ORIGINAL CIVIL.

Before Mr. Justice Scott.

KASHINATH CHIMNAJI, MINOR, BY HIS MOTHER AND NEXT FRIEND REVABAI, PLAINTIFF, *v.* CHIMNAJI SADASHIV AND OTHERS, DEFENDANTS.* 1906. *January* 25.

High Court—Original Side—Practice—Suits by manager of joint Hindu family having minor co-parceners—Minors' names should be added as parties—Will—Construction—Rule against perpetuity—Indian Succession Act (X of 1865), section 101.

As a matter of practice suits are not filed on the Original Side of the Bombay High Court by managers representing their minor co-parceners, the practice is to join all persons interested, but it would seem that even if on the face of the plaint there were an allegation of a sole plaintiff that he sued as manager on behalf of a co-parcenary the minor co-parcener would not be bound by the proceedings unless by judicial sale under the decree rights had been created in innocent third parties and no prejudice were shown to the absent minors.

Clause 13 of the will produced in this case was as follows:—

"As to my other property which there is, that is the property situated on the east side of the house of my step-brother, I give the same to my younger son Chiranjiv Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him my Mukhtyars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years."

Held, on a construction of the above clause, that the bequest in favour of a son of Mahadev who might be adopted at any time after Mahadev's death by a widow who might not have been living at the testator's decease was void under section 101 of the Indian Succession Act (X of 1865).

THIS was a suit brought by the plaintiff to administer the estate of his grandfather Khandoji Ranoji.

Khandoji Ranoji had one son Shamji and one daughter Gaoobai by his first wife. He had one daughter Satbai and one son Mahadev by his second wife Muktabai. On the 16th November 1888, he made his last will and testament; and died on the 31st May 1892.

* O. C. J. Suit No. 640 of 1905.

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Of this will, Muktabai and one Chimnaji Sadashiv (defendant No. 1) were appointed executors. The executors proved the will and probate was granted to them in 1893.

The material provisions of the will were as follows :—

"10. After paying the above-mentioned amounts in respect of maintenance and the Sarkar's dues and the Municipal bills, as to the balance that may remain, the same shall be collected together; and (out of the same) the expenses on account of the marriages of 'Chiranjiv' Mahadev and 'Chiranjiv' Satbai shall be made. After making the expenses on account of the marriages, as to the balance that may remain, the same shall be collected together and Government (promissory) notes shall be purchased with the same from time to time. And on 'Chiranjiv' Mahadev attaining the age of 21 years, the said balance and a moiety of the income collected, shall be handed over to him; and the other moiety shall be kept intact. The same shall be kept for the son of 'Chiranjiv' Shamji. But the said amount shall not be handed over to 'Chiranjiv' Shamji.

"11. Besides the above-mentioned immoveable property, as to whatever other moneys, etc., clothes and clothings, ornaments, etc., and goods and chattels there may remain after me, I give the whole of the same to my wife Muktabai.

"12. My above-mentioned immoveable property shall not be divided so long as my son 'Chiranjiv' Shamji may be alive. But after his (death) the said property shall be divided as follows:—Should "Chiranjiv" Shamji have a son or sons, then the house in which I now reside shall be given to such son or sons, in equal shares. Should he have no son, then the said house shall be given to my second son 'Chiranjiv' Mahadev and his heirs.

"13. As to my other property which there is, that is, the property situated on the east side of the house of my step-brother, I give the same to my younger son "Chiranjiv" Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property, and I give the property, after his death, to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him, my "Mukhtyárs" shall get a son adopted by his wife and thus perpetuate his name and they shall give the said property to him on his attaining the age of 21 years."

In 1896, Muktabai died. Gaoobai died in the year following.

Mahadev, the younger son of Khandoji Ranoji, attained the age of 21 years on the 24th May 1901 and died thereafter on the 4th day of June 1902, without leaving any issue. After his death, his widow Parvatibai (defendant No. 3) adopted Rama (defendant No. 4) on the 20th May 1904 as son to her husband.

Shamji, the elder son of Khandoji Ranoji, was the father of the plaintiff. The plaintiff was not born at the date of the will,

nor was he in existence at the date of Khandoji's death. The testator made some special provision regarding Shamji in the will. It ran :—

"There is a son born of the womb of my first wife. His name is "Chiranjiv" Shamji Khandoji. . . . (My) elder son "Chiranjiv" Shamji does not act obedient to my orders. And he has also been behaving improperly with me, so much so, that I had driven him from my house twice. But considering that he is a son born of my loins and forgiving his faults, I have brought him again to my house. He is however still giving me extreme annoyance. And knowing that if I keep him in (my) house he will put me to a great loss, I intend to drive him from my house.

After my (death) also my son "Chiranjiv" Shamji shall not be kept in my house but he shall be kept separate. And out of the income of my above-mentioned property Rs. 10 shall be paid to him every month for his and his family's maintenance."

In 1896, Shamji (defendant No. 2) filed suit No. 69 of 1896 in the High Court praying that the will of his father might be construed and that his rights in his father's estates might be ascertained. He sued in his own right and as the heir of his infant son who he alleged had been conceived in the life-time of the testator but was born and died after him and he claimed as the heir of such infant son what was given to such son under the will. The defendants in that suit were Muktabai, Chimnaji (defendant No. 1) and Mahadev. This suit was decided by Mr. Justice Fulton on the 2nd October 1897. The material declarations in the decree were: that no son conceived in the testator's life-time was born to Shamji, that no division of the immoveable properties mentioned in clauses 12 and 13 of the will should take place until the death of Shamji. That Shamji and his brother Mahadev were to be paid Rs. 20 per month each during Shamji's life. After payment of the monthly allowances and the outgoings and expenses out of the income of all the immoveable property a moiety of the balance of income should on Mahadev attaining the age of 21 and thereafter so long as Shamji should be alive be paid to Mahadev or his representatives and the other moiety intended by the testator for Shamji's son should so long as Shamji be alive be divided equally between Shamji on the one hand and Mahadev or his representatives on the other. And that in the event of Mahadev dying leaving a son or sons of his loins there would be an intestacy in respect of the chawl property

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Mahadev died in June 1902 after he had attained 21 years.

In 1904, Shamji filed another suit (No. 20 of 1904) in the High Court for administration of the estate of his father and for a declaration that the plaintiff was entitled to the properties mentioned in clauses 12 and 13 of his father's will subject to the maintenance of Mahadev's widow and for possession thereof and for the ascertainment of his rights in the entire property. The defendants in that suit were Chimnaji and Parvatibai, the widow of Mahadev.

Chimnaji filed his written statement on the 19th March 1904.

On the 20th May 1904, Rama was adopted by Parvatibai as son to her husband. Under a consent Judge's order, he was made third defendant in the suit without any admission on the part of the plaintiff or the first defendant therein that the adoption was valid.

This suit resulted on the 19th January 1905 in a consent decree, whereby it was provided:

"This Court by and with such consent doth order that the properties of the deceased Khandoji Ranoji be divided equally between the plaintiff and the third defendant Rama Mahadev Andhele and this Court by and with such consent doth further order that maintenance at the rate of Rs. 20 per mensem be paid to the said second defendant Parvatibai by the said third defendant Rama Mahadev Andhele out of his share in the said properties . . . and this Court by and with such consent doth further order that the plaintiff and the said third defendant Rama Mahadev Andhele do take their half shares each as on an intestacy so that the same shall be ancestral in the hands of each . . ."

This decree was sealed in July 1905 and the first defendant Chimnaji made an appointment for the 22nd August 1905 to give charge of the properties in the evening.

On the same day, the plaintiff, a minor, represented by his mother and next friend Revabai brought this suit against Chimnaji, Shamji Khandoji, Parvatibai and Rama Mahadeo. The plaintiff prayed that the decree passed in suit No. 20 of 1904 be set aside as being obtained by fraud and collusion of the parties to that suit or some of them; that the will of Khandoji Ranoji may be construed and his estate administered; that the plaintiff's rights and interests in the property of his grandfather

may be ascertained and declared; and that such property as he may be found entitled to, may be secured to him and safeguarded during his minority, and ordered to be made over to him when he attained majority.

Rama Mahadev (defendant No. 4) contended in his written statement that he was duly and validly adopted by Parvatibai; that the plaintiff not being in existence at the death of Khandoji was incapable of taking any benefit whatsoever directly under the will, and whatever interest he was entitled to was under an intestacy and as an heir to his father Shamji and through him alone and that the consent decree was not obtained by fraud and collusion as alleged.

Jinnah and *Setalvad* for the plaintiff:—We say the consent decree does not bind us. We were no party to it. Shamji was a lunatic at the date of the consent decree in Suit No. 20 of 1904. Moreover, our father could not in law sufficiently represent our interest. As regards the adoption we say that it is bad for there was no express authority given to Mahadev's widow (defendant No. 3) by Mahadev during his life-time and that the adoption was not in fact made, and even if held proved, it would not divest the estate vested in Shamjee and the plaintiff. Moreover, under clause 13 of the will the authority to adopt is given to the widow and the executors and therefore it is bad. This authority does not survive after Khandoji's death. See *Amrito Lal Dutt* v. *Surnomoye Dasi*[1]; *Lakshmibai* v. *Vishnu Vasudev*[2]. We further say that the gift in favour of Shamji's son under clause 12 is bad as Shamjee had no son at the date of the will and therefore the gift over is also bad and there is an intestacy.

As regards clause 13 the devise in favour of the adopted son is bad as there was no son adopted by the widow of Mahadev at Mahadev's death and therefore there is an intestacy and the plaintiff and the 2nd defendant Shamjee are entitled. The following cases were referred to in argument: *Anandrao Vinayak* v. *Administrator General of Bombay*[3]; *Balkrishna* v. *The Municipality of Mahad*[4].

(1) (1900) 27 Cal. 996: 2 Bom. L. R. 446.
(2) (1905) 29 Bom. 410: 7 Bom. L. R. 436.
(3) (1895) 20 Bom. 450.
(4) (1885) 10 Bom. 32.

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Raikes, acting Advocate General, and *Padshah* for the second defendant Shamjee:—We say Shamjee was not a lunatic. The consent decree was for the benefit of the plaintiff. Under the decree he gets more than what he would have got under the will. Different considerations apply to the two clauses. Clause 12 has been construed by Mr. Justice Fulton in Suit No. 69 of 1896. According to it plaintiff has no present interest until Shamjee's death as the expression is "leaving a son at his death." This decision is binding on the plaintiff. As regards clause 13 the plaintiff has no present right. The income is subject to accumulation. It is only on Shamjee's death that plaintiff would take it in the event of no adoption. Moreover there is the express authority of Mahadev to adopt. Even if there is no such authority the adopted son of Mahadev would take as a *persona designata*. In any view the decree is for the plaintiff's benefit who is a minor and the Court should always have regard to this fact.

Bhandarkar (with *Bahadurjee*) for defendants Nos. 3 and 4:—We say that the consent decree is binding on the plaintiff. His father Shamjee sufficiently represented his interest. A compromise made by a father is binding on the sons. The decree is nothing more than a compromise in the nature of a partition between Shamjee and Mahadev's representative. The property in clause 13 is more valuable than that of clause 12 and if the decree is set aside on a possible construction the plaintiff would be a loser if the adoption is upheld. See *Pitam Singh* v. *Ujagar Singh*(1); *Jagan Nath* v. *Mannu Lal*(2); *Radhabai* v. *Anantrav*(3); *Jehangir* v. *Bai Kukibai*(4); *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh*(5).

Moreover, we say that there was an express authority given to defendant No. 3 by Mahadev, and that defendant No. 4 was adopted under this authority. This is sufficient to divest any estate that may be vested in Shamjee. Further, Khandojee has given express directions to his executors to get a boy adopted. The case of *Lakshmibai* v. *Vishnu Vasudev*(6) does not apply as

(1) (1878) 1 All. 651.
(2) (1894) 16 All. 231.
(3) (1885) 9 Bom. 198.
(4) (1903) 27 Bom. 281; 5 Bom. L. R. 131.
(5) (1903) 31 Cal. 111.
(6) (1905) 29 Bom. 410: 7 Bom. L. R. 436.

there was no disposition of beneficial interest in favour of the adopted son, as is the case here.

Again, under clause 13, the adopted son is entitled to succeed independently of any consent of Shamjee. He takes it as a *persona designata*. The estate is not left in abeyance between the period between Mahadev's death and the adoption. According to the judgment of Mr. Justice Fulton there is not to be any division of *corpus* till Shamjee's death and until it is so done, an adopted son can come in by virtue of his adoption. He takes it as donee under a power of appointment. See *Yethirajulu Naidu* v. *Mukunthu Naidu*(1); *Gurlingapa* v. *Nandapa*(2). There is no intestacy as regards clause 13 and the plaintiff is not entitled to succeed.

SCOTT, J.:—This suit is brought by the plaintiff, a minor, by his mother, as his next friend, to have a consent decree passed in Suit No. 20 of 1904 set aside and to have the estate of his grandfather Khandoji Ranoji administered.

Khandoji Ranoji died on the 31st of May 1892 leaving two sons, Shamji (the plaintiff's father) and Mahadev. Mahadev died on the 4th of June 1902 at the age of 22 without issue but leaving a widow.

Shamji is still alive.

By his will Khandoji gave directions regarding the disposal of the income and *corpus* of two immoveable properties in Bombay mentioned in clauses 12 and 13 of his will.

In 1896 Suit 69 of 1896 was filed by Shamji against the executor and executrix of Khandoji's will and against Mahadev for construction of the will.

Mr. Justice Fulton held that the immoveable property was not to be divided till after the death of Shamji but that as to the balance of income if Mahadev attained twenty-one he or his representatives should receive ¾ thereof during Shamji's lifetime, the remaining ¼ going to Shamji; that at the death of Shamji leaving a son the house mentioned in clause 12 would be dealt

(1) (1905) 28 Mad. 363. (2) (1896) 21 Bom. 797.

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with as intestate property of the testator but if Shamji died leaving no son it would go to Mahadev absolutely.

The devolution of the house mentioned in clause 13 was not decided.

As above stated Mahadev attained twenty-one and died a year later. On Mahadev's death Shamji filed Suit 20 of 1904. He set out the following facts.

That Khandoji died on the 31st May 1892 leaving a will of which the first defendant was surviving executor and leaving him surviving two sons plaintiff Shamji and his brother Mahadev. That plaintiff had no sons born at date of testator's death. That Mahadev attained twenty-one years on the 24th May 1901 and died on the 4th June 1902. He submitted that he was, as the manager of a co-parcenary consisting of himself and Mahadev, entitled, in the events that had happened, to the two immoveable properties, the subject of clauses 12 and 13 of his father's will, and he prayed for a declaration of title to the two properties subject to maintenance of Mahadev's widow and for possession.

He did not state that the plaintiff was in existence who would, if his contention was correct, be entitled to a share as a co-parcener in the property in suit.

He stated that Mahadev had died without issue without having adopted a son and contended that if a son were adopted the direction that the property should be given to him when he attained twenty-one was invalid according to Hindu law.

Subsequently the plaint was amended by the addition of Rama Mahadev, as a party defendant, who alleged he had been adopted to Mahadev but who, Shamji contended, had not been validly adopted.

At the hearing before Chandavarkar, J., a settlement was proposed and after the executor of Khandoji had brought the present plaintiff's existence to the notice of the Court, a consent decree was passed without adding the plaintiff as a party.

By the decree it was provided that the testator's immoveable properties should be sold and the proceeds divided in equal shares between Shamji and Rama Mahadev. It being provided that

Shamji should take his share as ancestral property and that the maintenance of Mahadev's widow at Rs. 20 per mensem should be provided for out of the share of Rama Mahadev.

This decree was passed on the 19th of January 1905.

The present suit was filed on the 22nd of August 1905 before any of the property had been sold under the consent decree.

The first question which arises for determination is whether there was in fact a consent decree consented to by a competent plaintiff, for it is contended that Shamji was in fact a lunatic at the time it was passed, for he is now a lunatic in the Ratnagiri Lunatic Asylum, whither he was sent in November 1905. Upon the evidence of Messrs. Dinsha and Gulabbhai I hold that Shamji was not a lunatic at the date of the decree. His confinement in the Colaba Asylum some years ago and his present confinement at Ratnagiri appear to have been the result of alcoholic excesses but he was perfectly sane throughout the progress of Suit 20 of 1904.

On behalf of the fourth defendant it was contended that the existence of the consent decree to which the plaintiff's father had been a party, was sufficient to bar this suit in so far as it is sought to disturb the fourth defendant in the enjoyment of benefits secured to him by that decree. The contention is based upon the assumption that the senior member of one branch of a Hindu family is the representative of all minor co-parceners in that branch for the purpose of all litigation whether that litigation terminates in a decision of the Court after contest or in a consent decree. I can find no authority for this contention. In *Gan Savant* v. *Narayan Dhond*[1] it was pointed out by Mr. Justice West that since the enactment of section 50 of the Civil Procedure Code a plaintiff suing in a representative character must set forth and show in his plaint that he is qualified to fill it. The learned Judge goes on to say that in earlier times the same strictness of procedure did not prevail and the Hindu family was considered as a corporation whose interests were centred in the manager and that this was the practice in litigation as in other

(1) (1883) 7 Bom. 467.

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transactions and he referred to a dictum of the Judicial Committee in *Jogendro Roy's*[1] case decided in 1871 as showing that the practice had been recognised and not condemned.

In the later case of *Padmakar Vinayak* v. *Mahadev Krishna*[2], Sir Charles Sargent, C. J., appears to have doubted whether Mr. Justice West had not in *Gan Savant's* case stated the rule regarding the representative character of manager of Hindu families, in the days before the Civil Procedure Code, too widely.

In the recent case of *Khiarajmal* v. *Daim*[3] Lord Davey delivering the judgment of the Judicial Committee after observing that the Court has no jurisdiction to sell the property of persons not parties to the proceedings or properly represented on the record said that the Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family and in refusing to disturb judicial sales on the mere ground that some members of the family who were minors were not parties to the proceedings if it appears that there was a debt justly due from the deceased and no prejudice is shown to the absent minors. It appears from the same judgment that the discretion above referred to would not be properly exercised where the interest of a minor was affected by the provisions of a consent decree to which he was not a party.

As a matter of practice suits are not filed in this Court by managers representing their minor co-parceners; the practice is to join all persons interested, but it would seem that even if on the face of the plaint there were an allegation of a sole plaintiff that he sued as manager on behalf of a co-parcenary the minor co-parcener would not be bound by the proceedings unless by judicial sale under the decree rights had been created in innocent third parties and no prejudice were shown to the absent minors.

In the present case the defendant's contention must fail first because Shamji in Suit No. 20 of 1904 did not sue or purport to sue in a representative capacity on behalf of himself and his infant son, and, secondly, because no steps have been taken under

(1) (1871) 14 M. I. A. 367 at p. 376. (2) (1885) 10 Bom. 21.
(3) (1904) 32 Cal. 296: 7 Bom. L. R. 1.

the decree the property in suit being still intact in the hands of the Special Commissioners.

It does not, however, follow that because the plaintiff's suit is not barred by the consent decree it is one which is necessary or justifiable in his interests. In justification of it, it is contended on behalf of the plaintiff that Rama is not the adopted son of Mahadev and that, if he is, he took no interest as a legatee under clause 13 of the will of Khandoji nor did he take as an heir on an intestacy because he was not adopted with the express authority of Mahadev in which event only could he have participated with Shamji and the plaintiff in the property not validly disposed of by the will of Khandoji.

Dealing first with the issues of fact involved in the above contentions I hold the adoption of the fourth defendant by Mahadev's widow on the 20th of May 1904 to be proved; several witnesses have deposed to it who have been unshaken in cross-examination and the only evidence adduced to discredit their story by proving that it was not possible that the ceremony could have taken place in Vittoba Chelku's Divankhana is very inconclusive. The story of the adoption is moreover supported by the letter Exhibit 8A and the agreement Exhibit J executed on or in contemplation of the adoption.

Upon the question whether or not the fourth defendant was adopted under an express authority from Mahadev the evidence is not so clear or satisfactory as that as to the factum of the adoption but I have arrived at the conclusion that the defendant Rama has proved that he was adopted under an express authority given by Mahadev to his widow shortly before his death.

The express authority which is *a priori* likely to have been given is deposed to by the witnesses Mahadeo, Bapu and Narayan who appeared to me to be respectable and intelligent men with no motive for giving false evidence.

The same fact is deposed to by Parvatibai, the adopting widow, but she is a vague and inaccurate witness whose evidence standing alone would be of little value.

Her father Khandoji in whose house the authority is said to have been given says he was present at the time but his presence

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does not appear to have been noted by any of the other witnesses. No doubt, if the authority was really given, he must have heard of it at once and may have persuaded himself that he was present at the time.

It is said, however, that Mahadeo was not in Poona in March 1902, and that, therefore, the story of the authority having been given by him in Khandoji's house at Poona must be false.

The plaintiff's Counsel on this point called Satabai, the plaintiff's aunt, now aged sixteen or seventeen, Revabai, the plaintiff's mother, Tulsabai, the neighbour of Revabai, and Chimnaji Sadashiv, the surviving executor of Khandoji Ranoji. Satabai, who must in the early part of 1902 have been twelve or thirteen years old, says that she attended to Mahadev for six months before his death and that he was in Bombay during the whole of that period and did not go to Poona in the Shimga holiday. He, however, went to Nasik a year before his death.

Revabai says Mahadev and Satabai went to Nasik six months before his death and stayed there for two months.

Tulsabai says Mahadev went to Nasik six months before his death for fifteen days and did not go to Poona three or four months before his death.

Chimnaji Sadashiv says that he does not know if Mahadev was in Bombay in March 1902 and proves that Mahadev did not receive his monthly allowance in Bombay during that month.

If the oral evidence on this point stood alone I should probably hold that the authority was proved as I do not think the evidence of the female witnesses called by the plaintiff is of any value.

There is, however, certain documentary evidence which points to the same conclusion. We have a post card (admittedly genuine) dated the 8th of March, 1902, in which Khandoji Nathuji's mother writing to him from Bombay speaks of her intention of bringing Mahadev to Poona at his own desire on the following Monday and we have the agreement of adoption dated the 20th of May, 1904, in which the recital "whereas the said Mahadev Khandoji at the time of his death gave oral directions to the said Parvatibai to adopt a son" has been

altered by the substitution of the words 'shortly before' for 'at the time of' and by the addition of the words 'at Poona.' These alterations purport to have been made at the time of execution of the document and it seems improbable that if the story of the authority is wholly false, suspicion would have been invited by an alteration of Exhibit J on this point when a false story of an authority given by Mahadev in Bombay would, if the evidence of the plaintiff's witnesses is true, have been more easy to prove than that which has been set up by the fourth defendant's witnesses.

Mr. Jinnah suggested that as Parvati and her father said Mahadev died eight days after his return to Bombay from Poona and as his death occurred in June their story must be false. But as I have already observed Parvatibai is a vague and inaccurate witness. She does, however, say that her husband returned to Bombay in Chaitra and died in the following June. The inaccuracy relied on is, in my opinion, no ground for disbelieving the defendant's witnesses.

But although the fourth defendant has no desire to disaffirm the terms settled by the consent decree his case is put higher than that of an adopted son sharing in property which had descended to Mahadev and Shamji on an intestacy. It is urged that if his full rights had been insisted on he would have been absolutely entitled under the terms of clause 13 of the will of Khandoji Ranoji and in the events which have happened to the house mentioned in that clause—a house which is admittedly far more valuable than the other house of the testator.

Clause 13 of the will is as follows:—

"As to my other property which there is, that is the property situated on the east side of the house of my step-brother I give the same to my younger son Chiranjiv Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him my mukhtiars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years."

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It is argued that the gift to a son of Mahadev adopted after the death of Mahadev was good as an executory bequest though his interest did not come into existence immediately on the determination of the prior life interest of Mahadev. Executory bequests have been recognised as valid in Hindu wills in three cases, in all of which the executory interest, so recognised, would arise if at all immediately on the termination of a prior life interest. In *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (1) the Judicial Committee held that there would be nothing against the general principles of Hindu Law in allowing a testator to give property whether by way of reward or by way of executory bequest upon an event which was to happen if at all immediately on the close of a life in being.

In *Javerbai* v. *Kablibai* ' the High Court of Bombay following *Soorjeemoney's* case upheld a power of appointment subject to the same restrictions as the Hindu testamentary law imposes on the testator himself; *viz.*, that the appointment shall be made during the life of the tenant for life, so that the appointee might be ascertained when the event arose on which he was to take and that he should be a person alive at the death of the testator

The judgment in *Javerbai* v. *Kablibai* (2) was adopted and applied by the High Court in the case of *Bai Motivahu* v. *Bai Mamubai* (3). The last named case was taken on appeal to the Privy Council where the decision of the High Court was affirmed subject to a verbal variation in the decree. The question, whether an executory bequest, not taking effect immediately on the close of the prior life estate, would be good, did not directly arise as the interest of the possible appointee could not in that case take effect later than the close of the prior life estate but in dealing with an argument of Mr. Mayne that there would not be such a transfer of possession to the person who would take by virtue of the power as was necessary to enable it to be validly exercised, their Lordships say: "It

(1) (1862) 9 M. I. A. 123. (2) (1891) 16 Bom. 492.
(3) (1897) 21 Bom. 709, P. C.

appears to follow from the first taker being allowed to have only a life-interest, that his possession is sufficient to complete the executory bequest which follows the gift for life."

In the present case Rama, though born in the life-time of the testator, was not an adopted son at the date of Mahadev's death and the executory bequest in favour of an adopted son could not therefore take effect immediately on the death of Mahadev, the life tenant. The case is, however, complicated by the provisions for distribution of the surplus income of the immoveable property during Shamji's life-time irrespective of the bequest under clause 13 and in the events which have happened the person entitled to ¾ of that surplus on Mahadev's death was according to the judgment of Mr. Justice Fulton, his widow till the adoption of Rama and from the date of the adoption Rama himself, the other ¼ being payable to Shamji. The beneficial interest in these houses is therefore disposed of for the present under clause 10 and when Shamji dies the executory bequest in favour of an adopted son will have been already executed by the adoption of Rama. But it is unnecessary for me to consider whether these circumstances would be sufficient to support the executory bequest in clause 13 if the fact of the death of Mahadev before the adoption of Rama was the only objection to it, as I consider the bequest in favour of a son of Mahadev who might be adopted at any time after Mahadev's death by a widow who might not have been living at the testator's decease is void under section 101 of the Indian Succession Act. I should be prepared to hold on the authority of *King* v. *Isaacson* [1] that the interest of the adopted son would vest in him as a son on adoption notwithstanding the provision that the house should be given to him by the executors on his attaining twenty-one but it is clear that if we regard possibilities the vesting might be delayed beyond the period allowed by section 101 and it is no answer to say that the son adopted was in fact living at the death of the testator.

The result is that in my judgment the house mentioned in clause 13 subject to the provisions of clause 10 as to the

(1) (1853) 1 Sm. & G. 371.

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distribution of income during Shamji's life-time devolved upon Shamji and Mahadev as upon an intestacy. It is conceded that they would take it as joint family property from an ancestor and that therefore the plaintiff would have an interest in it at birth. On Mahadev's death the surviving coparceners were Shamji and the plaintiff but on his adoption the fourth defendant became entitled to a moiety as representing Mahadev's branch.

The house mentioned in clause 12 would according to Mr. Justice Fulton's judgment devolve on the testator's heirs including Rama Mahadev in an uncertain event and in default would devolve on Mahadev's heirs.

Of the distributable income $\frac{3}{4}$ in the meantime would go to the fourth defendant and $\frac{1}{4}$ to Shamji.

It is clear, therefore, that the consent decree which secured to Shamji as ancestral property one moiety of the property of the testator was very beneficial to the plaintiff and if the question were merely between him and Rama I should dismiss the suit with costs on the next friend on the ground that the plaintiff has not been shown to be entitled to so much as the fourth defendant has since the consent decree always been willing to secure to him.

The lunacy of Shamji, however, makes it necessary to make some provision for the safety of the interests of the plaintiff and his father. I am informed that there is no balance of income available for distribution. I appoint Messrs. Dinsha and Gulabbhai Special Commissioners in this suit as well as in Suit 20 of 1904 to sell the property and divide the net proceeds into two equal moieties, one of which shall be paid to the fourth defendant to be held by him as provided by the consent decree. The other moiety should be applied first in payment of the costs of the executor in this suit taxed as between attorney and client, secondly in payment of the taxed party and party costs of Shamji and one day's costs of the plaintiff. The balance to be paid to the Accountant General to be invested by him in Government paper the income of which shall be applied as follows: Rs. 20 per month to Revabai for maintenance, the balance for the support of the minor and

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the lunatic and such persons as the Court may hereafter from time to time order.

Next friend to pay fourth defendant's costs of suit and plaintiff's costs other than those above specifically provided for. Liberty to apply.

Attorneys for the plaintiff:—*Messrs. Captain and Vaidya.*

Attorneys for defendants:—*Mr. F. P. Pavri, Messrs. Payne & Co.* and *Messrs. Maganlal, Jehangir and Gulabbhai.*

R. R.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1906. *January* 26.

BAI JAIJI AND OTHERS (ORIGINAL DEFENDANTS 6—11), APPELLANTS, *v.* N. C. MACLEOD AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1—5), RESPONDENTS.*

Will—"Such debts and liabilities as aforesaid"—"Such"—Construction—Time no part of the description.

A will contained a clause providing,—

"11. As regards the remaining one equal fourth share of the said residue I direct that if at the time the said residue is divisible my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trust until the said Ardeshir shall be free from such debts and liabilities or until he shall die to apply the income of the same in or towards the maintenance and support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education or other benefit of such children including their marriage, but when and so soon as the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income, if any, to him the said Ardeshir absolutely."

A question having arisen as to whether the expression "when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid" had reference only to debts and liabilities existing at the time when the residue was divisible,

* Appeal No. 1411 of 1905 : Suit No. 857 of 1904.