

1869
Oct. 13.

Regular Appeal No. 12 of 1868.

Vinayak Narayan Jog. *Appellant.*
Govindrav Chintaman Jog. *Respondent.*

*Hindu law—Will—Attestation—Adoption of son subsequent
to will—Revocation.*

The will of a Hindu in the Mofussil need not be signed by the testator, or made with any particular formalities; all that is requisite is that it be a complete instrument, and express the deliberate intentions of the testator.

Where a separated Hindu made a will, and subsequently adopted a son, the boy adopted and his father being aware of the provisions of the will in which an adequate provision was made for the adopted son, it was held that the subsequent adoption did not invalidate the will.

This was an appeal from the decision of F. Lloyd, Judge of the District of Puna, in Original Suit No. 201 of 1865. The facts of the case fully appear in the following extracts from the judgment of the District Judge:—

“This is a suit instituted by Govindrav Chintaman to recover from his uncle, Vinayak Narayan, houses, ornaments, &c., of the value of nearly one lakh of rupees, to which he alleges he is entitled, as the adopted son of Chintamanrav, the brother of the defendant, Vinayak Narayan.

“Narayanrav is the common ancestor of the family. Vinayakrav is the eldest of four brothers, sons of Narayanrav, Chintamanrav, Sadashivrav, and Yeshvantrav being the other three. Of these Sadashivrav died, and his son separated from the family in 1858, and is not connected with the present suit. In November 1862 Chintamanrav and Yeshvantrav executed a formal deed of separation, addressed to Vinayakrav, with reference to a previous deed of disposition of the family property executed by all the three brothers in 1858. Chintamanrav being childless, the present plaintiff, Govindrav, was given in adoption by his natural father Yeshvantrav, and Chintamanrav accordingly adopted Govindrav on the 19th December 1862, and shortly afterwards, on the 22nd December, Chintamanrav died, leaving a widow, by name Sarasvati Bai.

"In 1863-64 Govindrav applied to Vinayakrav for possessions of his adoptive father's estate, when he was informed that Chintamanrav had left a *vyavastha patra*, or will, under which he was only entitled to 20,000 rupees out of the personal estate, and property to this amount was accordingly made over to him, for which he passed a receipt, and a release in full satisfaction of all demands against his uncle. The plaintiff asserts that, on subsequent information, he found that he has been the victim of fraud, his father never having, as alleged, restricted his interest in his moveable property to that sum, and hence he brings this action.

1869

Vinayak Nara-
yan JogGovindram
Chintaman Jog.

"Vinayakrav's defence is, that he has acted in accordance with the will of his late brother, Chintamanrav, and that the plaintiff has received all that he is entitled to under the will, and has formally passed a release giving up all further claim against him. He also objects to various items of the claim as being altogether incorrect.

The following issues were accordingly laid down :—(1) whether the will was invalid, by reason of its being unstamped; (2) whether the will was genuine and valid; (3) whether the release given by the plaintiff barred the claim; and lastly, (4) what portion of the property was the plaintiff entitled to.

On the first issue it was found that the *vyavastha patra* was a will, and therefore not subject to stamp duty; on the second issue, that the *vyavastha patra* was not signed by the deceased testator, an omission which the Judge considered fatal to its validity. "Certain witnesses," he said, "state that the word *karateshwar* at the head of the document is in the handwriting of the deceased, but the contention of the defendant that writing this invocation is equivalent to due execution is an assertion not borne out by the evidence. Out of the three witnesses who attested the document, the first and the third admit their attestation. The first witness, however, is the defendant himself, and being interested in the will, was not a competent attesting witness, and being interested in this case, his evidence must be regarded with caution. The second witness is Yeshvantrav, the natural father of the plaintiff. He alleges his signature to be a forgery; and points out that

1869 had he written it himself he would never have used the prefix *sahi* (signature) before his name. There is also a difference in the form of the initial letter from that usually written by him, which indicates that it is not a genuine signature. The absence of the testator's signature makes the will invalid, and it is not necessary to discuss the argument and the testimony of witnesses *pro* and *con*.

Vinayak Nara-
yan Jog.
Govindrav
Chintaman Jog.

On the third issue I find that no cognisance can be taken of the release, as it is insufficiently stamped; and though in the other document, which is a receipt, plaintiff foregoes all further claims against defendant, yet under the circumstances it cannot be considered as a bar to the present suit. It is alleged that at the time when these documents were passed by the plaintiff he had seen the *vyavastha patra* which was produced at the time; but the evidence is conflicting, and the fact is not established. If it had been present, the probability is that it would have been referred to in the body of these documents. The defendant being aware of the defect in the will, had strong reasons for keeping it out of sight; and the argument that the will must be genuine, as Yeshvantrav could not have otherwise attested the release and the receipt, falls to the ground, because it is not proved that his signature on the will is genuine." The third issue also was decided in the negative.

In determining the last issue as to the portion of the property to which plaintiff was entitled to under the will, it was held that he was entitled to the two houses at Poona and Belgaum, because they had fallen to Chintamanrav's share; and of the ornaments, &c., it was decided that, after making all allowances and deductions, plaintiff was entitled to the sum of R. 21,167-12-8; the rest of the claim was disallowed.

The appeal was argued before Couch, C. J. and Melvill, J. on the 29th of September 1869.

Macpherson (with him *Shantaram Narayan*) for the appellant. If the will is established to be genuine the absence of the signature cannot make it invalid. It is a Hindu will, and it has been held that neither Act 10 of 1865, nor the rules of English law as to execution and attestation apply in the

case of Hindu wills: *Muncharji Pestonji v. Narayan Lakshuman (a)*, *Crinivasammal Vijayammal (b)*. Besides, in this case the invocation to *karateshwar* was in the testator's handwriting, which is commonly used to authenticate documents as effectively as a signature. On referring to the will itself, it will be seen that it was never intended that the testator should sign it; the signatures of the witnesses, instead of being on the left side, leaving the right side for the signature of the executing party, are put down on both sides, the words *saksha* being in the middle of the paper.

1869

Vinayak Narayan Jog.

Govindray Chintaman Jog.

Marriott (with him *Vishvanath Narayan Mandlik*) for the respondent:—The property bequeathed by the will is admitted to be ancestral, both moveable and immoveable; and that being so, the will could not operate as a valid will to the prejudice of the legal heirs of the deceased. This devise must be considered to have been revoked by the subsequent adoption of the plaintiff. The rights and status of an adopted son are the same as those of natural born sons, and from the moment of adoption the adopted son became joint owner with his father of the ancestral property, and the will must be considered to have been revoked as much as if a son had been born subsequently to it.

Macpherson:—This objection to the validity of the will was not among those raised by the plaintiff before the Judge.

(Couch, C. J.:—Though the grounds of the decision arrived at by the Lower Court be incorrect, the party in whose favour it is may support it on other grounds.)

Marriott:—A general devise is necessarily bad against natural born sons, and therefore equally so against sons by adoption. He cited Madras S. D. A. Rep for 1859, p. 35.

Macpherson in reply:—The adoption and the will were one and the same transaction. The adoption took place in accordance with the will, and was intended to give effect to it. The whole transaction was moreover a family arrangement, and acquiesced in by all parties.

Cur. adv. vult.

(a) 1 Bom. H. C. Rep. 77. (b) 2 Mad. H. C. Rep. 37.

1869
 Vinayak Nara-
 yan Jog
 v.
 Govindrav
 Chintaman Jog

13th October 1869—Couch, C. J.:—In this case I am of opinion that the District Judge was wrong in holding the will on which the defendant relies to be invalid, merely because it does not bear the signature of the testator. I know of no provision of Hindu law which renders a signature indispensable to the validity of such a document. It has been held by this Court that no particular formalities are required in the execution of a will by a Hindu: *Mancharji Pestanji v. Narayan Lakshumanji and others (supra)*; and the High Court of Madras have also held this: *Crinivasammal Vijayammal (supra)*. All that is necessary to be shown is that the will is a complete instrument, and that it expresses the deliberate intentions of the testator. The District Judge, informing the conclusion at which he has arrived in this case, appears to have had in his mind the formalities which the English law requires in the case of a will made by an English testator; but neither this, nor any similar law has yet been made applicable to testaments executed by a Hindu in this country.

As the case however comes before us in regular appeal, we have to consider whether the document in question was a complete instrument, and whether the evidence shows that the testator wrote the word *karateshwar* at the head of the document, and caused it to be attested as his will. Now the position of the word *sakshi* (attesting) at the foot of the document clearly shows that it was never intended that it should be signed, and I think it is quite in accordance with Hindu custom that a person executing an instrument should write an invocation to the deity at the head of it, with the intention of signifying, in the same manner as he would signify by his signature, that such instrument was his own act and deed. So much for the appearance of the document itself, and the inferences to be drawn from it. Now, in regard to the evidence recorded in the case, Yeshvantrav, the father of the plaintiff, declares that the signature purporting to be his own on the will is a forgery. It is very improbable that such a forgery should have been committed. And the supposition that the signature is a forgery is quite inconsistent

with the fact that Yeshvantrav did subsequently, as he himself admits, attest the exhibit No. 14, in which the will is referred to and effect given to its provisions. There is evidence that the will was produced when exhibit No. 14 was executed, and it is impossible to escape the conclusion that the will was either produced at the time, or that it had been produced and examined, and acknowledged to be valid, and that exhibit No. 14 was deliberately executed with the intention of giving effect to its provisions. Yeshvantrav's own statements are very unsatisfactory, and I have no doubt that he did sign the will, his attestation being probably considered desirable because he was a near relation of the testator, and the father of the person whom the testator was about to adopt. The conclusion at which I arrive on the whole of the evidence is, that Chintamanrav did write the word *karateshwar* on the will, that he caused it to be attested and that he intended it to take effect as his last will and testament.

1869

Vinayak Nara-
yan Jog
v.
Govindrav
Chintaman Jog.

This being so, it only remains for me to consider whether there is any force in the objection raised by the plaintiff's Counsel that the will must be considered to have been revoked by the subsequent adoption. In connection with this question. It is important to see what the provisions of the will are. It runs thus:—"Govindrav, the son of my younger brother Yeshvantrav, is to be adopted. What is to be given to him is as follows:—ready cash, gold coins and jewellery, and silver, making an aggregate of Rs. 20,000." Provision is then made for the payment of a similar sum to the testators' widow. Now although the witnesses differ to some extent as to the exact value of the property left by Chintamanrav, the whole evidence goes to show that it was much in excess of the two legacies above-mentioned; so that in fact it may be said that the testator divided his property between his widow and his adopted son, making a proper provision for the former, and assigning a fully sufficient sum for the maintenance of the latter. It may well be that if the testator had disposed of his property without making a sufficient provision for the son

1869

Vinayak Nara-
yan Jogv.
Govindrav

Chintaman Jog.

whom he was about to adopt, such a will would be revoked by the adoption. There is an absence of authority directly bearing on this point, but there is a passage in 6 Moore's Indian Appeals, page 320, which incidentally touches upon it. In answer to a question referred to them, the pandits said; "If the testator had really given his wife verbal instructions to adopt a son in the event of her not bearing male issue, her compliance with those instructions would of course invalidate the will according to the Hindu law, it being competent for the testator who authorised the adoption of a son to alienate the whole of his estate, and thereby injure the means of the maintenance of his would-be heir." This seems to be quite consistent with the principles of Hindu law, and, under the circumstances indicated, a Court would probably consider the will revoked by an adoption; but in the present case the provisions of the will may stand consistently with the adoption, for a provision has been made in it for the maintenance of the son, and that provision is as ample and liberal as any person in the testator's circumstances was bound to make.

There is another light in which the subject may be regarded. The father of the plaintiff was not bound to give his son an adoption; both he and the plaintiff were fully cognizant of the intentions of Chintamanrav in regard to the disposition of his property, and in consenting to the adoption after the will had been made, it must be held that they consented that it should be made on the terms therein provided, and admitted that the provision made for the plaintiff was sufficient. Having done this, they cannot be allowed to repudiate the terms of the adoption. The will and the adoption were in point of fact parts of one and the same transaction, and must stand or fall together. I am aware of nothing in the Hindu law which requires me to pronounce the will to be invalid, and thereby declare that it is out of the power of a Hindu to adopt a son, and at the same time to make adequate provision for his widow. It is true that an adopted son occupies the same position as a natural born son; and if the adoption had preceded the will the plaintiff might have

objected to the will being made. But the adoption having been made in accordance with the will, and the plaintiff having, as appears from his subsequent conduct, assented to the will, and taken the benefits which it secured to him, it is impossible to hold that he is now at liberty to repudiate it. I think there must be a decree for the defendant; and that the plaintiff must bear the costs of both these appeals, and all costs in the Court below.

1889
Vinayak Nara-
yan Jog
Govindram
Chintaman Jog.

MELVILLE, J. concurred.

Marriott for the respondent:—By the terms of the will two houses are secured to the plaintiff, and these have not been made over to him. So much of the District Judge's decree as awards those two houses should be confirmed.

COCHRAN, C. J.:—The answer to that is, that you cannot claim a decree on a ground which is quite inconsistent with your plaint; you cannot sue as heir-at-law to set aside the will, and, failing that ask, for a decree as devise under the will. If the defendant does not carry out the terms of the will the plaintiff has his remedy.

Decree reversed with costs.

Referred Case.

Nov. 20.

Manchharam Kallindas Plaintiff,

Baksho Sahib mir Mainudin Khan Defendant,

Action on judgment of Mofussil Court—Cause of Action—Small Cause Court.

A suit cannot be maintained in a Small Cause Court in the Mofussil to enforce the decree of a Civil Court.

Case referred under Act X. of 1867 by Sayad Hussan El Medini, judge of the Small Cause Court at Surat, for the decision of the High Court.

* This plaint has been presented on behalf of the plaintiff to recover the amount of 200 Rupees due on a decree of the Court of the Principal Sadr Amin of Surat, No. 1588 of