APPELLATE CIVIL.

Before the Honourable Mr. J. W. F. Beaumont, Chief Justice, and Mr. Justice Baker.

VISHWANATH RAMJI KARALE, MINOR BY HIS GUARDIAN AD-LITEM AND NEXT FRIEND, HIS NATURAL FATHER GANU VYANKU (ORIGINAL PLAINTIFF), APPELLANT *v.* RAHIBAI MARAD RAMJI KARALE AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2 AND 3), RESPONDENTS.* 1930 *July 4.*

Indian Evidence Act (I of 1872), section 65—Secondary evidence admitted by trial Court—Power of Appellate Court to reject such evidence—Certified copy of adoption deed—Deed executed by agriculturist not in accordance with section 63 A of Dekkhan Agriculturists' Relief Act (XVII of 1879)—Registration Act (XVI of 1908), sections 17, 58, 59 and 60.

When the trial Court has admitted secondary evidence after satisfying itself that the original document cannot be produced, the appellate Court should not reject such evidence except in a very clear case of miscarriage of justice.

Srimati Rani Hurripria v. *Rukmini Debi*[1] and *Ningawa* v. *Ramappa*,[2] followed.

That a registered document was duly executed by the executant might be proved by the endorsements of the Sub-Registrar appearing on the document under sections 58, 59 and 60 of the Registration Act.

Thama v. *Govind*,[3] followed.

An adoption deed is not compulsorily registrable under section 17 of the Registration Act as it does not by itself confer the status of an adopted son nor create any interest in the property of the adoptive father and is admissible in evidence in proof of adoption along with other evidence.

Sakharam Krishnaji v. *Madan Krishnaji*,[4] approved.

The adoption deed not being compulsorily registrable under section 17 of the Registration Act the objection that the deed was not admissible under section 63 A of the Dekkhan Agriculturists' Relief Act was not maintainable.

LETTERS Patent Appeal No. 13 of 1928 from the decision of Madgavkar J. in Second Appeal No. 1040 of 1927 preferred against the decision of E. Clements, District Judge of Ahmednagar in Appeal No. 123 of 1926.

*Appeal under the Letters Patent No. 13 of 1928.

(1) (1892) L. R. 19 I. A. 79 at p. 81.
(2) (1903) 28 Bom. 94.
(3) (1907) 9 Bom. L. R. 401.
(4) (1881) 5 Bom. 232.

1930

VISHWANATH RAMJI v. RAHIBAI

Suit to recover possession of property.

The plaintiff Vishwanath Ramji Karale, a minor, alleging that he was the duly adopted son of Ramji, filed this suit against the defendants to recover possession from them of the estate of Ramji which consisted of houses and lands. In support of his adoption he relied upon a certified copy of an adoption deed which was a registered document executed by Ramji on July 5, 1918. The defendants disputed both the factum and validity of the plaintiff's adoption.

At the trial the defendants contended that the certified copy of the deed of adoption was not admissible in evidence but the trial Court overruled that contention and admitted the certified copy of the deed of adoption as secondary evidence in proof of the plaintiff's adoption. It held that Ramji, the executant, had taken away the document from Ganu (the natural father of the plaintiff) for effecting mutation of names in the record of rights and that Ramji's widow, defendant No. 1, when called upon to produce the original was unable to do so. Besides Ganu had no motive in keeping back the original from the Court. The trial Court further held that as the secondary evidence consisted of a certified copy of a registered document no further proof of its execution was required and relying upon the certified copy and the other oral evidence on record found that the plaintiff's adoption was proved and passed a decree in favour of the plaintiff. On appeal, the District Judge held that the certified copy of the deed of adoption was not admissible in evidence as the plaintiff had not proved that the deceased Ramji had executed the deed of adoption and therefore was not entitled to tender the certified copy of the deed as

secondary evidence. The copy was also held inadmissible as the adoption deed was not executed according to the formalities laid down in section 63 A of the Dekkhan Agriculturists' Relief Act. The District Judge further held that the oral evidence of the plaintiff was not quite sufficient to prove his adoption and accordingly he dismissed the suit.

The plaintiff appealed to the High Court.

D. R. Patwardhan, for the appellant.

D. S. Varde, for the respondents.

BAKER, J. :—The plaintiff sued to recover possession of the plaint property alleging that he was the adopted son of one Ramji Mayaji, husband of defendant No. 1. Defendant No. 1 the widow contested the factum and validity of the adoption. Defendant No. 2 was the husband's brother's wife of defendant No. 1. The trial Judge awarded the plaintiff's claim, holding the adoption proved, but on appeal the decree was reversed by the District Judge of Ahmednagar on the ground that the trial Court had improperly admitted into evidence a certified copy of the adoption deed executed by Ramji, and that the adoption was not proved. Against this decision a second appeal was presented. That appeal was summarily dismissed, and under the Letters Patent an appeal against that decision has been admitted.

The sole point in this appeal is whether the first Court acted improperly in admitting into evidence the certified copy of the adoption deed. According to the plaintiff's natural father Ganu the adoption deed after registration was returned to the executant the adoptive father and was taken away by him for the purpose of getting the names transferred in the Record of Rights and that

1930

VISHWANATH RAMJI v. RAHIBAI

Baker J.

it was never seen again. The first Court held that it was proved by Ganu that Ramji took away the deed on the pretext that he wanted it for transferring the lands in the name of the adopted boy. He says :—

"On this point, Exhibit 28 Ganu Vyanku is not cross-examined and there is no reason why this story should be disbelieved. The possession of the original document is therefore proved to have been with Ramji and defendant No. 1 being his widow must naturally be in possession of it. She was summoned to produce the original deed, but says she has not got it. It may be pointed out that Ganu Vyanku can have no ulterior motive in keeping back the original document if he had it. The original not coming forward, the plaintiff is entitled to prove the document by producing secondary evidence, namely, the certified copy."

The learned Judge further held :—

"A reference to sections 63, 65, 66, 76 and 89 of the Evidence Act will show that when the secondary evidence produced is a certified copy allowed by law, no further proof of its execution is required. I hold that the certified copy, Exhibit 65, is admissible in evidence. I am satisfied from the oral and documentary evidence that the plaintiff's adoption is proved."

The view of the learned District Judge on appeal was that—

"The plaint says nothing about the adoption deed, but one year and seven months after the plaint, the respondent asks for a summons to the first appellant to produce it. The lower Court places implicit reliance on the plaintiff and allows him to put in a certified copy. The lower Court's argument is that if he had the original he would no doubt produce it. This argument appears to me to assume that the original is a genuine document—a point upon which there is very considerable room for doubt. I think the lower Court was wrong in allowing secondary evidence of the document. The lower Court has not even insisted on proof that any such document was ever executed by the deceased Ramji. The person who is said to have identified him before the Sub-Registrar is not examined. The respondent cited the writer and witnesses, but did not examine them. The result of this extraordinary conduct of the case is that the plaintiff is allowed to accuse his adversary without any proof of having a certain document, and is allowed to take every advantage of this accusation, being exempted thereby from his obligation to prove the execution of the document. I find that the certified copy of the adoption deed was wrongly admitted."

It is argued on behalf of the appellant that the discretion as to admitting secondary evidence rests in the trial Court and reference has been made to the judgment of this Court in *Ningawa* v. *Ramappa*,[1]

[1] (1903) 28 Bom. 94.

which lays down that the question whether secondary evidence was in any given case rightly admitted is one which is proper to be decided by the Judge of first instance and is treated as depending very much on his discretion and that his conclusion should not be overruled except in a very clear case of miscarriage. In the present case there was the evidence that the adoption deed was handed over to the executant, the adopting father, for a certain purpose and was taken away by him and has not since been seen. The witness Ganu was not cross-examined on that point. Moreover, the remark of the learned Subordinate Judge that if the document was in his possession he would certainly have produced it, as it supports his case, has a good deal of force in it. That the question whether a certified copy should or should not be admitted is one within the discretion of the trying Judge has again been held in the Privy Council case of *Srimati Rani Hurripria* v. *Rukmini Debi*.[1]

Then as to the proof, the document in this particular instance has been registered and bears the necessary endorsements by the Sub-Registrar before whom the executant was identified by the Kulkarni of the village. The effect of registration has been considered by this Court in *Thama* v. *Govind*,[2] where it was held that sections 58, 59 and 60 of the Indian Registration Act provide that the facts mentioned in the endorsement may be proved by those endorsements provided the provisions of section 60 have been complied with. The endorsement of the Sub-Registrar in the present case shows that Ramji the executant admitted execution of the document and gave his thumb impression and

[1] (1892) L. R. 19 I. A. 79 at p. 81. [2] (1907) 9 Bom. L. R. 401.

1930

VISHWANATH RAMJI v. RAHIBAI

Baker J.

that he was identified before the Sub-Registrar by Keshav Hari Talati who was known to the Sub-Registrar. In these circumstances the view of the first Court that the copy of the adoption deed is admissible in evidence and that it is sufficiently proved appears to be correct.

However, a second objection was taken to the admissibility of this document by the learned District Judge under section 63 A of the Dekkhan Agriculturists' Relief Act. The parties in this case are agriculturists and section 63 A provides that when an agriculturist intends to execute any instrument required by section 17 of the Indian Registration Act, to be registered under that Act, he shall appear before the Sub-Registrar within whose sub-district the whole or some portion of the property to which the instrument is to relate is situate and the document must be written either by the Sub-Registrar or in his presence in accordance with the provisions of sections 57 and 59 of the Act and then be registered under the Indian Registration Act. The effect of this provision is that such documents as are required by section 17 of the Registration Act to be registered must in the case of agriculturists be written either by or in the presence of the Sub-Registrar and be subject to certain formalities. Now admittedly, this document was not written in the presence of the Sub-Registrar or by him, and the question then would be whether an adoption deed of this nature requires registration. Under section 17 of the Indian Registration Act, adoption deeds in themselves are not compulsorily registrable, but it is contended that by this adoption deed Ramji the adopter created an interest of Rs. 100 or upwards in immoveable property and therefore the document would be compulsorily registrable. The answer to that is that it is not the adoption deed which confers the status of an adopted son or any interest in

the property of the adoptive father, but the adoption itself which in this case had taken place some days earlier. A perfectly valid adoption can be made without an adoption deed and any status which the adopted son gets by the adoption is due to the proper ceremonies being performed and not to any deed passed as eivdence of that adoption. It has been suggested, however, that the case of *Pirsab valad Kasimsab* v. *Gurappa Basappa*[1] leads to a contrary conclusion. But that case supports my view. It says that a deed of adoption by which an interest is reserved to the wife of the adopter in immoveable property which she otherwise would not have possessed and could not have possessed, when such interest exceeds in value Rs 100 requires registration. That, however, is a case in which the adoption deed created an interest in a third person and not in the adopted son and therefore it does not in any way conflict with the principle that it is the act of adoption and not the adoption deed which gives rise to the rights of an adopted son. There can, therefore, be no question that the adoption deed does not purport to create, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards in immoveable property. It has, however, been suggested that it operates to declare such interest and the question will therefore arise, what is meant by declaring an interest in immoveable property. On this point we have a ruling of this Court in *Sakharam Krishnaji* v. *Madan Krishnaji*,[2] where it is laid down (p. 236) :—

"There [i.e., in section 17 of the Indian Registration Act III of 1877] 'declare' is placed along with 'create,' 'assign,' 'limit,' or 'extinguish' a 'right, title or interest,' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. . . . It implies a declaration of will, not a mere statement of a fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the

[1] (1913) 38 Bom. 227.

[2] (1881) 5 Bom. 232.

1930

VISHWANATH RAMJI v. RAHIBAI

Baker J.

intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not 'declare' a right within the meaning of the section. . . . it is not the expression or declaration of will by which the right is constituted."

Applying these principles to the present case it will be seen that the adoption deed is not the expression or declaration of will by which the right is constituted but merely a recital of an act which has already taken place. As I have already pointed out, it is not the adoption deed by which the rights of the adopted son are created but the adoption itself and any wording in the adoption deed cannot either create or limit any rights which the adopted son gets by his adoption. The result of this is that the adoption deed must be regarded as admissible in evidence, and, taken in conjunction with the oral evidence, is sufficient evidence of the proof of the adoption. We would, therefore, set aside the decree of the lower appellate Court and restore the decree of the first Court with costs throughout. The rule for stay of execution is made absolute with costs.

Decree set aside.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Madgavkar and Mr. Justice Barlee.

1930
July 7.

HARIDAS HIMATLAL, A MINOR, BY HIS NEXT FRIEND HIS MOTHER ITCHHA, WIFE OF HIMATLAL MAGANLAL (ORIGINAL APPLICANT), APPELLANT *v.* LALLUBHAI MULCHAND MEHTA, THE RECEIVER OF THE ESTATE OF THE INSOLVENT, HIMATLAL MAGANLAL, CLERK IN THE COURT OF THE FIRST CLASS SUBORDINATE JUDGE AT NADIAD (ORIGINAL OPPONENT), RESPONDENT.*

Provincial Insolvency Act (V of 1920), sections 2 sub-section (d), 37, 67—Presidency-towns Insolvency Act (III of 1909), sections 2 sub-section (e), 52—Father of joint Hindu family adjudicated insolvent—Right of Receiver to sell son's share—Return of any surplus to son.

Upon a Hindu father being adjudicated an insolvent under the Provincial Insolvency Act, 1920, the power of the father to dispose of the family estate (including his sons' share) for paying his just debts vests in the receiver of his property. The receiver is therefore entitled to sell the joint family estate including the sons' share therein to satisfy the debts of the father.

*Appeal No. 748 of 1928 from Appellate Decree.