(1872) 01 CAL CK 0004

Calcutta High Court

Case No: Miscellaneous Regular Appeals Nos. 256 and 292 of 1871

In Re: Mussamat Phuljhari Koer — APPELLANT

Vs

RESPONDENT

Date of Decision: Jan. 13, 1872

Judgement

Ainslie, J.

It has been contended that the party in all cases entitled to a certificate under Act XXVII of 1860 is the personal representative of the deceased, and that the general rule of Hindu law is in favor of the widow''s succession, and that her exclusion, in respect of joint estate governed by the Mitakshara, is an exceptional qualification: the authority of the Privy Council judgment in Katama Natchier v. The Rajah of Shivagunga 9 Moore''s I.A., 539 is cited in support of the contention. In theory, no doubt, this is a correct statement of the law; but it must also be borne in mind that, in the districts governed by the Mitakshara, the fundamental idea is that all property is joint and undivided, and that separate property is exceptional; so that, in practice, the qualification becomes the rule, and the rule is the exception. Cases may arise in which doubts may be entertained whether the certificate should be granted to the surviving co-sharers, or to the personal representative, there being both joint and separate property left by the deceased; but this is not one of these. It is not said on the one side that Sewparsan held some separate property, or, on the other, that he held some joint property; the parties respectively declare him to have been wholly separated, and wholly un-separated. If he was wholly separated, the respondents have no interest in his estate; if he was wholly united, the widow has nothing but her right to maintenance, and cannot interfere with the estate, and consequently cannot claim a certificate.

2. The question of separation has been divided into two parts; actual separate enjoyment and separation by declarations which have the effect of dissolving the joint tenancy. Taking the latter first, I am quite prepared to admit that, on the authorities cited, it is settled law that actual division by metes and bounds is not necessary to complete the dissolution of the joint tenancy of a Hindu family. The cases, however, do not go so far as

they have been pushed. In the judgments of the Privy Council in Appovier Alias Seetaramier vs. Rama Subba Aiyan , and Raja Suranani Venkata Gopala Narasinha Row v. Raja Suranani Lakshmi Venkama Row 3 B.L.R., P.C., 41; S.C., 13 Moore"s I.A., 113, it is determined that, when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and that this is a separation in interest and in right, though not immediately followed by a de facto actual division of the subject-matter. In both these cases there was a distinct agreement to hold certain shares separately at the sole disposal of the parties respectively. It was not the mere fact that the parties had described their interests in the joint property in terms of the shares they would have been entitled to take on a partition, but there was also a distinct declaration of an intention to separate their interests. The case of Lalla Mohabeer Pershad v. Mussamat Kundun Koowar 8 W.R., 116, and that of Kulponath Doss v. Mewah Lall 8 W.R., 302, both rest on agreements to be separate in interest. The case of In the matter of the Petition of Samandra Kunwar Ante, p. 390 did not turn on the existence of an agreement to separate, though one was tendered at the hearing of the appeal, but went on the ground that the sharers had transacted business and dealt with parts of the property separately. The Judges cited the case of Mussamut Jusoda Koonwar v. Gouree Byjnath Sohae Sing 6 W.R., 139 in which it was said "a legal partition is proved if it be found that the parties have separated in food and residence; that there has been a distinct separation in estate indicated by separate enjoyment and separate liabilities; and that they have dealt with their respective shares separately and in a manner inconsistent with the idea of their being still joint." The case of in the matter of the Petition of Mussamat Nowlakhu Kunwari Ante, p. 389 can hardly be said to bear upon this case, as there was a deed of division and also distinct proof of separation. The cases of in the matter of the Petition of Purnamasi Dayi [(5)] and Haunman Dutt Roy v. Baboo Kishen Kishor Narayan Sing Ante, p. 358 do not require notice. The respondent has cited Mussamut Jusoda Koonwar v. Baboo Gouree Byjnath Sohae Sing 6 W.R., 139 and In the matter of the Petition of Phul Koeri Ante, p. 388 of which the marginal note runs thus:-- "Though actual partition by metes and bounds is not necessary to a separation between the members of a joint Hindu family, yet there must be some unequivocal act or declaration on the part of the family of their intention to separate." And with reference to the case of Appovier Alias Seetaramier vs. Rama Subba Aiyan , cited by Mr. Piffard, he brings forward the judgment of Justices L.S. Jackson and Glover in Muktakasi Debi v. Ubabati [(6)], in which the former learned Judge says:-- "It seems to me it would be going very much beyond what their Lordships intended in that case were we to attribute to vague expressions and statements contained in petitions, not directed to that particular subject, the effect of solemn deeds or agreements between the parties whether reduced to writing or not, but agreements contemplating the very subject of separation." I fully concur in these remarks, and I altogether fail to see that the decisions, either of the Privy Council or of this Court, warrant us in saying that a mere definition of an interest in a joint estate, in terms of a fraction of the whole, without any indication of intention to divide

interest and liabilities, is sufficient to constitute a legal dissolution of a joint family. No doubt, the expression of a joint tenant''s interest in the joint estate, as a half or a third or any other fraction, is not strictly consistent with the theory of the joint family property as set forth in the judgment in Appovier Alias Seetaramier vs. Rama Subba Aiyan ; but as a matter of fact, it is extremely common, and, by no means necessarily implies any intention to abandon interests in the entire property, or to withdraw from common liabilities. In this particular case, the first document relied on, viz., the petition of 2nd October 1841, though it certainly sets forth that the three brothers were entitled to equal thirds in the property held by them, and might, if so minded, thereafter make a partition into three equal party at the same time distinctly recites that they were at the date of the petition holding the whole jointly, and it is evident from a perusal of the document that the object of it was solely to guard against any one or more of them laying claim to any portion of the property held in his or their separate names as his separate property. So far is this document from indicating any separation in 1841 that it proves just the contrary, and it is impossible to overrule the express declaration of continuing joint ownership, because the parties have given definitions of their shares by describing them as what they would be if any one claimed a partition. I would go further and say that even if, for common convenience, they took the rents and profits of the estates in certain defined shares, yet in the face of this distinct declaration that the community of interest remained unbroken, it would be no evidence of separation. Passing from this, the earliest, to the Income Tax returns of 24th December 1869, one of the latest documents put in, in which it is said that the former returns were made jointly, but that there had subsequently been a separation, I am not prepared to admit that this statement is conclusive evidence of separation. The Judge below, looking at the whole of the evidence, has come to the conclusion (a correct one, I think) that this statement was a mere device to evade payment of Income Tax. Unless there was a distinct understanding among the parties to separate their interests and liabilities, the fact that they made a false statement for their common benefit in a particular matter is wholly immaterial. The statement would be evidence and of the strongest character, if believed; but when found to be false, it is of no effect whatever. It is the intention of the parties to have no further community of profit and loss which is material, and not their expressions, except so far as these are evidence of intention. I do not propose to go through the whole of the oral and documentary evidence which has been read and commented upon. Much of it is inconclusive, and might consist with either state of facts. Those documents which specify: the shares of the parties in the transactions referred to therein are quite in keeping with their petition of 1841. The evidence does not raise the slightest doubt, in my mind as to the absence of any separation, and it was for the party pleading separation to prove it. I would dismiss the appeals with costs.

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(1) See Mussamat Deowanti Kunwar v. Dwarka Nath, ante, p. 363, and Mitrajit Sing v. Raghubansi Sing, ante, App., 5.

(2) Before Mr. Justice Kemp and Mr. Justice Glover.

The 13th December 1869.

In the matter of the Petition of Phul Koeri, alias Ghina Koeri. *

Mr. Piffard (with him Baboos Mahes Chandra Chowdhry and Budh Sen Sing) for the appellant.

Mr. R.T. Allan and Baboos Anukul Chandra Mookerjee, Annada Prasad Banerjee, and Kali Krishna Sen for the respondent.

Glover, J.--This was an application under Act XXVII of 1860 by Phul Koeri, widow of Lachman Prasad, for a certificate to collect the debts due to the estate of her deceased husband.

The application was opposed by Debi Prasad, nephew of the deceased, on the ground that the estate being joint and undivided, he was the sole heir of his uncle, and that the widow had no claim to anything beyond maintenance.

It appears that uncle and nephew had been litigating for a long time regarding the family property, the nephew claiming a share, the uncle alleging that, inasmuch as Beni Prasad, Debi Prasad''s father, pre-deceased his father, Dindayal, the son had no share in the succession.

A suit was brought by Debi Prasad, which resulted in his favor in the District Courts, and this suit is now the subject of an appeal to Her Majesty in Council.

In the case now before us, the Judge has held that the acts of the objector Debi Prasad have sufficiently established the fact that the property was divided, and that the widow, therefore, is the rightful heir of her husband according to the law of Mitakshara.

It appears to me that, under the circumstances stated, there is no sufficient presumption that the family separated before Lachman Prasad''s death. No doubt, the Privy Council decision in the case of Appovier Alias Seetaramier vs. Rama Subba Aiyan establishes the principle that actual partition by metes and bounds is not necessary to a separation, but it is still necessary that there should be some unequivocal act or declaration on the part of the family of their intention to separate, and I fail to see any such act or declaration in this case.

The Judge has gone exclusively on the fact that Debi Prasad sued Lachman for his share of the family property, but this alone would not, as it seems to me, be sufficient to indicate an intention of separating from his uncle on the part of Debi Prasad. If the suit had been brought for a declaration of Debi Prasad''s right, and for a subsequent demarkation of his share, it might then have been fairly presumed that Debi Prasad''s intention was to be separate from his kinsman, but all that he sues for is a declaration of his right in the estate, and there is nothing to show that, if he got a decree in his favor, he intended to

keep that share separate and distinct from that of Lachman Prasad. The mere fact of his bringing a suit would not be a sufficient indication of his intentions. There must be some unequivocal notice of his wish to live separate in estate before the ordinary presumption of Hindu law can be ignored.

In the present case, the family was admittedly joint. No separation in direct form is alleged. The only thing, in support of the petitioner''s case, is the fact that the objector Debi Prasad brought a suit against his uncle for his share in the family estate, and that in terms which at the most leave it undecided as to whether he asked for a divided or an undivided share.

I think that the widow Phul Koeri has not made out any sufficient case for the grant of a certificate under Act XXVII of 1860, and that her application ought to have been refused. I would, therefore, allow this appeal with costs.

Kemp, J.--I concur in this judgment. There has been no definition of shares or enjoyment of possession according to such definition. The suit of Debi Prasad was for a declaration of his right to a share in the estate of his grandfather Dindayal. It was not a suit for partition, nor can I find any unequivocal act on the part of Debi Prasad, whereby it can be said that he has declared his intention to separate in estate from his uncle, the late Lachman Prasad. I therefore think that the certificate under Act XXVII of 1860 should have been granted to the appellant Debi Prasad, and not the respondent the widow of Lachman Prasad.

The appeal will be decreed with costs payable by the respondent.

* Miscellaneous Appeal No. 313 of 1869, from an order of the Judge of Patna dated the 1st May 1869.

(3) Before Mr. Justice E. Jackson and Justice C.P. Hobhouse, Bart.

The 31st May 1869.

In the matter of the Petition of Mussamat Nowlakhu Kunwari. *

Mr. C. Gregory and Baboos Anukul Chandra Mookerjee, Annadaprasad Banerjee, and Rames Chandra Mitter for the appellant.

Mr. R.T. Allan, and Baboos Mahes Chandra Chowdhry, Chandra Madhab Ghose, and Lakhi Charan Bose for the respondent.

The judgment of the Court was delivered by

Jackson, J.--This is an appeal from the orders of the Judge of Zilla Bhagulpore passed on an application by the widow of one Ranjit Sing to obtain a certificate to collect her husband''s debts under Act XXVII of 1860. Objection was raised to the grant of a

certificate to the widow by Chintaman Sing Chowdhry, the next mail heir, the first cousin of the deceased. The Judge, however, ordered that the certificate should be given to the widow. Chintaman Chowdhry appeals against that decision.

His vakeel urges that the widow was not entitled to the certificate, because the deceased Ranjit Sing lived with Chintaman Chowdhry as a joint Hindu family, and that consequently, under the Mitakshara law which prevails in that part of the country, Chintaman Chowdhry was the heir of the deceased, and his widow was entitled only to maintenance. Chintaman Chowdhry was therefore entitled to the certificate. The vakeel for appellant was asked whether his client had adduced evidence to prove that the families of the deceased and appellant lived jointly. He stated that there was evidence upon the record consisting of petitions alleged to have been put into Court by members of the family. But he admitted that there was no evidence adduced to prove by whom these petitions were presented. The vakeel did not read to the Court any other evidence in support of the fact that the families lived jointly, but in the end supported his case on the ground that the widow had not adduced evidence to prove that the families lived separately. There is, however, evidence upon the record which makes out at least a prim■ facie case that, as regards certain portions of the estate of the family, the members of the family had separated. There is a distinct deed of taksimnama (deed of partition) which deed is admitted to be genuine by the appellant. Independent of this, however, the claim of the appellant in the lower Court was argued, not on the point of a joint family, but on the ground that Chintaman Chowdhry was under the deed of taksimnama the next heir to a property called Ganjur, as that property, under the custom of the family and under deeds entered into by former members of it, descended to the next surviving male member of the deceased''s family. It is quite clear that the question of the title to Ganjur has nothing to do with the question as to the certificate. Whether Chintaman is entitled to succeed to Ganjur or not, Ranjit''s widow will be entitled to the certificate to collect her husband''s debts if her husband was living separate from the rest of her family. Upon the evidence on the record, it is quite certain that Ranjit was to a very large extent separate in family estate from Chintaman and that his separate possession was, as found by the Judge, confirmed by the Civil Court in a suit between Ranjit Sing and Chintaman Chowdhry''s father Ram Dayal Sing. Under these circumstances, we consider that the Judge of the Court below was right in declaring the widow of Ranjit entitled to obtain the certificate she applied for to collect the debts of her deceased husband Ranjit. The appeal is dismissed with costs.

* Miscellaneous Appeal No. 110 of 1870, from, an order of the Judge of Bhagulpore, dated the 7th March 1870.

(4) Before Mr. Justice Bayley and Mr. Justice Kemp.

The 19th February 1870.

In the matter of the Petition of Samandra Kunwar. *

Baboos Rames Chandra Mitter and Chandra Madhab Ghose for the appellant.

Mr. R.T. Allan for the respondent.

Bayley, J.--This is an application by the widow of one Lal Behari for a certificate under Act XXVII of 1860.

That Act is an Act to facilitate the collection of debts on successions and for the security of parties paying debts to the representatives of deceased persons. This proceeding of giving a certificate is intended merely for the purpose which the Act as above defines, and is restricted to that purpose only.

In this case, a debt was admittedly due to the estate of the deceased Lal Behari, but the amount was in dispute. The Judge has refused to give the certificate under the Act to the widow of the deceased as the next of kin, and has given it to Kali Charan. The Judge has done so because he thought that the witnesses adduced on behalf of the widow, were interested as being connected with the family, and that their evidence could not be depended upon. The Judge then observes that the documents on behalf of the widow only went to show that her husband, the deceased Lal Behari, mortgaged a few bigas of land, which fact was insufficient to prove the division of the family interests. The Judge then proceeds to the evidence of the objector, Kali Charan, and finds that that evidence proved that the family was joint and undivided.

From this decision the widow appeals to this Court, and urges that the evidence on the record clearly proves that in various transactions Kali Charan acted for himself, and Lal Behari for himself, and that this was a sufficient proof of the separation of the family. It is also urged that a taksimnama, or deed of partition, which could not be traced when the case was heard in the lower Court, and which has been produced in this Court, clearly proves that a partition in the family had long taken place.

In the first place we think that the lower Court is wrong when it says that, because the witnesses for the widow are connected with the family, their evidence could not therefore be relied upon; for if the transactions and affairs of the family are not known to this class of persons, we do not know how they could be better known to strangers.

Then as to the mortgage of a few bigas of land by Lal Behari, we find that Lal Behari mortgaged his 8-anna share of a certain mauza; but further that each party transacted business and dealt with parts of the property separately. In this view, we cannot say that no sufficient evidence of separate right has been given by the widow such as is enough to entitle her under Act XXVII of 1860 to a certificate to collect the debts admittedly due to the estates of her deceased husband.

It has been very strongly pressed by Mr. Allan that the decision of Mr. Justice Loch and Mr. Justice Macpherson, dated the 4th August 1866, in Mussamut Jusoda Koonwar v. Gouree Byjnath Sohae Sing 6 W.R., 139 clearly lays down the principle that we should

follow, and that that was also a case of a certificate. That the principle is one and the same, we fully admit. We also think, to use the words of the learned Judges:-- "A legal partition is proved if it be found that the parties have separated in food and residence, that there has been a distinct separation in estate indicated by separate enjoyment and separate liabilities, and that they have dealt with their respective shares separately and in a manner inconsistent with the idea of their being still joint; if, in short, looking at all the circumstances, it is clear that the parties really did intend to hold, and did in fact hold their shares respectively, each freed from any interest therein of any other sharer, and if the separate enjoyment was not merely a matter of arrangement for the private convenience of the family." The facts of the case have also been referred to by Mr. Allan, and all that we can say on that point is that the facts in that case go further in degree, but are substantially of the same kind as in this, viz., separate leases, mortgages, and so forth. The simple question before us is whether the separate transactions of Kali Charan and Behari Lal have been proved so as to entitle the widow to a certificate under Act XXVII of 1860 for the purpose of collecting the debts admittedly due to the estates of her deceased husband. And this question we answer in the affirmative.

It has been pressed on us by Mr. Allan that, although the taksimnama has been tendered in this Court and was not produced and referred to in the Court below, we should remand the case for trial of the genuineness of that deed. Were this a regular suit for partition and declaration of title to a joint undivided estate, the case might have been different; but when this case is merely for a certificate under Act XXVII of 1860, the object of which Act has been referred to above, we think no remand is necessary.

The order of the lower Court is reversed, and it is ordered that a certificate be given to the widow of Lal Behari for the purpose of collecting the debts admittedly due to the estates of her deceased husband Lal Behari.

Kemp, J.--I entirely concur in this judgment. As the Judge has alluded to certain petitions filed by Kali Charan as indicating that Lal Behari and Kali Charan were joint in estate and acted as such up to 1868, I think it necessary to state that, in my opinion, those petitions, as contended by Baboo Chandra Madhab Ghose for the appellant, are no evidence whatever of the family being joint. The first petition is one filed by Lal Behari and Kali Charan opposing an application made by a co-patnidar to open a separate account in the Collector"s serishta under the Sale Law. The other petition was one presented in the Fowzdari Court through a mookhtear, whose mookhtearnama was not proved. The decision of the Moonsiff was also a decision in a rent suit which was dismissed, as the kabuliat was not proved. That decision referred only to the rents of that particular year, and was no evidence whatever of a joint holding by Kali Charan and Lal Behari.

* Miscellaneous Appeal No. 527 of 1869, from an order of the Judge of Sarun, dated the 15th September 1869.

(5) Before Mr. Justice Bayley and Mr. Justice E. Jackson.

The 6th December 1870.

In The Matter of The Petition of Purnamasi Dayi. *

Baboo Ramacharan Banerjee for the appellant.

Mr. R.T. Allan for the respondents.

Bayley, J.--I am of opinion that this appeal mast be dismissed with costs.

The Judge has found that the special title upon which alone the objector attempts to come in fails. That title is alleged to be a certain deed called (regulating order deed), under which it is alleged that in this family the husband of the petitioner managed the family property. This, however, is a case in which the Judge was deciding, not on the general right or title of the parties to the property in suit, but under a special law, Act XXVII of 1860, as to who was the party best entitled to collect the debts due on the estate of the deceased Bissambher.

The lower Court has decided that the widow of the deceased was the best entitled, as being his next heir, to hare the certificate under the Act cited. It has also found that the special title attempted to be put forward by the objector Pratap Narayan Das, as based on the aforesaid deed, was not proved, and that there was no evidence that this deed was ever operative in any Court of law, or that it ever saw the light from the time of its execution in 1187 to 1252. This order of the Judge under Act XXVII of 1860 appears to me to be quite correct. It does not prevent the objector instituting a regular suit for tile establishment of his title, either under that deed or otherwise. The evil is that, in these applications under Act XXVII of 1860, due regard is not had to the nature and object of the Act, which is simply a law for the facilitation of collecting the debts due on the estate of a deceased person and giving acquaintances to debtors; but endeavor is made to make it a regular suit, and the sooner this is put a stop to the better.

In this view I would dismiss this appeal with costs.

Jackson, J.--I quite concur with Mr. Justice Bayley. I think the appellant has not made out his case, as he failed to prove the ground upon which he put it in the lower Court, viz., the special custom of the family under a deed. The point which be now takes is a new point altogether. It is evident that the vakeel is not prepared to argue that point, and I see no sufficient reason for considering the new point. Certainly, the widow was the best entitled to represent her husband, unless exceptional circumstances can be shown; and if there is any discretion in the matter, I should hesitate to grant a certificate to a person who has set forth a title under a deed attendant with so many suspicions circumstances as this deed is.

* Miscellaneous Appeal No. 360 of 1870, from an order of the Judge of Midnapore, dated the 15th June 1870.

(6) Before Mr. Justice L.S. Jackson and Mr. Justice Glover.

The 7th June 1870.

Muktakasi Debi (Defendant) v. Ubabati, alias Umabati, Guardian of Mahendra Narayan Roy and Girish Narayan Roy, Mr. Nors (Plaintiff.) *

Baboos Kalimohan Das and Rames Chandra Mitter for the appellant.

Baboo Srinath Das for the respondent.

The judgment of the Court was delivered by

Jackson, J.--The facts out of which the present suit has arisen are fully stated by the Zilla Judge before whom it was tried. It seems, therefore, unnecessary to re-state those facts at any great length.

The gist of the matter is this that the property to which the suit relates, whether divided or undivided, is the property of three persons, of whom, unless the hibbanama in dispute be a valid document, Kasi Nath Roy is one, and his two nephews, sons of his deceased brothers, namely Girish Narayan Roy and Mahendra Narayan Roy, are the other two.

The suit was brought by Umabati, the mother and guardian of Mahendra Narayan, for the sake of setting aside the hibba under which the defendant Muktakasi, who is Kasi Nath''s wife, claimed to hold separately one-third of the property in dispute. One of the objections taken by the defendant, which was unsuccessful before the Judge, but which was again urged before us in appeal, was that the property being, according to the plaintiff''s allegation, joint and undivided, she was not competent to maintain this suit in her capacity as guardian of one of the co-sharers, but the suit should have been on the part of all the co-sharers interested. After the argument had proceeded some length, we intimated our opinion that the plaintiff, who, as it happens, is the guardian of Girish Narayan as well as of Mahendra Narayan, should have herself placed on the record as plaintiff in her double capacity of guardian of both the infants. This has, accordingly, been done, and the requisite amount of stamp duty has been paid, so that the suit now represents the interests of the co-sharers, excepting Kasi Nath, whose share is now in question.

I may say that the only question we have had to consider on this appeal is, whether the property, to one-third of which the hibba relates, has been and is divided as to interest, or whether this Hindu family continues to be a joint undivided Hindu family in estate.

We have been very much pressed with a definition of an undivided Hindu family in Hindu law contained in the judgment of the Judicial Committee of the Privy Council in the case of Appovier Alias Seetaramier vs. Rama Subba Aiyan . The passage on which the appellant relies is this.--"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint

and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

Now we must bear in mind for what purpose this definition was set forth. Looking at the facts of that case, it evidently was with advertence to the contention by the appellant that a division in such a case as this meant a division by metes and bounds, and that there could be no operative division of title until such a division had taken effect upon the property; and their Lordships, repudiating any such view, held that there might be an operative division of title without a corresponding division of the subject-matter to which that title relates; and then, applying the principle so enunciated to the particular case, their Lordships show that the members of the undivided family had agreed amongst themselves with regard to the particular property, to have a written deed executed embodying their intentions, of which the words are set out in the judgment, and which indicate quite unmistakeably the intention of the parties to separate and to enjoy that which had been joint property in definite specified shares.

It seems to me that it would be going very much beyond what their Lordships intended in that case were we to attribute to vague expressions and statements contained in petitions, not directed to that particular subject, the effect of solemn deeds or agreements between the parties whether reduced to writing, or not, but agreements contemplating the very subject of separation.

In this case there is not only no document in which an agreement to separate is embodied, but there is no evidence that the members of the family came together with any such intention, or made any such agreement. It is only sought to be shown, or to be inferred, from vague random expressions in certain petitions, or from the evidence of certain persons who have been cited as witnesses in this case, that as to portions of the property rents had been separately collected; but there is no documentary evidence, there is nothing beyond some verbal assertions: and as to the petitions upon which the defendant relies, every one of those petitions contains, together with the vague statements relied upon, a positive assertion that the parties are at this moment in a state of ijmali, or joint property. There is a certain presumption in favor of the family continuing joint, and I think that, in the circumstances of the case, the Judge was quite right in concluding that the defendant, on whom the burden of proof lay, had not discharged

herself of that burden by showing that the family were separate in estate. There can be no doubt that if such separation had been made out, the plaintiff could have no interest which would enable her to maintain the present suit; but it also follows conversely that, if such separation was not made out, and if the property continued to be the common property of a joint Hindu family, the co-sharer, Kasi Nath, had no power to make the hibba which, is before us in this case, and that, consequently, the defendant had no title under the hibba.

The result, therefore, I think, must be that the plaintiff must succeed so far as to obtain a declaration from the Court that the hibba is not a valid instrument, and that the defendant has no title thereunder. Regard being had to the circumstances of the case, and to the fact that Muktakasi is the wife of the co-sharer Kasi Nath, who is manifestly, from the evidence, a lunatic, and incapable of managing his own affairs, I think it is not necessary that the decree should run so as to direct the ejectment of Umabati from the land, and therefore, I think, the decree of the Court below ought to be modified to this extent; but it will remain clear from the judgment and decree now made in this case that any possession which Muktakasi may retain will not be in the quality of owner under the hibba, but simply out of her relation to Kasi Nath, one of the co-sharers.

The costs of the suit will, of course, include the costs which the plaintiff incurred by payment of excess stamp duty here, representing Girish Narayan''s interest in the property.

The respondent is entitled to her costs of this appeal.

* Regular Appeal No. 11 of 1870, from a decree of the Officiating Judge of Zilla Moorshedabad, dated the 4th October 1869.