APPELLATE CIVIL.

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

PANDURANG SAKHARAM THAKUR (ORIGINAL PLAINTIFF), APPELLANT *v.* NARMADABAI, WIFE OF RAMKRISHNA APPAJI KELUSKAR AND OTHER (ORIGINAL DEFENDANTS), RESPONDENTS.* 1932 *January* 28.

Hindu Law—Adoption—Adopted son sui juris—Agreement as to property entered into with adoptive father—Adopted son bound by the agreement.

Where a Hindu, who is *sui juris*, agrees to be given in adoption and at the same time agrees with his adoptive father that on that event happening he will carry out certain agreements as to the property which he will acquire on adoption, he is bound by that agreement, and is not at liberty to accept the adoption and disregard the agreement.

Kashibai v. *Tatya*[1] and *Ramasawmi Aiyan* v. *Vencataramaiyan*,[2] relied on.

Krishnamurthi Ayyar v. *Krishnamurthi Ayyar*,[3] considered.

Shivram v. *Ramkrishna*,[4] distinguished.

Kashibai v. *Tatya*[1] was not cited nor in terms overruled by Privy Council in *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar*.[3]

SECOND APPEAL against the decision of E. Weston, District Judge at Ratnagiri, confirming the decree passed by M. H. Limaye, Second Class Subordinate Judge at Vengurla.

Suit to recover possession.

The following statement of the facts is taken from the Judgment of the Chief Justice: The plaintiff sued for possession of the suit property, and his case was that he had been taken in adoption by one Sakharam, and that the property in suit was part of Sakharam's ancestral property which had descended to the plaintiff, and that the defendants were wrongly in possession of it.

The facts are that Sakharam had a brother named Soire who died in 1893. Defendant No. 1 is the daughter of Soire, and defendant No. 2 is her husband; defendant No. 3, who

*Second Appeal No. 447 of 1928.

(1) (1916) 40 Bom. 668.
(2) (1879) L. R. 6 I. A. 196 : 2 Mad. 91.
(3) (1927) L. R. 54 I. A. 248 : 50 Mad. 508.
(4) (1929) 31 Bom. L. R. 1246.

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died pending the suit, was the widow of Soire. In 1921 Sakharam adopted the plaintiff, and in 1924 Sakharam died. The defence to the plaintiff's claim to possession of the property was that at the time of the adoption Sakharam and the plaintiff agreed that the plaintiff should not claim more than half of the ancestral property. The learned trial Judge found in answer to the issues which he raised, that the plaintiff was taken in adoption on the express understanding and agreement that plaintiff was to get Sakharam's moiety only, and that defendants Nos. 1 and 3 were to get the other moiety. It is not clear from his judgment what the terms of the agreement were. It is not disputed that it was an oral agreement, and there is nothing in writing of any relevance. The learned Judge in the course of his judgment says :—

"The conclusion I then arrive at—on giving the case my best and anxious consideration—is that there was an express agreement by which plaintiff on adoption was to get no more than the moiety of the immoveable property, and that Sakharam had given with plaintiff's knowledge and after due deliberation the other moiety to defendants, whom he naturally and tenderly loved."

In the result he dismissed the plaintiff's claim for exclusive possession. From the whole judgment it is not clear whether the adoption was made on the basis that half the property should thereafter be given to defendants, or whether such half had been given before the adoption. There was an appeal, and in the lower appellate Court it is again difficult to discover exactly what the agreement was which the Court held proved. The learned Judge says :—

"Considering the probabilities of the case I am of opinion that the lower Court's conclusion is correct and that the adoption took place on the understanding that defendant No. 1 was to have half the property. It is not disputed that under these circumstances plaintiff can obtain only one-half share."

There was then an appeal which came on before Mr. Justice Madgavkar, and that learned Judge referred to the fact that since the decision in the lower Courts there had been a case before the Privy Council, *Krishnamurthi Ayyar* v.

Krishnamurthi Ayyar,[1] which seemed to suggest that the admission as to the law which was made in the lower appellate Court was possibly not sound. The learned Judge was doubtful as to whether Sakharam and Soire had originally been joint or separate. If they were separate, no question would arise: the plaintiff could not get more than the half-share of the property which belonged to Sakharam at the date of adoption. It is, I think, also clear that if the agreement on adoption between Sakharam and the plaintiff was made after the half of the property of Sakharam had been made over to defendants Nos. 1 and 3 no question would arise, as the plaintiff would only be entitled in that event to Sakharam's moiety. But Mr. Justice Madgavkar thought that on the findings before him it was difficult for him to arrive at a conclusion, and therefore he referred the matter back to the trial Court to determine whether Sakharam and Soire were joint or separate in interest at the time of the plaintiff's adoption. The lower Court has found that they were joint.

A. G. Desai, for the appellant.

T. N. Walawalkar, for respondent No. 2.

BEAUMONT C. J. This is a second appeal from a decision of the District Judge of Ratnagiri. [His Lordship stated the facts as above set out and continued :]

Now, putting the case at the highest in the plaintiff's favour it comes to this, that at the time of his adoption Sakharam was the owner of the whole of the family property, and that he agreed with plaintiff that after adoption the plaintiff should only get half of the joint property, and the other half should go to the defendants as claiming through Sakharam's brother. On that basis, Mr. Desai on behalf of the plaintiff says that the agreement is void, and that he is entitled to the whole property. He contends that, although the plaintiff was 30 years old at the date of the

[1] (1927) L. R. 54 I. A. 248 : 50 Mad. 508.

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adoption, and although he may have agreed that if Sakharam would adopt him he would allow half the family property to go to Sakharam's relations, nevertheless he is entitled now to claim the benefit of the adoption, and not carry out that agreement, and he says that we are bound to arrive at that conclusion because of the case in the Privy Council to which I have referred. But before coming to that case I would point out that this very question is covered by a decision of this Court in *Kashibai* v. *Tatya*.[1] In that case it was held that an adopted son who was of full age, having deliberately made an arrangement as to the extent of his interest in the property of his adoptive father at the time of his adoption, was bound by it. That case was not cited and is not in terms overruled by *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar*[2] in the Privy Council. In that case the agreement in question was made on the adoption of an infant, and was made by the natural father on behalf of the infant, and what the Court held was that, except in respect of an arrangement whereby the widow of the adoptive father is to enjoy the property during her life or for a less period, any arrangement or agreement made by a natural father on behalf of an infant on the occasion of his adoption is not effectual to limit the rights of the adopted son. Their Lordships dealt at length with the cases and they arrived at the conclusion I have stated. But at page 263 they say this :—

"Next, can the case be solved by the doctrine of approbate and reprobate ? Their Lordships think clearly not, for the doctrine of approbate and reprobate assumes election, and the adopted son has no election. He cannot undo the adoption and be as he was. The same fact destroys the idea of conditional adoption. The adoption cannot be undone ; it cannot, therefore, be conditional."

Mr. Desai on behalf of the plaintiff-appellant says that that statement of the law is a general statement, and applies whether the person adopted is a major or a minor. But I think the statement must be taken in connection with the facts of the case then before their Lordships, particularly the fact that the adopted person was a minor. I cannot

[1] (1916) 40 Bom. 668. [2] (1927) L. R. 54 I. A. 248 : 50 Mad. 508.

myself see why, in the case of a major, the doctrine of approbate and reprobate should not apply. It is quite true that a person adopted, whether a major or a minor, cannot afterwards get out of the adoption. But it seems to me that where a major is adopted he has an election whether he will be adopted or not. No doubt he is given in adoption by his natural father if he has one, and, if he has not, then by his mother. But obviously, if he is *sui juris*, he is entitled to say that he refuses to be given in adoption. If he agrees to be given in adoption and at the same time agrees that on that event happening he will carry out certain arrangements as to the property which he will acquire on adoption, I cannot see why he should be at liberty to accept the adoption and disregard the agreement. I know of no principle in Hindu or English law which enables that to be done and I do not think that their Lordships of the Privy Council intended to hold that such a thing was legal. Amongst the cases which are referred to in the judgment of the Privy Council is the case of *Ramasawmi Aiyan* v. *Vencataramaiyan*[1] which seems to me to be a strong authority in favour of the view that a major is bound by an agreement which he makes on adoption. In that case a Hindu widow during the lifetime of her minor son alienated part of her husband's estate, and after the son's death she, under an authority from her husband, adopted the plaintiff, who was then an infant, and the plaintiff's natural father gave him in adoption under an agreement that he would inherit only about one-third of his late adoptive father's estate ; that is to say, the father agreed in substance on behalf of his minor son that he would not challenge the alienation of the two-thirds made by the widow. Two years after the plaintiff's coming of age he entered into an agreement, which the Privy Council held amounted to a ratification of the agreement made on his behalf by his natural father on the occasion of the adoption, and the Privy Council held that that ratification was

[1] (1879) L. R. 6 I. A. 196 : 2 Mad. 91.

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effective. If the ratification was effective it necessarily follows that the agreement which was ratified might have been made by the ratifying party. There can be no ratification of an agreement which the person ratifying was not competent to make. Therefore it seems to me that that decision is an authority for saying that the adoptive son could himself have made an agreement affecting his interest in the property of his adoptive father had he been *sui juris*.

We were also referred to a decision of Mr. Justice Madgavkar in *Shivram* v. *Ramkrishna*[1] in which he discusses the case of *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar*.[2] The case before Mr. Justice Madgavkar is clearly distinguishable from the present case because there a Hindu had made a will dealing with his property in a certain manner, and after that he adopted the defendant who was a major, and subsequently died; the will of course took effect from the death of the testator, and therefore that was a case of the adoptive father, after the adoption, disposing of the joint property in a way which he could not do; there was apparently some suggestion that at the time of the adoption the person adopted agreed to carry out the terms of the will, but I do not find that it was proved that any such agreement was made. I think, therefore, that case is distinguishable from the present case, but I am not prepared to accept some of the dicta of Mr. Justice Madgavkar as to the effect of the Privy Council decision.

It seems to me that we are bound by *Kashibai* v. *Tatya*[3] which is a decision of this Court, and that we cannot hold that that case is impliedly overruled by the decision of the Privy Council in which it was not cited. Moreover, if we adopted that course we should really be departing from the principle on which the decision of the Privy Council in *Ramasawmi Aiyan* v. *Vencataramaiyan*[4] was based.

(1) (1929) 31 Bom. L. R. 1246.
(2) (1927) L. R. 54 I. A. 248: 50 Mad. 508
(3) (1916) 40 Bom. 668.
(4) (1879) L. R. 6 I. A. 196: 2 Mad. 91.

Mr. Desai also took a further point, viz., that the agreement, under which the defendants claim, is void as not being in writing or registered. But I am quite unable to see that there is any force in that argument. The suggestion is that the agreement amounts to a gift which requires to be in writing under section 123 of the Transfer of Property Act, and that the written document ought to have been registered. But in point of fact there is no gift and no document and as far as I can see no foundation for applying either section 123 of the Transfer of Property Act or section 17 of the Indian Registration Act. The defendants are in possession and the plaintiff is suing to oust them; he sets up his title as the adopted son of Sakharam, and the answer to him is the agreement that he would not claim more than half the property. In my opinion there is nothing whatever in that second point. I think, therefore, that the appeal must be dismissed with costs. The Civil Application also is dismissed with costs.

BROOMFIELD J. In view of the finding that the brothers Sakharam and Soire were joint, the plaintiff as the adopted son of Sakharam would be the owner of the whole property in suit unless he is bound by the agreement which he entered into at the time of the adoption. According to the decision of this Court in *Kashibai* v. *Tatya*[1] he is bound by that agreement and the principal question in this appeal is whether, as Mr. Desai for the appellant-plaintiff contends, that decision has been overruled by implication by the decision of the Privy Council in *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar*.[2] In that case the Privy Council were dealing with a minor who had been given in adoption with the consent of his natural father. We have gone carefully through the judgment and in my opinion it is clear that their Lordships had not the case of an adult son in their minds at all. Although

[1] (1916) 40 Bom. 668.

[2] (1927) L. R. 54 I. A. 248; 50 Mad. 508.

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numerous decisions were cited, there was not a single case referred to in which the person given in adoption was *sui juris*, although there would seem to have been no reason at all why the case of *Kashibai* v. *Tatya*[1] should not have been cited along with the other Bombay decisions if the minority of the adopted son had not been an essential factor in the question which was then being considered. I agree also with the learned Chief Justice that the remarks of their Lordships of the Privy Council with respect to the doctrine of approbate and reprobate are difficult to understand except on the assumption that they were dealing with the case of a minor. I am unable to see how an adult person who is given in adoption can be said to have no election. He can presumably elect that he will not go in adoption at all if the conditions are not satisfactory to him. In another case decided by the Privy Council, *Ramasawmi Aiyan* v. *Vencataramaiyan*,[2] it was held that an agreement by the natural father limiting the rights of the adopted son was not void but capable of ratification on the adopted son's coming of age. In the case of *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar*[3] their Lordships have not suggested that this previous case was wrongly decided, and it seems clearly to follow from it that if the agreement had been made by the adopted son himself being of full age it would have been a valid agreement.

The only other point taken by Mr. Desai is that we have no document evidencing the transaction and he has argued that the agreement set up is not valid and cannot be given effect to without an instrument registered under section 17 of the Indian Registration Act. Obviously the provision in the Indian Registration Act requiring certain documents to be registered has no application until it is first shown that a document is necessary. The only provision to which Mr. Desai referred us as showing that a document was

[1] (1916) 40 Bom. 668. [2] (1879) L. R. 6 I. A. 196 : 2 Mad. 91.
[3] (1927) L. R. 54 I. A. 248 : 50 Mad 508.

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.

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.