APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Russell.

VISALAKSHI AMMAL (FIRST DEFENDANT), APPELLANT,

v.

SIVARAMIEN AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

1904. March 15, 25, 29.

Hindu Law—Adoption—Agreement limiting property to be taken by minor adopted son—Validity.

A Hindu widow, in pursuance of authority given by her husband, since deceased, adopted plaintiff, a minor. A registered document was executed by the widow on the day of the adoption, wherein the fact of the adoption was recited, and certain terms were set forth as to the manner in which the property of the deceased adoptive father should be enjoyed as between the plaintiff and the widow. By those terms it was declared that, in the event of disagreement between plaintiff and his adoptive mother, the property described in the second schedule should be enjoyed by the latter during her life, and should be taken by the plaintiff after her death. The authority under which the widow adopted had been given orally, and merely enabled her to adopt a son, and made no reference to the manner in which the estate of the deceased should be enjoyed either by the son or the widow. The effect of the arrangement was to vest in the widow, on the contingency mentioned, for her life, about a moiety of the property inherited by her from her husband. The terms embodied in this agreement were consented to by the plaintiff's natural father prior to the adoption, and it was in consequence of such consent that the adoption took place and the document was executed. Disagreements arose between plaintiff and the widow, and plaintiff, still a minor, now sued through his natural father as next friend to recover all the property of his deceased adoptive father :

Held, that the provision in the document in favour of the widow was binding on the plaintiff and the widow was entitled to enjoy the property in the second schedule during her lifetime.

AGREEMENT limiting the property to be taken by an adopted son. First defendant, a widow, had taken plaintiff in adoption to her deceased husband in pursuance of his authority. On the day of the adoption the following document (which was filed as exhibit I) was executed by first defendant :—

"Deed executed on 30th December 1893 by me, Visalakshi Ammal (first defendant), wife of Rengasami Aiyar, deceased,

* Appeal No. 223 of 1901, presented against the decree of O. S. R. Krishnan, Subordinate Judge of Trichinopoly, in Original Suit No. 42 of 1901.

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Brahmin, to Sivaraman *alias* Veeraraghavan, aged 5 (plaintiff), Brahmin by caste, Mirasidar. According to my husband's permission I have on this date taken you in adoption and you have become son to me. Consequently you yourself shall inherit all the undermentioned land, house-sites, etc., which are my properties. And you shall also protect me. In case of disagreement between you and myself, I shall thenceforward till my lifetime enjoy, paying the Circar assessment, the property mentioned in paragraph 2 out of the undermentioned properties, and you shall after my lifetime perform the obsequies, etc., that should be done for me and inherit also those properties yourself."

The document was registered. Plaintiff, who was still a minor, now sued through his natural father as his next friend, to recover the properties left by his adoptive mother's deceased husband and mentioned in exhibit I. First defendant, among other defences, pleaded that plaintiff was not entitled to claim possession of those properties which, by the terms of exhibit I, were to be enjoyed by first defendant during her lifetime. The Subordinate Judge passed a decree in plaintiff's favour practically as prayed for. Further facts as to the adoption and the claim are set out in the Order of Reference to a Full Bench. First defendant preferred this appeal with regard to the properties specified in schedule II to exhibit I.

P. R. Sundara Ayyar and *T. V. Vaidyanatha Ayyar* for appellant.

S. Subrahmania Ayyar and *S. Venkataramana Ayyar* for first respondent.

The appeal came, in the first instance, before Sir S. SUBRAHMANIA AYYAR, Offg. C.J., and BENSON, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The plaintiff, a minor, through his next friend, his natural father, brought the present suit for the recovery of certain properties stated to have vested in him by virtue of his having been adopted to one Rengasami Aiyar, deceased, by his widow, the first defendant. The Subordinate Judge gave a decree to the plaintiff practically as prayed for. In the present appeal by the first defendant no question is raised as to the plaintiff's adoption. The dispute here relates only to the properties specified in schedule II to exhibit I, dated 30th December 1893, executed by the first defendant on the day of the adoption in proof of it and setting forth the terms and

arrangements as to the enjoyment of the property of the adoptive father as between the plaintiff and the first defendant, and whereby the property described in the said schedule II to the instrument was, in the event of disagreement between the plaintiff and the first defendant, to be enjoyed by the first defendant for her life and, subsequent to her death, to be taken by the plaintiff. The permission by the first defendant's husband in pursuance of which the adoption of the plaintiff took place was oral, and it appears to have merely enabled her to adopt a son, and made no reference as to the terms of enjoyment of the estate by either. There is also no doubt that the terms embodied in exhibit I were consented to by the plaintiff's natural father prior to the adoption, and that it was in consequence of such consent that the adoption took place and exhibit I was executed. The effect of the arrangement was to vest in the first defendant, on the contingency mentioned, for her life, almost an exact moiety of the property inherited by her from her husband, each moiety being of the value of about Rs. 10,000.

The question for determination is whether the decree in favour of the plaintiff in so far as it relates to the property mentioned in the said schedule II to exhibit I is sustainable.

Now, the effect of an adoption in the Dattaka form is to transfer the person adopted from his natural family to that of the adoptive father, such transfer necessarily carrying with it on the one hand the cessation of whatever right the adopted son possessed in the property of the natural family, and, on the other hand, under the Mitakshara law, the acquisition, among other things, by him of the right that accrues to an aurasa son on his birth in respect of the ancestral property of the father. Though a person may, at his discretion, give away a son of his in adoption, or refuse to do so, and though a sonless man may, according to his choice, accept, or refuse to accept, a son in adoption, yet once the giving and the accepting have taken place, the change of status, with the incidents as to property annexed thereto by the law, follows without the slightest reference to the volition of the party giving or the party taking. No doubt the adoptive father can simultaneously with the adoption make such arrangement in respect of the joint property of himself and the adopted son as under the law a man can lawfully make notwithstanding the existence of an aurasa son. For example, as a part and parcel of the transaction of adoption the adoptive father may, of his own will, effect a partition of the

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property between himself and the adopted son—cf. *Kandasami* v. *Doraisami Ayyar*(1). He may likewise provide for the maintenance of those who under the law would be entitled to be provided with maintenance from the joint property. Such arrangement for maintenance may be made independently of any partition and would be an act within the scope of the father's paternal authority under the law, and the circumstance that the father refrains from exercising his paternal authority to the fuller extent of effecting a partition could not, in reason, detract from the validity of the arrangement made merely in respect of the maintenance of those who have a right thereto. So long as the partition, or the provision for maintenance, is fair and just, the adopted son cannot raise any question in respect of either; and it may be added that even when the provision for maintenance made by an adoptive father to a party entitled thereto seems to the Court more liberal than what, if the matter were litigated, it would itself award as maintenance, the provision will presumably be upheld if it was made *bonâ fide* and not for the purpose of alienating joint property under the guise of a provision for maintenance.

In cases of adoption after the death of the adoptive father by his widow under his authority, every lawful disposition of his property made by him even by a will would be binding on the adopted son for the obvious reason that those dispositions become operative from the moment of the death of the testator, while the adoption must necessarily take place at some time subsequent to the death, and the rights accruing by virtue of such adoption are only in that part of the estate which remains undisposed of at the moment of the adoption. For like reasons alienations by a widow of her life-interest made before the adoption will also bind the adopted son (*Sreeramulu* v. *Kristnamma*(2)). But no transfer made or agreement entered into, even though simultaneously with the adoption, or as a condition thereto, can bind the adopted son if they are inconsistent with his rights under the law as they would stand at the time of the adoption apart from any agreement between the parties giving and receiving. Take, for example, a case where a natural father, in well-to-do circumstances, gives a son of his in adoption to a divided brother, who is comparatively poor, and enters into an agreement that the adopted son shall,

(1) I.L.R., 2 Mad., 317. (2) I.L.R., 26 Mad., 143.

notwithstanding the adoption, continue to be entitled to the property belonging to the members of the natural family. Would such an agreement be binding upon the members of that family? Would the adopted son in such a case enjoy the benefits accruing from survivorship incident to membership in that family? Take, again, the case of an adoptive father subject to the Mitakshara law arranging at the time of adoption that the adopted son is to have no interest in the ancestral property during the lifetime of the adoptive father, would that prevent the springing up of co-ownership between the adoptive father and the adopted son which is the inevitable incident of the relation of father and son under that law, while unseparated? These and similar conditions and agreements would not in any way touch the validity of the adoption itself as that altogether depends upon other considerations (compare *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*(1)). They must necessarily be looked upon as agreements or conditions essentially repugnant to the status created by adoption, and therefore not binding.

To attempt to support them on the footing of agreements by a person representing the adopted son is hardly possible. For, before the adoption the natural father of the person to be adopted could represent the latter only in regard to the property vested in him at the time and no consent of his could operate on property coming to the son after the adoption, since the natural father's power to represent his son ceases with the giving away of him (cf. *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*(1)). Similarly, the adoptive father could not purport to act on behalf of the person to be adopted before the adoption. And as soon as the adoption takes place the two become joint owners and the adoptive father can make transfers and enter into agreements so as to bind the adopted son only for purposes which make them binding on him under the law. Nor can weight be attached to the argument that the test of the validity of agreements entered into between the party giving and the party receiving a person in adoption simultaneously with it, is whether such agreements are beneficial to the adopted son. For, though where some one duly empowered to represent a minor in a matter enters into agreements on his behalf, the validity of such agreements will depend on whether they are for the minor's

(1) I.L.R., 16 Calc., 556; S.C. L.R., 16 I.A., 53 at p. 59.

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benefit, yet inasmuch as neither the party giving nor the party receiving in adoption can lawfully represent him in agreements or things forming part and parcel of the transaction of adoption, no question of benefit or no benefit can legitimately arise for determination in such cases.

Nor, again, does the doctrine of approbating and reprobating with reference to the same thing seem to be capable of being rightly invoked against the adopted son in these cases. Except where the person given in adoption is of full age and assents to the conditions and agreements between the parties giving and receiving, a case which would be very rare, and in which such assent would preclude any question like the present being raised, the transaction would take place without any reference to the adopted son's will and consent. No doubt, when a thing is capable of being rejected or accepted in its entirety the doctrine referred to should be applied if good faith requires its application. Now, the transaction of adoption is in the nature of a sacrament, or, at all events, it creates a status. If the condition attached is such as to invalidate the adoption itself, then there is an end of the matter, and there is nothing to affirm or disaffirm. If, on the contrary, the condition leaves the adoption valid, the legal relation created thereby cannot possibly be renounced and the adopted son must be held entitled to repudiate conditions sought to be attached to the adoption by the parties giving and receiving when the conditions are inconsistent with his rights under the law.

It is to be observed that the arrangements in the present case cannot be supported to any extent as a provision for maintenance for the first defendant, as the adoptive mother had, under the law, no power to reserve or provide maintenance for herself. When occasion for such provision arises the same must be made by the adopted son or under an order of Court.

In this view the reservation of a life-interest to the widow in the property in dispute will not bind the plaintiff, who can, therefore, on attaining age, avoid the arrangement (*Ramasamiayyen* v. *Venkataramaiyen*(1), though, until then, the possession of the widow, it would seem, cannot be disturbed.

That the plaintiff is not bound by the arrangement is in accordance with the conclusion in *Jaggannadha* v. *Papamma*(2), where

(1) I.L.R., 2 Mad., 91; S.C.L.R., 6 I.A., 196. (2) I.L.R., 16 Mad., 400.

the facts, so far as the present question is concerned, were practically on all fours with those here. But to the extent to which that decision is supported by reference to an alleged absence of power of alienation in the widow, the reasoning can hardly be treated as satisfactory, inasmuch as if the power of alienation possessed by a soniless man until he makes an adoption were a sufficient argument for upholding arrangements or directions such as were in dispute in *Lakshmi* v. *Subramanya*(1) and *Narayanasami* v. *Ramasami*(2), the unquestionable power of alienation which a widow possesses in respect of her life estate must likewise have gone to support the arrangement pronounced against in *Jagannadha* v. *Papamma*(3). But it is difficult to see how the power of alienation possessed by a man prior to his adopting a son or by a widow prior to her adopting one has any real bearing on the matter. If that power has been availed of and if property has been alienated before the adoption such alienation will, of course, not be affected by what takes place afterwards. But when no alienation has actually taken place up to the time of adoption, it is as futile to refer to what the adoptive father or the adoptive mother could have done, but for the adoption, as to argue against an aurasa son acquiring by birth an interest in his father's ancestral property, on the ground that before such birth the father could have given away all his property as he pleased.

It will be seen, therefore, that *Jagannadha* v. *Papamma*(3) is, in truth, in conflict with the *ratio decidendi* in *Lakshmi* v. *Subramanya*(1) and *Narayanasami* v. *Ramasami*(2) which *ratio decidendi*, as far as it can be gathered from the judgments, seems scarcely reconcilable with the fundamental principles underlying the law of adoption.

The following question is therefore referred for the opinion of a Full Bench:—

Whether the provision in exhibit I in favour of the first defendant in regard to the property described in the second schedule thereto will bind the plaintiff?

The appeal came on for hearing before the Full Bench constituted as above.

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(1) I.L.R., 12 Mad., 490. (2) I.L.R., 14 Mad., 172.
(3) I.L.R., 16 Mad., 400.

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P. R. Sundara Ayyar and *T. V. Vaidyanatha Ayyar* for appellant.

S. Subrahmania Ayyar and *S. Venkataramana Ayyar* for first respondent.

Their Lordships expressed the following opinion :—

BENSON, J.—The facts of the case referred for our decision are stated in the Order of Reference in the following terms [This has been set out above] :—

I understand that the plaintiff's natural father agreed to give his son in adoption and the first defendant made the adoption on the condition that the disposition of the property in exhibit I should be binding on the plaintiff.

The question for determination is "whether the provision in exhibit I in favour of the first defendant in regard to the property described in schedule II thereto will bind the plaintiff."

This question is one of no small difficulty. Notwithstanding the view expressed in the Order of Reference to which I was a party, further argument and consideration has now led me to the conclusion that the answer must be in the affirmative.

It is argued for the plaintiff that the matter is decided by the authority of the Privy Council and that was the view taken by this Court in the case of *Jagannadha* v. *Papamma*(1), where the facts were on all fours with those in the present case. In that case the learned Judges relied on the observation of their Lordships of the Privy Council in *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*(2) that it was difficult to understand how an agreement by the natural father "could prejudice or affect the rights of his son which could only arise when his parental control and authority determined." In that case, however, the question was whether the adoption itself was invalid, and the decision was that it was not. Their Lordships expressly point out that no trace of any reservation or condition is to be found in the deed of adoption and that no conditions were attached to the adoption.

The case, therefore, can hardly be regarded as deciding that a condition made at the time of adoption and entered in the instrument evidencing the adoption, as in this case, is void. On the contrary, it is clear from the decision of the Privy Council, in the case of *Ramasamiayyen* v. *Venkataramaiyen*(3) that such an agreement by the natural father is, at all events, not void.

(1) I.L.R., 16 Mad., 400 at p. 404. (2) I.L.R., 16 Calc., 556 ; S.C.L.R., 16 I.A., 53.
(3) I.L.R., 2 Mad., 91 ; S.C.L.R., 6 I.A., 196.

Their Lordships there say (at p. 101) :—" How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Rajadiksh* v. *Janaki*(1), certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age."

The concluding words seem to indicate that in their Lordships' opinion the natural father was not legally incapable of acting as guardian of his son, and of making an agreement on his behalf with regard to the property to be acquired by the adoption. If that is the true position, then the question in each case would be whether the agreement so made by the natural father should or should not be upheld, and this, I take it, would depend on whether the agreement in regard to the property was in itself a fair and reasonable one, and one which, taken as part of the contract for the adoption, was for the minor's benefit, as being a condition on which alone the adoption would be made. This is the principle that was adopted in the case of *Ravji Vinayakrav Jaggannath Shankar Sett* v. *Lakshmi Bai*(2) and I think that it accords with the general practice of the people in this Presidency and their consciousness of what their law allows.

No doubt in the case of *Lakshmi* v. *Subramanya*(3), this Court went further and held that when the disposition of property was one which the person adopting could make immediately prior to the adoption the agreement as to the property must be taken to be part of the contract for the adoption and be valid apparently in all cases. SHEPHARD, J., put the case in these words :—

" In the present case the adoption was made not by a widow, as in the case of *Lakshmana Rau* v. *Lakshmi Ammal*(4) but by the plaintiff's husband who, before the adoption took place, was unquestionably at liberty to alienate his property as he pleased, subject only to the plaintiff's right of maintenance. If being thus

(1) 11 Bom. H.C.R., 199.
(2) I.L.R., 11 Bom., 381.
(3) I.L.R., 12 Mad., 490.
(4) I.L.R., 4 Mad., 160.

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full owner he might before the adoption have disposed of his property in part or in whole in favour of the plaintiff, I fail to see why he should not, when making the adoption, stipulate with the other party to the adoption that a certain part of his property should be set apart for the maintenance of his wife and to that extent taken out of the category of property in which his intended son should have the full right of a co-parcener. It seems to me a mistake to say that the infant adopted son on whose behalf the natural father consents to such a stipulation can only be bound by that consent on the principle on which he might be bound by other agreements made on his behalf, viz., on the principle that the agreement is made for a necessary purpose (*Lakshmana Rau* v. *Lakshmi Ammal*(1)) for the supposition is that, but for the consent of the natural father, the adoption would never have taken place. To object to the agreement is therefore tantamount to objecting to the adoption. The adoption and the disposition of his property by the father being part of one transaction, the son never acquired any interest in the property disposed of and therefore no question can arise as to his guardian's competency to deal with it."

We may add that a reservation made by a widow in regard to her life interest, which she had the right to alienate before the adoption, would stand on the same footing.

The above case was followed in *Narayanasami* v. *Ramasami*(2) and *Ganapati Ayyan* v. *Savithri Ammal*(3) and the decision is in accordance with the decision in *Vinak Narayan Jog* v. *Govindrav Chintaman Jog*(4), *Chitko Raghunath Rajadiksh* v. *Janaki*(5) and *Basava* v. *Lingan Gauda*(6). Among the Judges who decided these cases were such distinguished Hindu lawyers as Sir T. Muthusami Ayyar, Nanabhai Haridas and Ranade, JJ. I think that great weight must be attached to the decisions of such men on a question like the present which I regard as one of Hindu Law modified by Hindu custom and usage developed in accordance with the conceptions of the present time. It is to be observed that there is no text of Hindu law which either recognizes or prohibits such an agreement as the present being entered into, and it is certain, as remarked by West and Buhler, 'Hindu Law,' 3rd edition, page 1106, that in actual practice "fair arrangements

(1) I.L.R., 4 Mad., 160.
(2) I.L.R., 14 Mad., 172.
(3) I.L.R., 21 Mad., 10.
(4) 6 Bom. H.C.R., 224.
(5) 11 Bom. H.C.R., 199.
(6) I.L.R., 19 Bom., 428.

for the protection of the widow's interest during her life, are commonly made, and are always supported by the authority of the caste."

This is the principle on which Farran, J., proposed to decide cases like the present. He says "By Hindu law an infant will be bound by the act of his guardian when *bonâ fide* and for his interest, and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age, but not where the act appears not to have been for his benefit unless he has ratified it on reaching majority. I cannot but think that this principle ought to guide the Courts in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father; if reasonable, such as only to define and limit the son's enjoyment of the property, they should be upheld" (*Ravji Vinayakrav Jaggannath Shankar Sett* v. *Lakshmi Bai*(1)). The validity of the adoption, if legally made, is quite independent of the validity of any agreement as to the property. If the agreement is such as to be inconsistent with the fundamental idea underlying adoption and the purpose for which it is sanctioned by Hindu law, as, for instance, if it deprived the adopted son of all right to the property of the adoptive father and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu law and would refuse to uphold it. But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu law, or the purposes for which adoption is allowed, and is nowhere forbidden by that law. Such dispositions are commonly made, and are upheld by the authority of the caste and the consciousness of the people. In these circumstances, I think that the Courts ought not to refuse to recognize them as binding on the minor, for whose benefit the adoption, coupled with the agreement as to the disposition of the property, was really made. It may be assumed that the natural father would not have agreed to the adoption, coupled with the disposition of the property, unless it was for the benefit of his

(1) I.L.R., 11 Bom., 381 at p. 402.

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son to do so: nor would the adoptive father have taken the son in adoption except on the condition agreed to. The adoption, of course, cannot be set aside, and to set aside the condition which was coupled with the adoption, while maintaining the adoption, would require the justification of strong grounds of legal necessity or public policy.

In the present case the condition as to the property is a reasonable one, and such as the Courts should uphold. I would, therefore, answer the question referred to us in the affirmative.

DAVIES, J.—I concur.

RUSSELL, J.—I concur.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Boddam.

1904. February 29. March 1.

SAKYAHANI INGLE RAO SAHIB (PLAINTIFF), APPELLANT,

v.

BHAVANI BOZI SAHIB AND OTHERS (DEFENDANTS), RESPONDENTS.*

Abatement of appeal—Practice—Personal right to sue—Suit dismissed—Appeal by plaintiff—Decease pending appeal—Abatement.

A suit was brought by a plaintiff who claimed to be the sister's son of a deceased, and as such the nearest reversioner, to set aside alienations made by the widow. The suit was dismissed on the ground that plaintiff had failed to establish the legitimacy of his mother, and the plaintiff appealed. While the appeal was pending, the plaintiff died. His son thereupon applied by petition to carry on the appeal, and his petition was allowed without notice being issued to the other parties. At the hearing of the appeal it was objected that the alleged right on which the suit was based was personal to the plaintiff, even assuming that he was the reversioner, and that such right having ceased with plaintiff's death, the appeal abated:

Held, that the right to sue in the case was a personal right and ceased with the death of the plaintiff, and the appeal abated.

ABATEMENT of appeal. Plaintiff in the suit had instituted it, as the sister's son of the late Rajah Ekojee, the deceased husband of first defendant, and as such, next reversioner, to set aside

* Appeal No. 116 of 1901, presented against the decree of P. S. Gurumurti Ayyar, Subordinate Judge of Kumbakonam, in Original Suit No. 5 of 1899. (Civil Miscellaneous Petition No. 734 of 1903.)