APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

1919, November 13.

V. BALAKRISHNAYYA AND ANOTHER, APPELLANTS (DEFENDANTS NOS. 1 AND 2)[1]

v.

V. VENKATA TRIAMBAKAM AND ANOTHER, RESPONDENTS (PLAINTIFFS).*

Hindu Law—Partition—Birth of natural son after adoption—Suit for partition by adoptive father and natural son against adopted son—Shares.

In a suit for partition during the lifetime of a Hindu father, the father and a natural born son are entitled to eight shares of the property and the adopted son to one share.

Narasimhappa v. *Chinna Kenchappa* (1917) 38 I.C. 244 (Mad.) and *Subbarayudu* v. *Perarazu*, Appeal No. 104 of 1914 (unreported), followed.

SECOND APPEAL against the decree of A. S. KRISHNASWAMI AYYAR, Temporary Subordinate Judge of Guntūr, in Appeal No. 237 of 1917, filed against the decree of P. RAJAGOPALA ACHARIYAR, Additional District Munsif of Tenali, in Original Suit No. 246 of 1915.

The facts are given in the judgment.

A. Krishnaswami Ayyar (with *T. M. Ramaswami Ayyar*) for the appellant.—A decree should have been given on the basis of the award. An adopted son is under the Hindu Law in the same position as a natural son and has all the rights of the latter. Any rule of law which gives him less rights is only an exception to this general rule and must not be enlarged. The decisions that have till now held that the adopted son is entitled to only a fourth of what the natural son would get out of the patrimony have all been cases of partition after the death of the adoptive father; there is no reason why both of them should not get equal shares when the division is made during the father's lifetime. The general rule that the two sons are equal in the eye of the law has been laid down by the Privy Council in *Pratap Singh Shivsingh* v. *Agarsingji Rajasangji*(1), *Gangadhar Bogla* v.

* Second Appeal No. 1754 of 1918.

(1) (1919) I.L.R., 43 Bom., 778 (P.C.).

Hira Lal Bogla(1), and *Nagindar Bhagawan Dass* v. *Bachoo Hurkissondas*(2) which overruled *Bachoo* v. *Nagendas*(3). There are two cases, *Narasimhappa* v. *ChinnaKenchappa*(4) and *Subbarayudu* v. *Perarazu*(5), in this Court which are against my contention; but not only do they refrain from giving any reasons, but they are against the express rulings of the Privy Council in the above cases.

P. Narayanamurthi for the respondent.—The award was disputed by my client and any claim based on the award must be deemed to have been abandoned by the other side, in the lower Court. A vakil is entitled to abandon an issue depending on a question of fact: *Venkatanarasimha Naidu* v. *Bhashyakarlu Naidu*(6). The parties in this case are Brahmans. Even in the case of Sudras it has now been held in this Court in *Gopalan* v. *Venkataragavulu*(7), overruling *Raja* v. *Subbaraya*(8), that on a division after the father's death the adopted son gets only a fourth of what the natural son gets. The same rule must apply even when a division takes place during the father's lifetime. The Privy Council cases quoted relate to collateral succession of the adopted son and the natural son, and the right of the adopted son to represent his father on a partition with the father's coparceners. They do not refer to a case like the present. On principles laid down by the Hindu Law Texts the adopted son must get only the smaller share. In Manu, Chapter IX, verse 168, it is laid down that if a son is born after adoption, the adopted son is entitled to get only maintenance. In Vashishta, Chapter XV, verse 9, it is said that he takes a fourth share; similarly in Baudhayana and Katyayana. Later commentators all enjoin only a fourth share: see Mitakshara, Chapter I, section 11, verses 24 and 25; Smiriti Chandrika, Chapter X, placitum 16; Dattaka Mimamsa, section 5, placitum 40 and section X, placitum 1; Dattaka Chandrika, section 5, verses 16 and 17; Dayabhaga, Chapter X, placitum 9; Vyavahara Mayukha, Chapter 5, placitum 25; and Saraswati Vilasa,

(1) (1916) I.L.R., 43 Calc., 944 (P.C.).
(2) (1916) I.L.R., 40 Bom., 270 (P.C.).
(4) (1917) 38 I.C. 244 (Mad.). (3) (1914) I.L.R., 16 Bom. L.R., 268.
(5) Appeal No. 104 of 1914 (unreported).
(6) (1902) I.L.R., 25 Mad., 367 (P.C.)
(7) (1917) I.L.R., 40 Mad., 632. (8) (1884) I.L.R., 7 Mad., 253.

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placitum 379. The scheme of the Mitakshara in dealing with this matter in Chapter I, section 11, following sections 4 to 11 all of which deal with matters which would be applicable equally to partition between sons before and after the father's death, shows that the unequal division of patrimony between the adopted and the natural born son must be adhered to whether the division takes place during or after the father's lifetime. This must be the reason for the two recent decisions of this Court on this matter, in favour of my contention, as section 11 is specifically relied on therein even in case of a division after the father's death.

S. Ramaswami Ayyar in reply.—The wording of the Sanskrit verse on this matter suggests that the division spoken of in this respect is one after the father's death.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit for partition. The first plaintiff is the father, and the second plaintiff is his natural born son. The first defendant is his adopted son, and the second defendant is the son of that adopted son. The question for consideration is, what is the share to which the first defendant, the adopted son, is entitled when a suit is brought for partition, and the father is a party to that suit. A question was raised, which is referred to in the written statement, that, as before the birth of a second son there was an award of arbitrators settling the disputes between the first plaintiff and the first defendant, a decree should be passed in pursuance of that award. The first issue related to that contention. The facts relating to that issue are these. The adoption of the first defendant was made in 1887, when the first plaintiff's first wife was alive. She died in 1888. First plaintiff contemplated marrying a second wife. Thereupon the natural father of the first defendant raised disputes, and asked that before the second marriage was performed the share of the first defendant should be set apart. It is said that in consequence of this objection by the natural father of the first defendant, the arbitrators settled the shares of the first plaintiff and the first defendant. The District Munsif was of opinion that, as the award was not made a decree of Court, and as it was not registered, it was not receiveable in evidence; but he gave the two plaintiffs and the first defendant a third share each in the property. He relied upon

Raja v. *Subbaraya*(1), which has since been overruled by *Gopalam* v. *Venkataragavulu*(2). The Munsif also stated in his judgment that the genuineness of the award was not admitted by the plaintiffs. Against the decree of the Munsif there was an appeal to the Subordinate Judge. A memorandum of objections was also filed by the defendants. In that memorandum there is no claim that they should be given a half share under the award. The Subordinate Judge came to the conclusion that the share to which the first defendant was entitled was one-ninth of the property. Against this finding this Second Appeal has been preferred by the defendants.

Mr. Krishnaswami Ayyar argued that the conclusion come to by the lower Courts, that the award is not receiveable in evidence, was wrong and that his clients were entitled to a finding whether the award was genuine or not, and to a decree in pursuance of that award. He conceded that the appellants could not claim one-half of that property, as there was no memorandum of objections in the lower Appellate Court, but argued that he is entitled to rely upon the award for the purpose of supporting the decree of the District Munsif. We have come to the conclusion that it is not open to the appellants to rely upon that award. The genuineness was disputed. There was no attempt made in the lower Appellate Court to base any claim upon the award. We have no affidavit before us by the appellants, or by their pleader, that this question was argued in the lower Appellate Court. Under these circumstances, we are of opinion that the defendants gave up their right under the first issue. As was held by the Judicial Committee in *Venkatanarasimha Naidu* v. *Bhashyakarlu Naidu* (3), on a question of a disputed fact it is within the competence of the pleader, or the parties, to give up an issue; that is what seems to have happened in the lower Court. We are not prepared to remit the issue for a finding as to whether this award was genuine or not.

Now, we come to the main question in the case, and that is what is the share to which the first defendant is entitled where a suit is brought during the lifetime of his adoptive father for settling the shares. There can be no doubt that if Manu's text

(1) (1884) I.L.R., 7 Mad., 253. (2) (1917) I.L.R., 40 Mad., 632.
(3) (1902) I.L.R., 25 Mad., 367 (P.C.).

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in Chapter IX, sloka 163, is to be applied literally, the first defendant will be entitled to nothing more than maintenance. But Vignanaswara, in commenting upon Yagnavalkya's text, points out that this rule must be restricted to cases where the adopted son is not a good man. Since that time, three Smrithi writers at least have laid down the rule as regards the shares of the adopted son—Vasishta, Katyayana and Bodhayana. All of them say that the adopted son, if a son is born to the adoptive father after the adoption, is entitled to one-fourth share. In this Court it has been consistently been held that the meaning of that text is that the property should be divided into five shares, four of which will be taken by the *aurasa* son and one will be taken by the adopted son. The contention of Mr. Krishnaswami Ayyar was, that this rule being a restriction upon the natural rights of a son should be confined to cases where there is a partition between the brothers—between the adopted son and the natural born son—and should not be applied to cases where a suit is brought by the father to divide the property. He relied for this contention upon the latest pronouncement of the Judicial Committee in *Pratap Singh Shivsingh* v. *Agarsingji Rajasangji*(1), where their Lordships point out that the adopted son, ordinarily speaking, is in the same position as a natural born son. That observation was made with regard to the right of maintenance, and it was held that the fact that a person is adopted will not deprive him of the right. The learned vakil also relied upon two other cases. *Nagindar Bhagawan Dass* v. *Bachoo Hurkissondas*(2) was a case where the question was, what was the share to which the adopted son was entitled in cases of collateral succession. The adopted son and the natural born son were the only two heirs who were alive when the succession opened, and it was held that the text of Vasishta was not applicable to such cases, and that both the sons were entitled to the inheritance in equal moieties. In *Gangadhar Bogla* v. *Hira Lal Bogla*(3), which related to the stridhanam of a step-mother, both WOODROFFE and MOOKERJEE, JJ., point out that the exception should be confined within proper limits and should not be extended to cases of stridhanam succession. From these

(1) (1919) I.L.R., 43 Bom., 778 (P.C.).

(2) (1916) I.L.R., 40 Bom., 270 (P.C.). (3) (1916) I.L.R., 43 Cal., 944 (P.C.).

observations Mr. Krishnasami Ayyar contended that the injunction of Vasishta should be confined to cases where the suit is brought by a natural born son against the adopted son, or vice versa, and should not be extended to cases where the suit is instituted in the lifetime of the father. On principle, there is no reason why such a limited application should be given to the texts of Vasishta or Bodhayana or Karthyayana. In two cases of this Court, it seems to have been taken for granted that even if such a suit is brought during the lifetime of the father, the text of Vasishta will be applicable; *Narasimhappa* v. *Chinna Kenchappa*(1), and *Subbarayudu* v. *Perarazu*(2). But in those cases there was no discussion upon this point. And naturally, the learned vakil for the appellant contended that the decisions are not binding upon him. We have therefore considered the text of the Hindu Law with some care, and we are glad to say that our conclusion is in accordance with the decision come to in the two cases already cited. As was pointed out by Mr. Narayanamurthi for the respondents, in this portion of Mitakshara, in section 1, the whole discussion begins with a definition of Daya. The author says that properties are of two kinds, obstructed property and unobstructed property. First of all he deals with unobstructed property, and then deals with obstructed property. The rules relating to partition are all contained in the sections dealing with unobstructed property. Here again, we must observe that the sections are not to be found in Vignaneswara's commentary, but they were imported by Mr. Colebrooke who has very carefully analysed the commentary and has given headings which he thought were appropriate for the subject-matter discussed. In the first clause of section 2, the rules relating to partition during the lifetime of the father are considered. In section 3, the rules relating to partition after the death of the father are considered, and the other sections 4, 5, 6, 7, 8, 9 and 10 deal with matters which would be applicable to both classes of partition—partition during the lifetime of the father and partition after his death.

Section 11, in which the question as to the right of the adopted son when he is in competition with a natural born son is dealt with, must also be regarded as belonging to the same

(1) (1917) 38 I.C., 244 (Mad.). (2) Appeal No. 104 of 1914 (unreported).

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category as sections 4 to 10, which all have a general application without reference either to the question of partition after the death of the father or partition before his death. There is no reason for saying that the text applies only to cases of partition after the death of the father. No doubt the language in Sanskrit, to which Mr. Ramaswami Ayyar drew our attention in reply, suggests that the commentator contemplated a state of things existing after the death of the father. But that would not show that this text is solely to be applied to cases where partition takes place after the death of the father and not during his liftime. After dealing with this portion of Yagnavalkya's text, Vignaneswara begins the next head of discussion, namely, obstructed properties. What has been laid down in the cases decided by the Judicial Committee and by the Calcutta High Court relates to the second head of discussion, obstructed property. It was held in these cases that there is no reason for applying section 11 to subjects covered by Chapter 2. In our opinion, we will be doing no violence to the canon of interpretation suggested by the Judicial Committee and by the learned Judges of the Calcutta High Court by applying the rule in section 11 to cases of partition during the lifetime of the father, because section 11 is germane to the discussion relating to unobstructed property. In the Dattaka Chandrika, the Dattaka Mimamsa, and the Saraswathi Vilasa, the rule of Vasishta is quoted as of general application to all cases of partition. The principle underlying these texts is that in the partition of the patrimony *inter se* between the members of the family, the adopted son is only entitled to a limited share. In the case of collateral succession, his share is as extended as that of a natural born son. According to Bodhayana Sutram the adopted child has to give and provide at the time of adoption that he would not claim more than a fourth share of his father's property if a natural son is born. For these reasons we are of opinion that the lower Courts were right in holding that Vasishta's text is applicable to the present case. Applying that rule, the father and the natural son would between them be entitled to eight shares and the adopted son to one share in the property.

We dismiss the second appeal with costs.

N.R.