakrishna, which was claimed to be admissible under and by virtue of Section 33 of the Indian Evidence Act. The District Judge rejected the evidence as inadmissible. As to issue 1 (*a*) he found that the plaintiff was the son born of Mangayamma, and as to issue 1 (*b*) he found that the plaintiff was the " aurasa " son of the late Rajah. By his decree dated the 5th October, 1920, he ordered and decreed that the adoption be declared invalid and not binding on the plaintiff, and that the adoption did not affect the plaintiff's rights as the reversioner under the Hindu law entitled to the Gollaprolu estate.

On appeal to the High Court at Madras, the two Judges who formed the Bench differed. Krishnan J. held that the plaintiff was justified in withholding his consent to the adoption, and that

in the absence of his consent the adoption was invalid. Venkatasubba Rao J. held that the plaintiff was not justified in refusing his consent, and that the adoption was valid. Both Judges agreed that the tendered evidence had been rightly rejected, and accepted the District Judge's findings on issues 1 (*a*) and 1 (*b*). In the result the appeal was dismissed, and a decree dated the 28th October, 1926, was made confirming the decree of the District Judge.

Ramayamma had died pending the appeal, and her legal representative was joined as a party to the proceedings. Krishna and this new party preferred an appeal under the letters patent against this decree, which was heard by Kumaraswami Sastri, Odgers and Jackson JJ. Kumaraswami J. upheld the validity of the adoption, but Odgers and Jackson JJ. held it to be invalid. All three Judges held that the tendered evidence had been rightly rejected. By their decree dated the 7th March, 1928, the decree of the 28th October, 1926, was confirmed, and the letters patent appeal was dismissed.

Krishna and the representative of Ramayamma then appealed to His Majesty in Council, praying that the decrees of the Courts in India should be set aside and the plaintiff's suit be dismissed with costs; and they also preferred a petition to their Lordships' Board, praying that the tendered evidence be admitted as evidence in the suit.

These being the relevant facts, it became evident at an early stage of the proceedings before the Board that it was essential to decide the question of the admissibility of this evidence before the consideration of any other matter arising on the appeal; for it was agreed by both sides that in the event of the evidence being admissible in the suit, the matter must be sent back to the Indian Courts for the purpose of having that evidence considered and the findings on issues 1 (*a*) and 1 (*b*) reviewed and, if necessary, amended in the light thereof.

The question for decision turns upon the true construction of Section 33 of the Indian Evidence Act (Act I of 1872), and the application of its provisions to the circumstances of the present litigation. Omitting words which are inapplicable, the section runs thus:—

> "Evidence given by a witness in a judicial proceeding . . . is relevant for the purpose of proving in a subsequent judicial proceeding . . . the truth of the facts which it states when the witness is dead. . . .
>
> "Provided—
>
> "that the proceeding was between the same parties or their representatives in interest;
>
> "that the adverse party in the first proceeding had the right and opportunity to cross-examine;
>
> "that the questions in issue were substantially the same in the first as in the second proceeding."

The proviso, it will be observed, is threefold, and it is common ground that the second proviso is fulfilled in the present case.

In regard to the third proviso, their Lordships feel no doubt that this also is fulfilled. It is not necessary that all the questions in issue in the two proceedings should be substantially the same. In the suit No. 6 of 1891 the question of the sonship of the plaintiff was the principal question in issue before the trial Judge, and the very same question is in issue in this the second proceeding.

The contest before their Lordships has mainly centred round the first proviso, both as to its true construction and as to whether its requirements (whatever they may be) are in fact complied with.

There is but little authority in the way of decision by the Courts in India upon the meaning and effect of the first proviso. Such as there is was cited in argument before the Board. In addition, there are the judgments of the learned Judges in the present case. Their Lordships proceed to consider the views so expressed, more particularly in regard to the question whether, for the purpose of complying with the first proviso (where the parties to the two proceedings are not identical), the party to the first proceeding must have been a representative in interest of the party to the second proceeding or the party to the second proceeding must be a representative in interest of the party to the first proceeding. This appears to their Lordships a crucial question, for if the latter view be the true one, it would seem that the proviso could only be fulfilled where an interest vested in the party to the first proceeding at the date thereof had become vested in the party to the second proceeding—in other words, where, according to the well-known terms of English law, the party to the second proceeding was privy in estate with the party to the first proceeding, and so claimed title through and under him. On the other hand, if the former view prevails, the words " representatives in interest " may cover a much wider field, and include persons who have no privity of estate with and do not claim through or under the propositus.

The earliest reported decision is the case of *Morinmoyee Dabea* v. *Bhoobunmoyee Dabea* (15 Bengal, L.R. 1), decided in the year 1874. In that case certain evidence in an earlier suit was held inadmissible in a later suit. Sir Richard Couch, in his judgment, gave no reasons except that the second proceeding was not between representatives in interest of the parties to the first proceeding. There was apparently no critical examination or consideration of the language used in the first proviso to the section. In *Rajkumari Debi* v. *Nrityakali Debi* (12 Calcutta, L.J. 434), evidence given in an earlier suit was held inadmissible on the ground that the second proviso was not complied with; but there are indications that the Court thought that the first proviso also had not been fulfilled because the relevant party to the second proceeding did not " claim through " the relevant party to the first proceeding. So, too, it would appear from the language used in the judgment of the Chief Justice in *Lanka Laksmanna* v.

Lanka Vardhanamma (I.L.R. 42 Madras, 103) that the same view was there entertained in regard to the first proviso. On the other hand, the judgments in *Sitanath Dass* v. *Mohesh Chunder Chuckerbati* (I.L.R. 12 Calcutta, 627) and *Chaudreshwar Prasad Narain Singh* v. *Bisheshwar Pratap Narain Singh* (I.L.R. 5 Patna, 777) indicate the view that for the purpose of complying with the first proviso you must find in the first proceeding a party thereto who was a representative in interest of a party to the second proceeding.

The judgments under appeal, while differing somewhat as to the meaning of the first proviso, agree in rejecting the evidence. The District Judge puts the matter thus: " . . . where the parties are not identical in both the proceedings, the party in the prior suit should have represented in interest the party in the subsequent suit to make this proviso applicable. The question is whether Ramakrishna Rao represented the interest of the present second defendant in the prior suit." He excluded the evidence upon answering that question in the negative. In the High Court, Krishnan J., while realising that the wording of the first proviso is " perhaps a little defective " for the purpose of the construction which he places upon it, states its meaning thus: " The parties in the second proceedings in which the evidence is tendered must be the representative in interest of the parties in the first proceeding; or, in other words, should be the persons who derive their title through or claim under them, or shortly are their privies." He then cites the English rule (hereinafter referred to), and states that there is no reason to suppose that the Indian rule is in any way different from the English rule on this point. Venkatasubba Rao J., like his colleague, felt the difficulty of fitting his view into the words of the section, but nevertheless stated that under the section the question resolved itself into this: " Is the party in the second proceeding the representative in interest of the party in the first ? In other words, was the party in the first the predecessor in interest of the party in the second ? " Upon the letters patent appeal, Kumaraswami Sastri J. thought the evidence inadmissible, " as the second defendant in this suit is not the legal representative of the plaintiff in O.S. No. 6 of 1891." Odgers J., on the other hand, stated the question as being " was Ramakrishna the representative in interest of the second defendant. . . . ? " and contents himself with saying that nothing had been shown to cause him to come to any other conclusion than that arrived at by the other judges. Jackson J. simply agreed with the judgment of Krishnan J.

Their Lordships find themselves unable to agree with the view which first finds expression in the judgment of Sir Richard Couch. Reading the words of the first proviso as enacted, it would seem that the words " that the proceeding was " must, from the use of the past tense, necessarily refer to the first proceeding. If this be so, then this proviso must mean (and can

properly be so paraphrased) " Provided that the first proceeding was between the parties to the second proceeding or between representatives in interest of the parties to the second proceeding." In other words, where A seeks to read against B in a later proceeding evidence given in an earlier proceeding to which A was not but B was a party, A must show that a party to the earlier proceeding was a representative in interest of A, *i.e.*, that the person who is called by the proviso a " representative in interest " of another is a person who was a party to the first proceeding.

The judgments appealed from are all based in substance upon the view that the first proviso was not fulfilled because there was no privity of estate between Ramakrishna and Krishna in regard either to Pittapur or Gollaprolu. In truth, the learned Judges have treated the matter as governed by a section identical with the provisions of the English law. Whatever may have been the intention of those who framed the section, the first proviso exactly inverts the requirements of the English law, which requires that the parties to the second proceeding should legally represent the parties to the first proceeding, or be their privies in estate. Their Lordships, however, are not disposed to consider this inversion to be accidental. Nothing would have been easier, had it been desired so to do, than to follow the English rule, or to require that the party to the first proceeding should be privy in estate with or the predecessor in title of the party to the second proceeding. Instead of using such well-known terms, a much more elastic phrase is employed, and one which is neither technical nor a term of art. The legislative authority was, it must be remembered, dealing with a country in which (amongst other institutions) the Hindu joint family involved representation of interest of a kind and degree and in circumstances unfamiliar to English law. In view of this fact, their Lordships cannot but surmise that the omission of strict English legal terminology and the employment of the less restricted phrase " representatives in interest " was deliberate and intentional.

It will be a question depending for its correct answer upon the circumstances of each case where the question arises, whether there was a party to the first proceeding who was a representative in interest of a party to the second proceeding within the wider meaning which their Lordships attribute to those words.

Turning back to the first proviso, it requires, in their Lordships' view, that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which " the facts which the evidence states " were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz. (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to

be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso; but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represented in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative in interest of the party to the second proceeding.

What the section intends is to allow the admission of evidence given in a former proceeding, which it is, for the specified reasons, impossible to give in a later proceeding, subject to the protection which the provisoes afford to the party to the later proceeding against whom the evidence is tendered. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the evidence by cross-examination, either is himself, or represented the interests of, the party to the later proceeding against whom the evidence is tendered, *i.e.*, that he was (in the latter case), in effect, fighting that person's battle as well as his own.

In the light of their Lordships' views as to the meaning and effect of the first proviso, how does the present case stand ? The evidence is tendered by Krishna against the plaintiff, who was himself a party to the first proceeding and who himself (by his counsel) cross-examined the witnesses. But notwithstanding this fact, since Krishna was not himself a party to the first proceeding (indeed he was then unborn), the admissibility of the evidence in favour of Krishna must be tested by its admissibility if tendered against him. If not admissible against him it cannot be admissible in his favour.

The determining factor is the answer to the question whether the relevant party to the first proceeding (viz., Ramakrishna) was a representative in interest of the relevant party to the second proceeding (viz., Krishna). In their Lordships' opinion he was.

The suit No. 6 of 1891 related not only to the impartible Raj of Pittapur. It related also to the late Rajah's self-acquired property to a value claimed to be at least equal to the value of Pittapur. As regards Pittapur, the estate, though impartible, still retained to some extent its character of joint family property. Although other rights which a coparcener acquires by birth in joint family property did not exist in regard to it, the birthright of the senior member to take by survivorship still remained (*see Shiba Prasad Singh* v. *Prayag Kumari Debi* (59, I.A. 331)). This right of survivorship, which might in certain events have enured for the benefit of Krishna, was a right which he would acquire on birth, and their Lordships are not prepared to say even in regard to Pittapur alone, that Ramakrishna, in claiming Pittapur on the footing of the plaintiff being a supposititious child, was not a representative in interest of Krishna within the meaning of the first proviso.

But there can be no doubt in their opinion that in relation to the claim for self-acquired property, Ramakrishna was such a representative in interest of Krishna. He claimed possession of this property, which in his hands would be joint family property, and in which (under the Mitakshara law) all his after-born sons would, upon birth, acquire an immediate interest as coparceners. It is difficult to see how it could be said that Ramakrishna in asserting his claim to that property upon that footing was not the representative in interest of his sons born and to be born, except upon the restricted view taken by the Courts in India.

Much was said in argument in reference to *res judicata* and Section 11 of the Code of Civil Procedure, but their Lordships get no assistance from that section in construing the first proviso. Nor do they feel able to depart from the plain language of the first proviso, because in other sections of the Indian Evidence Act the words " representative in interest " appear in contexts which clearly show that the representative comes after and does not precede the person whose representative he is.

Their Lordships are of opinion that the evidence in question was admissible, and should have been read and considered as relevant for the purpose of proving in the present suit the truth of the facts which it states.

The existing findings on issues 1 (*a*) and 1 (*b*) must be set aside. The case as regards those two issues must be remanded to the High Court, with a direction that the evidence in question is, subject to all just exceptions, admissible under Section 33 of the India Evidence Act, in order that they may either themselves, if they think proper, consider the evidence and frame findings in answer to issues 1 (*a*) and 1 (*b*), or remit the case as regards those two issues to the District Judge for him to consider the evidence and frame findings in answer to those issues, the findings of the District Judge being, in that event, submitted for consideration and review by the High Court. In the former event the findings of the High Court, and in the latter event the findings of the District Judge and the findings of the High Court, are to be submitted to their Lordships' Board. In the meanwhile, the hearing of the rest of the appeal is adjourned, without prejudice to the right of the appellants to make any application which they may think fit to make to the Courts in India for the appointment of a receiver or otherwise. Pending the final hearing of this appeal, all further proceedings under the decrees of the 5th October, 1920, the 28th October, 1926, and the 7th March, 1928, must be stayed. The respondent must pay the costs of the appellants of their petition for the admission of evidence and of the hearing of this appeal before their Lordships, down to and including this judgment.

Their Lordships have humbly advised His Majesty accordingly.

In the Privy Council.

SRI RAJAH RAVU SRI KRISHNAYYA RAO *alias* SRI RAJAH RAVU VENKATA KUMARA MAHIPATHI KRISHNA SURYA RAO BAHADUR GARU AND ANOTHER

v.

RAJAH SAHEB MEHERBAN-I-DOSTAN SRI RAJAH RAVU VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR GARU, RAJAH OF PITTAPUR.

DELIVERED BY LORD RUSSELL OF KILLOWEN.

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