necessary is section 123 of the Transfer of Property Act which relates to gifts, but the transaction with which we are concerned was obviously not a gift. In my opinion Mr. Desai has been quite unable to show that a document was necessary to give effect to a family arrangement of this kind. The plaintiff is suing to get possession of the whole property and it is for him to establish his title to it. If, as we hold, the agreement subject to which he was adopted is valid, then he has failed to establish his title, and I consider that the lower Courts were right and that the appeal should be dismissed.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

1932 *February* 5.

SHANKARAPPA KOTRABASAPPA HARPANHALLI (ORIGINAL PLAINTIFF), APPELLANT *v.* KHATUMBI KOM JAMALUDDINSAB NASHIPUDI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 6 (e)—Property sold along with right to recover mesne profits—Sale not void—Meaning of the word "mere".

If along with land the right to recover the profits of land which have already accrued due is sold, the subject-matter of the sale is not a "bare" or "mere" right to sue, and section 6 (*e*) of the Transfer of Property Act, 1882, does not apply and the sale is valid. What is sold in such a case is not a mere right to sue but property with an *incidental* right *attached* to the property itself.

Definition of the word "mere" means "bare" right to sue.

Ellis v. *Torrington,*[1] *Monmatha Nath Dutt* v. *Matilal Mitra,*[2] *Ganga Din* v. *Piyare*[3] and *Jagannath* v. *Kalidas,*[4] relied on.

Seetamma v. *Venkataramanayya,*[5] disapproved.

SECOND APPEAL against the decision of D. V. Yennemadi, District Judge at Dharwar, reversing the decree passed by M. B. Honavar, Joint Subordinate Judge at Haveri.

*Second Appeal No. 680 of 1929.

(1) [1920] 1 K. B. 399.
(2) (1928) 33 Cal. W. N. 614.
(3) [1929] A. I. R. (All.) 63.
(4) [1929] A. I. R. (Pat.) 245.
(5) (1913) 38 Mad. 308.

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Suit to recover possession.

The property in suit originally belonged to defendants Nos. 1 to 4 and one Aminabi.

On July 8, 1925, Aminabi sold her one-fifth share in the plaint property along with her right to recover mesne profits for four years before that date to the plaintiff by means of a registered sale deed.

Plaintiff demanded separate possession of his share from the defendants but they refused to comply, whereupon the plaintiff instituted the present suit to recover by partition one-fifth share in the plaint property with mesne profits mentioned in the sale deed.

The Subordinate Judge decreed the plaintiff's claim.

Against this decision the defendants appealed to the Court of the District Judge where the defendants raised a contention that the right to recover mesne profits could not be legally sold along with the land under section 6 (*e*) of the Transfer of Property Act, 1882, and that as the consideration for the two transactions was simple and indivisible, the sale deed was void under section 24 of the Indian Contract Act. This contention was upheld by the District Judge who relied on *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India,*[1] *Seetamma* v. *Venkataramanayya,*[2] *Har Prasad Tiwari* v. *Sheo Gobind Tiwari,*[3] and *Kathu Jairam* v. *Vishwanath Ganesh.*[4]

He accordingly allowed the appeal and dismissed the suit.

Plaintiff appealed to the High Court.

A. G. Desai, for the appellant.

D. R. Manerikar, for respondents Nos. 1 to 4.

RANGNEKAR J. This appeal raises an important question of law, which has not come up for decision yet in this Court.

[1] (1883) 9 Cal. 695.
[2] (1913) 38 Mad. 308.
[3] (1922) 44 All. 486.
[4] (1925) 49 Bom. 619.

The plaintiff-appellant brought this suit to recover a one-fifth share in the property in suit by partition and mesne profits. It appears that defendants Nos. 1 to 4 and Aminabi were co-owners of certain property and obtained a decree for possession of the same in Suit No. 229 of 1912. On July 8, 1925, Aminabi sold her one-fifth share in the property to the plaintiff by a registered sale deed, and this suit was filed by the plaintiff on that sale deed. The defendants claimed a right of pre-emption. This was, however, found against them and a decree for partition was passed by the trial Court. In appeal by the defendants the question as to the right of pre-emption was given up, and the only point raised was whether the sale deed was void as Aminabi had sold the right to recover mesne profits along with her share, and as a right to recover mesne profits could not be legally sold, the whole transaction was void. The plaintiff-appellant objected to the plea on the ground that it was not raised in the trial Court, but the learned Judge rightly rejected this contention. He held that as the sale was of land as well as the right to recover mesne profits, and that as mesne profits were in the nature of damages, the whole transaction was void under section 6 (*e*) of the Transfer of Property Act. He found that the consideration paid by the plaintiff was a single consideration for both land and the right to mesne profits, and that the transaction was indivisible and the sale void. The learned Judge relied upon *Har Prasad Tiwari* v. *Sheo Gobind Tiwari*[1] and *Kathu Jairam* v. *Vishwanath Ganesh*,[2] which I think had no application to the facts of this case. He further referred to *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India*[3] and *Seetamma* v. *Venkataramanayya*.[4] The question is whether the decision is right.

Mr. Desai for the appellant has argued that, assuming that the right to recover mesne profits cannot be legally sold,

(1) (1922) 44 All. 486.
(2) (1925) 49 Bom. 619.
(3) (1883) 9 Cal. 695.
(4) (1913) 38 Mad. 308.

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where there is a sale of land and a right to recover mesne profits of that land is sold with it, section 6 (*e*) of the Transfer of Property Act does not apply, and the sale is valid even though the consideration is not severable. It is common ground that what was sold was the one-fifth share of Aminabi and mesne profits appertaining to that share.

Section 6 (*e*) of the Act runs as follows: "A mere right to sue cannot be transferred." Now the word "mere" seems to me to be important and, apart from any authority, what the section means is that what is known in English law as a "bare" right to sue cannot be transferred. But if along with the land the right to recover the profits of the land which have already accrued due is sold, then it is difficult to see how it can be said that the subject matter of the sale is a "bare" or a "mere" right to sue. In such a case, in my opinion, the section would not apply and the transaction would not be illegal. In such a case what is sold is not a mere right to sue, but property with an *incidental* right *attached* to the property itself.

There is ample authority for this view. In *Ellis* v. *Torrington*[1] Bankes L. J. stated that the rule that a bare right of action for damages is not assignable rested on the principle that the law will not recognise any transaction savouring of maintenance or champerty, and that there is an exception to the rule, and the exception is where the assignee can establish that he has an interest in the suit. The learned Lord Justice then referred to the observations of Best C. J. in *Williams* v. *Protheroe,*[2] and observed (p. 407) :—

> "It was held then that the purchase of an estate conferred on the purchaser an interest sufficient to validate an assignment of a right of action for damages for breach of a covenant to repair the premises, and that the law of champerty could not be invoked to defeat his rights under the assignment."

The learned Lord Justice was of opinion that where a right to profit is appurtenant to the right to property, it is not

(1) [1920] 1. K. B. 399. (2) (1829) 2 M. & P. 779.

a bare right to sue. The judgment of Scrutton L. J. is very instructive on the point under consideration. The learned Lord Justice pointed out that early in the development of the law the Courts of equity and perhaps the Courts of common law also took the view that where the right of action was not a bare right, but was incidental or subsidiary to a right in property, an assignment of a right of action was permissible, and did not savour of champerty or maintenance. In support of this statement the learned Lord Justice referred to *Glegg* v. *Bromley*,[1] *Dawson* v. *Great Northern and City Railway*,[2] and *Dickinson* v. *Burrell*.[3] All these cases emphasize the distinction between the assignment of a bare right of action for damages and the sale of property with all incidents attached to it, and upheld the validity of the latter. Warrington L. J. also took the same view.

Turning to the Indian cases, I find that the same view is taken by at least three of our High Courts. In *Monmatha Nath Dutt* v. *Matilal Mitra*,[4] Ghose J. observed at page 617 as follows :—

"In this case the question is whether what was assigned was a mere right to sue or property with an incidental remedy for its recovery and consequential benefit. An assignment of a mere right to sue does not convey any property, *e.g.*, if any person out of possession of immoveable property makes an assignment to the effect that the assignee would have a right to sue, without conveying any interest in the property, the assignee would not be entitled to maintain any suit for the recovery of the property. But it would be otherwise if the property itself is transferred."

In *Ganga Din* v. *Piyare*[5] Mukerji J. observed as follows :—

"With all respects to the learned Judges who decided the case of *Seetamma* v. *Venkataramanayya*,[6] I am unable to hold that a right to claim mesne profits is a 'mere right to sue' within the meaning of Section 6, Transfer of Property Act. I may point out that in the Madras High Court itself the soundness of this decision has been doubted in *Venkatarama Aiyar* v. *Ramasami Aiyar*.[7]

[1] [1912] 3 K. B. 474.
[2] [1905] 1 K. B. 260.
[3] (1866) L. R. 1 Eq. 337.
[4] (1928) 33 Cal. W. N. 614.
[5] [1929] A. I. R. (All.) 63.
[6] (1913) 38 Mad. 308.
[7] (1920) 44 Mad. 539.

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Mesne profits has been defined in the Civil Procedure Code as:

'those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits.'

A person who is entitled to a property in the possession of a trespasser is entitled not only to the property but to the profits of which he has been improperly deprived. The profits rightfully belong to the owner of the land and it is not accurate to say that the profits are payable merely by way of damages."

In *Jagannath* v. *Kalidas*[1] Chatterji J. observed at page 247 as follows:

"A point was argued by the learned advocate for the respondent that what was purchased was a right to sue for compensation and that this cannot be transferred. Under Section 6, Clause (*e*), Transfer of Property Act, the prohibition is against the transfer of a mere right to sue. The word 'mere' implies that the transferee acquires no interest in the subject of transfer other than the right to sue. But in the present case what has been purchased is the tank and along with it any covenant running with the land has passed to the plaintiff and by virtue thereof the plaintiff brings this action. It cannot, therefore, be stated that what has been purchased is a mere right to sue. The test to be applied is pointed out in *Glegg* v. *Bromley*[2] quoted with approval in *Jai Narayan Pande* v. *Kishun Dutta Misra*[3]:

'The question was whether the subject matter of the assignment was, in the view of the Court, property with incidental remedy for its recovery or was a bare right to bring an action either at law or in equity.'

Applying that principle it cannot be asserted that what was assigned to the plaintiff was a bare right to bring a suit. I am unable to accept the contention put forward on behalf of the respondent in this respect."

This brings me to the Madras decision on which Mr. Manerikar relies. In *Seetamma* v. *Venkataramanayya*[4] it was held that a transfer of a claim for past mense profits is invalid under clause (*e*) of section 6 of the Transfer of Property Act. As far as I can see, in the short judgment in that case the distinction between a mere right to recover mesne profits and right to recover mense profits incidental to the property sold is not at all noticed. The learned Judges simply referred to an earlier case in *Shyam Chand Koondoo* v. *The land Mortgage Bank of India*[5] and an

(1) [1929] A. I. R. (Pat.) 245.
(2) [1912] 3 K. B. 474.
(3) (1924) 3 Pat. 575.
(4) (1913) 38 Mad. 308.
(5) (1883) 9 Cal. 695.

equally earlier case of *Pragi Lal* v. *Fateh Chand*.[1] They also referred to a Madras decision, *Varahaswami* v *Ramchandra Raju*.[2] The claim in that case was, as appears from the head-note, to recover damages from an agent for being negligent in collecting rent, and it was held that it was a mere right to sue within the meaning of section 6 (*e*) of the Transfer of Property Act. *Seetamma* v. *Venkataramanayya*,[3] however, was doubted in a later case of *Venkatarama Aiyar* v. *Ramasami Aiyar*.[4] Mr. Justice Sadasiva Ayyar stated that the decision in *Seetamma's* case[3] and some other cases was the result of what he thought was an unnecessarily close adherence to the law of torts in English Courts. Mr. Justice Seshagiri Aiyyar rested his decision on *Ellis* v. *Torrington*.[5] The learned Judge then referred to *Seetamma's* case[3] and to another case to which he was a party and observed that these decisions did not seem to have recognised the distinction between a bare right to sue and a right which was only subsidiary to the enjoyment of the property itself. The learned Judge observed as follows at page 543 :--

" If the decision to which I was a party is to be understood as laying down that even in cases of actual transfer of mesne profits as subsidiary to the enjoyment of the property the right cannot be enforced, I am not prepared to stand by it."

As far as I can see, the course of decisions in Madras does not seem to be uniform. Whatever the view of the Madras High Court may be, I am unable to agree with the view taken in *Seetamma's* case,[3] and in my opinion, the word " mere " in clause (*e*) of section 6 makes the position clear. The rule, as pointed out by Bankes L. J., is based on champerty and maintenance, and these specific rules of English law against maintenance and champerty have not been adopted in British India.

[1] (1882) 5 All. 207.
[2] (1913) 24 Mad. L. J. 298.
[3] (1913) 38 Mad. 308.
[4] (1920) 44 Mad. 539.
[5] [1920] 1 K. B. 399.

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I am, therefore, unable to accept the view taken by the lower appellate Court, and the appeal must be allowed. The decree of the lower appellate Court is set aside and that of the trial Court is restored with all costs throughout.

Appeal allowed.

J. G. R.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Broomfield.

1932
February 26.

GANGADHAR NARAYAN INAMDAR AND ANOTHER, GRANDSONS, HEIRS AND LEGAL REPRESENTATIVES OF THE DECEASED HARI GANESH KULKARNI (HEIRS OF ORIGINAL DEFENDANT NO. 1), APPELLANTS *v.* PRABHUDHA ALIAS BANDU VASUDEV MOHALKAR AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 2 TO 5), RESPONDENTS.*

Hindu law—Surrender—Deed of gift by Hindu widow of property inherited from husband in favour of daughter—Stipulation in the deed for maintenance of widow and daughter-in-law out of portion of property gifted—Nature of the transaction.

L, a Hindu widow, executed a deed of gift in favour of her daughter K who was the next reversioner, by which she gave her the estate comprising 231 acres and 32 gunthas inherited by her from her husband. Out of the estate so gifted, the widow reserved 42 acres and 31 gunthas for the maintenance of herself and her daughter-in-law.

Held, that the transaction embodied in the deed of gift did not amount to a valid surrender by a Hindu widow of her estate in favour of the reversioner but was a mere device on her part to divide the estate with the reversioner.

Authorities on the question of surrender by a Hindu widow reviewed.

Rangasami Gounden v. *Nachiappa Gounden*[1]; *Bhagwat Koer* v. *Dhanukhdhari Prashad Singh*[2]; *Sureshwar Misser* v. *Maheshrani Misrain*[3]; *Rama Nana* v. *Dhondi Murari*[4]; *Sakharam Bala* v. *Thama*[5]; *Man Singh* v. *Nowlakhbati*[6]; *Anna* v. *Gojra*[7]; *Govindprasad* v. *Shivlinga*[8]; *Angamuthu Chetti* v. *Varatharajulu Chetti*[9] and *Adiveppa* v. *Tontappa*,[10] referred to.

*Appeal from Order No. 2 of 1931.

(1) (1918) L. R. 46 I. A. 72 : 42 Mad. 523.
(2) (1919) L. R. 46 I. A. 259 : 47 Cal. 466.
(3) (1920) L. R. 47 I. A. 233 : 48 Cal. 100.
(4) (1923) 47 Bom. 678.
(5) (1927) 51 Bom. 1019.
(6) (1925) L. R. 53 I. A. 11.
(7) (1928) 30 Bom. L. R. 867.
(8) (1930) 32 Bom. L. R. 1482.
(9) (1919) 42 Mad. 854.
(10) (1919) 44 Bom. 255.