(1936) 04 BOM CK 0006

Bombay High Court

Case No: None

Ramchandra Vishnu Joshi		APPELLANT
	Vs	
Ramabai Govind Gadre and Others		RESPONDENT

Date of Decision: April 16, 1936

Acts Referred:

- Succession Act, 1925 - Section 273

Citation: AIR 1937 Bom 341

Hon'ble Judges: Tyabji, J

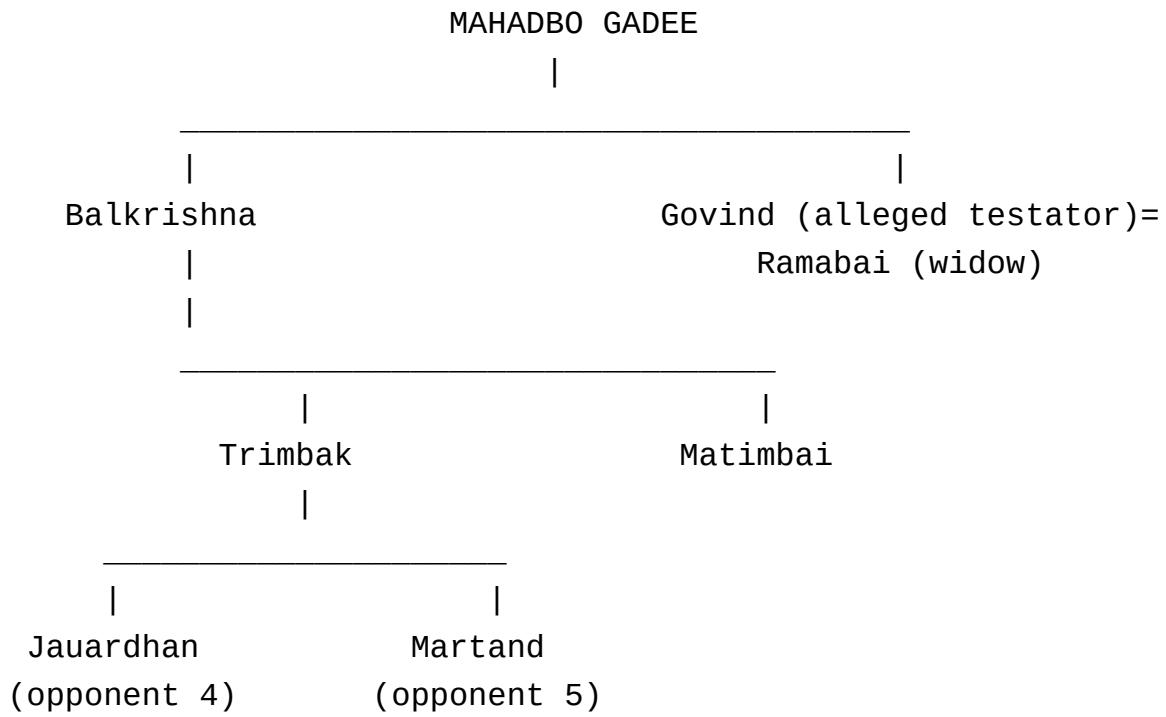
Bench: Division Bench

Judgement

Tyabji, J.

This appeal arises out of a petition dated 9th January 1934 for probate of a will alleged to have been executed by one Govind Mahadeo Gadre on 30th July 1894. The petition -was opposed by opponents 4 and 5, the sons of the nephew of the alleged testator, named Martand and Janardhan. Their father was Trimbak, whose father was Balkrishna, the brother of Govind, the alleged testator. I shall refer to opponents 4 and 5 as the opponents. The grounds for opposition to the grant of probate were, first, that no such document as was relied upon by the petitioner had ever been executed by Govind; secondly, that if executed at all, it was executed when Govind was not in a sound disposing mind; thirdly, that, in any case, the original document not having been produced, there was no admissible and sufficient secondary evidence to determine what the terms of the document were; fourthly, that assuming that there was such a document executed in the terms alleged, and that there was sufficient secondary evidence of it, the document was not a document that could be regarded in law to be a will capable of probate. The learned District Judge, before whom the petition was taken, decided all the preliminary points in favour of the petitioner, but he accepted the final contention of the opponents and held that the alleged will was not in terms of issue 3 before

him-"a will in law capable of being admitted to probate". The relation between the parties is shown by the following pedigree:



2. As there were cross-objections on the points decided against the opponents, the evidence in favour of the view taken by the learned Judge was placed before us by the appellant''s counsel. Counsel for the opponents (respondents before us), however, did not contend that the learned Judge was wrong in deciding the first three points against the respondents. In our opinion, on the evidence no other conclusion could have been reached. The respondents however supported the final decision of the learned Judge and argued that probate could not be granted for the reasons that I shall presently state. A distinction was made between the cases of opponents 4 and 5. The former did not appear and did not produce accounts, which presumably would have been against him if produced. The latter appeared and gave false evidence. No distinction need be made between the two for the purposes of the only issue argued before us.

3. Under the Succession Act 39 of 1925 an application for probate must be made in a form particulars of which are given4 in Section 276. The main facts that have to be alleged are that the writing annexed to the application is the last will and testament of the testator, that it was duly executed and that the petitioner is the executor named in the will. If the Court is satisfied that the will was duly executed, it may declare that the executor appointed under the will is the representative of the deceased for the purpose of carrying into effect the declaration of the intention of the testator, with respect to his property, after his death. That is the result of the grant of probate, as appears from the definitions of "executor", "probate" and "will" in the Succession Act. Section 273 (corresponding to Section 59, Probate and Administration Act 5 of 1881 and Section 242, Succession Act of 1865) lays down what the effect of probate shall be. It is conclusive as to the executor''s title as

representative of the deceased against all debtors of the deceased and all persons holding property which belongs to him; it affords full indemnity to all debtors paying their debts or delivering up to the executor property belonging to the deceased.

4. Accordingly, on applications for probate, the Court will not enter on a question as to the title to the property which the testator by his will purports to leave, nor into the question whether the deceased''s property is joint or separate: Ochawaram Nanabhai v. Dolatram Jamietram (1904) 28 Bom. 644. The probate Court is concerned only with the question stated by me with reference to the Succession Act, Sections 273 and 276. In the present case, however, it was the opponents who raised the objections to the grant of probate on which the effective discussion before us has exclusively proceeded. The petitioner on the other hand did not either in the first Court, or until a late stage of the arguments before us, protest against these contentions being allowed to be raised by the opponents; nor did the petitioner say that the contentions of the opponents were not such as could be considered on the petition for probate. Moreover, on the basis of those objections taken by the opponents the learned Judge declined to grant probate. It was impossible therefore for us to accept the argument addressed to us at a late stage of the appellant''s case, which suggested rather than pressed that we should refuse to hear the respondent in support of the judgment under appeal and decline to examine the grounds for the refusal of probate which had already found acceptance. The issue therefore that remained to be determined-the only issue before us arose in these circumstances. The petitioner said that the document in question was a will, in every respect conforming with the requirements of the Succession Act, Section 2, Clause (h). The opponents contend that though on the face of it the document looks like a will-this cannot be denied-yet it cannot, on a proper construction, be treated as a will. The question then to which the learned Judge ought to have addressed himself was, in what respects according to the opponents'' contention the document failed to conform with the definition in Section 2(h); "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. For that purpose the document had to be construed and its language interpreted in accordance with principles which have been frequently laid down. They are stated in extenso in Venkata Narasimha Appa Row v. Parthasarathy Appa Row 41 I.A. 51: "In all cases"(said Lord Moulton) the primary duty of a Court is to ascertain from the language of the testator what were his intentions, i.e. to construe the will. It is true that in so dinghy are entitled and bound to bear in mind their matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure: ''The Court is entitled to put itself into the testator''s armchair''. Among such surrounding circumstances which the Court is jound to consider, none would be more important than race and religious opinions, and the

court is bound to regard as presumably (and in many case certainly) present to the mind of the testator, influences and aims arising there from. But (says Lord Moulton resuming the thread of his original theme)

all this is solely as an aid to arriving at right construction of the will, and to ascertain the meaning of its language when used By that particular testator in that document. Bo soon as the construction is settled, the duty of the Oourt is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto.

5. This last is a point that seems to be overlooked in several parts of the learned District Judge''s judgment. Lord Moulton proceeds to answer an apparent objection more and then concludes (p. 72):

That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect is one of the most important of the ''surrounding circumstances'' which the Courts must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator''s true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and Once ascertained they must not be departed from.

6. So that ascertaining the meaning of the language by the proper construction of the words used is throughout insisted upon. I do not overlook that Lord Moulton is-speaking of a document admitted to be will. But the fundamental principle of construction cannot differ. The learned District Judge has not clinched the matter as (with all deference) he ought to have done. He ought to have directed his attention to the document itself﷿to the language that he was invited by the opponents to construef so as to reach the conclusion that the document was non-testamentary. He ought to have asked the opponents to specify the particular "surrounding circumstances" which according to them aided the construction of specified words of the document. He ought to have brought the words of the document in direct juxtaposition with the circumstances, and then given to the words their proper meaning. He ought first to have specified the words or sentences of the document which he was construing. He next ought to have specified the surrounding circumstances by reference to which he was construing those particular words. He thirdly ought to have decided, in the light of the particular circumstances, upon the precise meaning of the words he had specified. That meaning may no doubt be different from what might be attributed to the words at first sight. Finally he ought to have proceeded to consider whether a document having that precise meaning (which he found this document to have) could be deemed to be will under the Succession Act, Section 2(h), or whether it failed to conform with the definition in

Clause (h) in any particulars-in the latter event specifying the particulars in which the document so failed.

7. The process he has followed is much vague and indefinite. I say so in spite of the fact that the judgment has been rightly admitted even by the learned counsel for the appellant to be careful and fair in a remarkable degree. And yet I believe I am doing no great injustice to the reasoning adopted in the judgment when I state that it amounts to holding that the document meant something different from what appears on the surface, and that therefore, per saltum, it is nob a will but something else-perhaps a family arrangement.

8. In my opinion several of the considerations relied upon for construing the document failed to satisfy the restrictions laid down by law. Where the terms of the documents are clear, evidence ought not to have been permitted to contradict those terms or to vary their meaning. In the rest of my judgment therefore, though I deal with all the considerations that have been relied upon for the purpose of construing the document so as to make it out to be non-testamentary, I wish to guard myself against being understood as agreeing with the view that all those considerations were properly placed before the Court. I intend to deal with those considerations, because in my opinion even if they had been unobjectionable they would not have led to the conclusions of the learned Judge.

9. With all deference, the learned Judge did not initially make the exact questions before him sufficiently definite; he had to consider in what way the document failed to conform to the requirements of a will; particular words of the document had to be interpreted in such a way as to prevent its being treated as a will for the purposes of probate. This aspect of the matter was therefore specifically put to the learned counsel for the respondent. So far as I can appreciate the contentions of the respondents why this document cannot be treated as a will, they may be put under five heads. I do not suggest that the contentions were put in the exact form of these five heads, but the arguments can all be brought under them: (1) that the document does not contain a Unilateral declaration such as a will consists of, but a bilateral transaction, brought about by and representing the terms of an agreement between Govind and his nephew Trimbak, (2) that the, document, so far as the dispositions contained in it are concerned, is intended to speak from the time of execution, not from the death of the executant, (3) that it fails to conform to the requirements of a will in that it is not revocable, (4) that for these and other reasons, to which I shall refer, the document cannot support the grant of probate, because probate means forensic recognition of the fact that the executant has appointed his representative for the purpose stated in the Succession Act, Section 273, whereas (it is argued) if the document is properly construed, it must appear that no person is under it entitled to represent the executant in respect of the dispositions mentioned in it—that no person may exercise in the character of a representative of the executant the power of giving effect to those dispositions in accordance with its

tenor, and (5) that the document was acted upon and the only dispute is whether it was acted upon as a will or as a family arrangement. The last two heads seem to follow from the first three and do not perhaps require separate statement. The fourth was not put to us in the form I have given it.

10. Neither these points nor any others to take their place were clearly enunciated by the learned Judge. Enunciating these points is only the first part of the task. The next is to bring the words of the document into contact with the points, and to explain the words of the document so as to give the document the meaning and the effect on which reliance is placed. As to this latter part of the task, I may say at once that the only chance of the respondents was to argue at as great a distance from the language of the document as possible. For, the language of the document gives a complete answer to all their contentions. The respondents'' case breaks down at such an early stage of the logical sequence that there seems no justification for formally attempting to go through the last stage.

11. I shall presently deal with the points taken by the learned Judge, but my general conclusions are that the document is in most respects so clear that no reliance on external circumstances was justifiable; secondly, that the circumstances relied upon cannot induce me to construe it as having a meaning different ''from what appears on the face of it. Assuming that those circumstances are relevant, they do not lead to the alleged construction. Finally, assuming that the document could be construed in the sense in which the learned Judge thought the circumstances led him to construe it, a document having that sense does not become non-testamentary. The learned Judge referred to the evidence of Mr. Karve, the pleader, Ex. 168, as being the key to the construction of the document. Mr. Karve deposed to having been asked by the alleged testator "what the rights of a person in a joint family were as regards making a will," and to have answered "unless you show your .property as divided, you cannot make a will. He (Govind) said ''if they (i.e. the grandsons and nephews) agree to be executors?'' I said if they agree to be so in your divided estate, it will be free from objection". In respect of this answer supplying the key to the scheme of the document, the learned Judge and the petitioner are agreed, though the learned Judge uses the key to unlock a different portal. In any case all parties are agreed that Govind was aware of the law that if he remained a member of the joint family he could not make a will; and that he was desirous of making certain testamentary dispositions.

12. The document purports to be a deed of disposition made on 30th July 1894. It states that it is executed by Govind-not by Govind and Trimbak. Then follow statements in the nature of recitals: (1) that Govind and his elder brother Bal-krishna had remained joint till then, (2) that in the beginning of the year 1894, Govind had gone for pilgrimage to Benares where he thought of separating from his brother, and that he wrote a letter to that effect to his brother, (3) that his brother said that the family property should be partitioned by Govind in consultation with Govind''s

nephew Trimbak, son of Balkrishna, (4) that accordingly on his return to Poona, Govind told Trimbak to partition all the moveable and immove-able properties, (5) Trimbak consented, (6) the two agreed that they are "separate from to-day in a symbolical way". "In this way that whatever Immovable and moveable property, business and dealings exist to-day are to be divided equally- one share belongs to me and the other to Trimbak Balkrishna." Two reasons are given for the agreement to divide in a symbolical way, viz. (a) that the property to be divided was such that it would take a long time to make a partition (meaning evidently a partition by metes and bounds) and (b) that in the meantime Govind''s health was becoming worse and he was not confident about his life, (7) then the actual partition in a symbolical way, which has been led up to is thus stated: "in this way the partition is made and each has become the owner of his own share." (8) What follows is not a bare recital: "I have no son and have no intention of taking one in adoption and my desire is that my wife Soubhagyavati Ramabai also should not make an adonjiion after my death." (9) That Govind told Trimbak to that effect and he (Trimbak) requested that the property should not be actually divided by mates''and bounds just then, and that he" Was willing to act in compliance with the dispositions made by Govind in regard to his (Govind''s) property, (10) "on considering this", Govind says "I have full confidence in Trimbak. I am sure that as long as he lives he will manage everything as I would do", (11) Finally the operative part follows: "For this reason we (i.e. I) make the disposition of our (i.e. my) property as shown below". As to his properties, he speaks (a) of a half share in property in Nagar District and Akolner, (b) he refers to the money-lending business, and to lists of what is to be recovered, and of the debts and move-able property of the value of more than Rs. 20,000, and (c) to two houses. He sums up "the joint property of us two brothers is as stated above; and I have got a half share in the same". I have numbered what I call the recitals. They are all important. The 6th, 7th and llth are crucial. In the eleventh I have used the words ''my property'' instead of ''our property''. In the vernacular the first person plural is used in the the sense of the singular. There is no dispute about this. It was expressly admitted by counsel.

13. A good deal of argument was addressed to us with reference to the effect of the recitals. The interpretation of the document is invited by the opponents in the circumstances that I have already stated, as a ground of defence against ''the application for probate being granted. The determination of the status of Govind at the time when he executed this document whether he was joint or separate is, according to the opponents, vital for the purposes of construing the document and understanding its meaning. It is in this manner and in spite of the fact that the Court granting probate does not ordinarily determine whether the property is joint or separate, that the status of Govind has to be determined. Lord Moulton in the passage that I have quoted refers to the position of the testator and his family relationships as matters that have to be considered for construing the will. The opponents rely upon the fact that Govind was joint up to the time of the execution

of the document, and contend that upon the true construction of these recitals it appears that he continued to be joint till his death and could not have intended to make a will, and that the document must therefore be considered not as a will but as a -writing of which probate cannot be granted, perhaps as a family arrangement. An argument pressed upon us was that the recitals of a severance of the estate, since they are alleged to be part of the will, must speak from the death of Govind; that therefore Govind died before there was any severance and that the interest of Govind not being severed he had no power of making a will. This is a perversion of the meaning of the words ''the will speaks from the death of the testator''. That expression is a picturesque form, I presume of the proposition in Section 119, Succession Act, that:

Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator''s death.

14. How can this doctrine have any effect on the significance of the events that took place at the time when the will was being written? How can it help to understand the meaning of recitals in the will stating that certain events had taken place at stated times? These recitals are contained in a writing which though it calls itself a deed of disposition executed by Govind alone, is signed both by Govind and Trimbak. There are no reasons to doubt the truth of the statements in the recitals. Everything points to the events recited having taken place as recited. The recitals establish therefore that on 30th July 1894, Govind and Trimbak agreed that they were on that day, i.e. on 30th July 1894, separate in a symbolical way. The sequence of the recitals leading to the con-* eluding statements that the partition is made, that each has become the owner of his own share and that Govind makes aitji disposition of his property as stated, is so clear that any attempt to give the words any other meaning than the obvious seems desperate. But in view of the arguments before us and the line of reasoning adopted in the judgment under appeal, I will bring the exposition of the law in Lord Westbury''s judgment in Appovier v. Rama Subba Aiyan (1886) 11 M.I.A. 75 to bear on these recitals (p. 89): "Certain principles or alleged rules of law" (said Lord Westbury)
have been strongly contended for by the appellant. One of them is that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds. Their Lordships do not find that any such doctrine has been established: and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject to which the title is applied. 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 the particular property that it shall thenceforth be the subject of ownership in certain defined shares [and this is what Govind and Trimbak did] 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.

15. Again on p. 91 it is stated:

There may be a division of right and there may be a division of property; and thus after the execution of this instrument, there was a division of right in the whole property, although in some portions that division of right was not intended to be followed by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition.

16. And at p. 93:

It operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz. that that is sufficient to make a divided family and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject matter.

17. Then at p. 92:

Thus-using the language of the English law merely by way of illustration-the joint tenancy is severed and converted intoi a tenancy in common.

18. The words with which the document before Lord Westbury concluded wera "We have henceforward no interest in each other''s effects and debts except friendship between us" (p. 93). With reference to these words Lord Westbury said (p. 93):

We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition.

19. The learned District Judge has somehow come to construe what I have called the recitals as not effecting a severance of the estate, and apparently as having no effect at all. He holds that there is in the document an indication that the property is

not to be partitioned by metes and bounds. Several observations of the learned Judge indicate a notion﷿contrary to what Lord Westbury laid down-that Govind could not have severed his own interest and converted the joint tenancy into a tenancy-in-common unless he expressly provided that there should be not a mere severance of the joint tenancy but that the resulting tenancy-in-common should be followed by a partition by metes and bounds. The words of the learned Judge are:

There were... no such circumstances present which induce the members of a joint family to separate and yet this document starts by reciting that a separation had been made that very day.

20. The absence of circumstances ordinarily inducing separation﷿I do not (with all respect) imply that I share the opinion that they are absent-would not be sufficient to disregard the plain terms of the document. The learned Judge goes on to observe that Govind was not thinking of himself as a separate member or of his own immediate relatives, but he was thinking of the family as a whole. Reference is then made to the bequests to Mathubai, to the daughters of Balkrishna, the elder brother of the testator, and to Durgabai and to the somewhat peremptory direction that the clerk Nijsure was to be retained in the service of the estate, as leading to this conclusion. The facts that there is no provision for actually dividing the property at any time, and that no steps were taken to carry out the notional partition into actual effect, are referred to as being most significant of all, as though the notional partition were not in the eye of law "an actual effect"﷿though it severs the joint property and makes joint tenants tenants-in-common. The learned Judge repeats that no steps were taken to carry out the notional partition into actual effect and that the executes were not asked to do so, that the other executor does not do so, and that he does not ask for probate for forty years. Perhaps the most striking passage in the judgment in this connexion is:
Does this conduct not lead to a clear inference that there was some insuperable objection to the claiming of a partition of Govindrao''s share in spite of the recital in this document of his having separated from the family 1 I think it does. The nature of the objection does not appear because the parties choose to suppress it. Was it a prohibition by Govindrao that notwithstanding the recital in the Vyavasthapatra no partition was to be claimed? We do not know. But in the absence of some such obstacle the conduct of Mr. P.P. Khare, or of the petitioner or of Ramabai appears to be quite inexplicable. It is not enough explanation to say, as Ramabai does, that it was1 a mistake pot to have asked for a partition of Govindrao''s share when opponents Nos. 4 and 5 were dividing up the whole property. The opponents want the Court to infer from this conduct that the document is fabricated. That contention is unacceptable because the copies are in the handwriting of Nijsure who was dead long before the two opponents fell out. But that does not make the conduct of the petitioner and of Mr. P.P. Khare at all understandable or natural.

21. And yet the words in the document are almost to the same effect as the words before Lord Westbury. I have dwelt on the recitals and their effect in detail because their alleged effect is the real basis of the respondents'' case. The learned District Judge accepted their argument which was to the effect that the terms of the document show that Govind continued joint, that he desired to continue joint and that the document represents a bilateral arrangement between Govind and Trimbak. The circumstances sought to be relied upon for construing the document do not in my opinion show that the document must be construed in the sense that Govind continued joint, or desired to do so for that the disposition he was making was not the expression of his own will but an arrangement between him and Trimbak. I have enumerated the five points which fche respondents undertook to make out. In my opinion none of them can stand the consideration of the recitals which show that Govind effected a severance of his share and proceeded to deal with it as his own property.

22. The learned Judge''s other grounds for his conclusion may be considered in connexion with the terms of the dispositions. The document is according to him some-what peculiar. He concedes that there are certain dispositions ordinarily contained in wills, such as bequests to relatives. He also refers to the fact that the main object of the document was to make suitable provisions for the widow and to make some minor bequests. But he says that the document also partakes of the nature of a family settlement. In such cases probate may be given of those parts of the document which are testamentary. The whole of the will cannot be rejected because there are some portions which cannot be treated as testamentary dispositions or because the testamentary declaration is embedded in a larger document which may reasonably be classed as a family arrangement. Attention is not directed to the exact difference in the present connexion between the document interpreted as a will and the document interpreted as a family settlement. The dispositions are said not to be reasonably complete as though there were no law that:

Where an eventuality is unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto: Venkata Narasimha Appa Row v. Parthasarathy Appa Row 41 I.A. 51.

23. Under this document Govind has dealt with his severed share of the property, but he has not provided for certain eventualities. He has not purported to restrict the widow from asking for a partition by metes and bounds, nor has he provided what was to happen after her death. The law must step in when eventualities arise for which the testator has not provided. That circumstance cannot affect the construction of the document for the purpose of determining whether, so far as it goes, it is a will conforming with the terms of the Succession Act, Section 2(h); and whether there is any person nominated to carry into effect the declaration of the

intention of the testator with respect to his property, any person entitled to apply that his appointment to represent the executant of the document should be recognized by grant of probate. The words of the document are too clear to admit of any construction except that Govind is making a disposition of his own property. The learned Judge seems to interpret the document as though it had said: "Our property continues to be joint; we have agreed that out of the joint properties Trimbak will make such and such payments."

24. It is hardly necessary to refer to Lakshmi Chand v. Mt. Anandi AIR 1926 P.C. 54 to which our attention was drawn by the respondents'' learned counsel, and to contrast the care with which the document there construed avoids "the one word" (see Lakshmi Chand v. Mt. Anandi AIR 1926 P.C. 54) by which separation could have been brought about. The operative part of the present document runs:

25. The disposition of that (viz. the half share that Govind has in the property originally owned by the two brothers jointly) should be made as stated below:

first for the marriage of the three unmarried daughters, Rs. 5,000 each; then Rs. 10,000 to the wife Ramabai for her stridhan. Directions are given to her that she should if possible live with Trimbak, and if not that she should stay in the half portion of ''our'' residential house. The fourth clause refers to the money-lending business: out of Govind''s half share in the vasul (recoveries) fourteen ''gifts'' are to be made. To these fourteen gifts three others have to be added which are stated in Cls. 13, 5 and 6, including provisions for Rs. 50 being paid annually out of Govind''s half share of the income of the business to his brother-in-law; Rs. 500 a year to his widow Ramabai; Rs. 20 and Rs. 5 per month being given for maintenance to Durgabai Joshi and Autai Joshi. Finally the rest of the income is to be taken by Trimbak Balkrishna under Clause 6. So that the whole of the income of the half share in the money-lending business is disposed of. These seventeen legacies are payable only out of the income of the money-lending business; the principal is not to be spent, but Govind''s half share, in the principal amount must be invested in promissory notes or deposited in some institution (Cl. 10). He clearly purported to deal with his own property and therefore the person that he appointed to give effect to his desires was to act as his representative or his executor after his death. That person is therefore entitled to have his representative character forensically reoognized by grant of probate.

26. Govind has in these gifts provided not only for his own daughters and widow but for the daughters of his brother and of other more remote female relatives. This circumstance has been referred to by the learned Judge as indicating that the property continued to be joint and that the document was a family arrangement; at least that it was non-testamentary. I do not follow the reasoning. An uncle who owns half of a large estate may surely desire to give comparatively small legacies to his nieces. If he has just severed his own share, the desire would not lose its edge. At any rate I do not see how the disposition ceases to be testamentary because the

beneficiary is a niece and not a daughter-Govind''s ideas with regard to the women of the family were not illiberal. I instance the very first ''gift'' of Rs. 6,000 to his niece Dhondubai, married in a poor family. If he purports to make bequests, must it be supposed that he had no right for dispose of what he was purporting to bequeath, though he had (by a mere declaration such as he has made) the power to make it his separate bequeathable property? Would Govind not say: "Let my half share be severed so that I may deal with it exactly as I like". That is what on the face of it the document purports to do.

27. The learned Judge says that the document must be construed so as to give it quite a different effect, viz. that Govind did not take the natural and easy step necessary for exercising powers of disposition according to his own wishes, but that he made an arrangement with Trimbak to give effect to his testamentary desires in a circuitous, unstable manner—after permitting Trimbak to become the sole owner by survivorship. What is more likely to have happened? Would Govind say: "I desire that after my death these payments should be made. I have power and means out of which these payments could be made of my own free will. But I will not use those powers and means. I will place the whole thing in the hands and at the mercy of Trimbak. I will make a family arrangement with him that he should do these things as a matter of grace after my death". I need take only two observations in the judgment under appeal to show how inconsequential they are. In one place it is said:

The inference therefore that Govindrao never intended to effect a real partition and that this was well known to all concerned seems to be very strong. The intention to separate appears to have been recited only for the purpose of placing a weapon in the hands of the widow if the allowance which he thought necessary for her was not paid to her after his death.

28. What would be the weapon? According to the learned Judge''s view Govind threw away the weapon. The weapon he himself had was to sever his interest and to make dispositions according to his own will. That obvious weapon the learned Judge says that Govind refused to wield; that he only pretended to wield it: that apparently he carefully put the real weapon out of arm''s way, and flourished a sham one, deceiving all but the astute into taking the sham one to be real. Again Govind expressly took away all power of adoption from his widow--a threat of which might bring the surviving coparceners of her-deceased husband to their senses in case they did not treat her properly. Except the power to adopt, is there any weapon left in the hands of the widow if the joint family continues?

29. The provision in favour of Mathubai has also, with great deference to the learned Judge, been entirely misunderstood. Mathubai was a daughter of Govind''s brother Balkrishna. She had no claim directly against her uncle Govind. Her rights were against her own father and her brother Trimbak. Govind provides for her in Clause (7) of the will; she is asked to stay with his brother Balkrishna (her own

father) as long as he lives; thereafter with her brother Trimbak or with his own widow Bamabai:

Even if disputes arise they should stay in the same condition bearing in mind the former good name. She should not bring a suit for maintenance. Ramabai should treat her as her own daughter. If in spite of this if they cannot carry on together Ramabai should pay her Rs. 10 monthly out of her own money.

30. What does this show? Govind asks his widow who is going to be left in a position of comparative affluence, rather to pay Rs. 10 to Mathubai out of her own pocket, than let her bring a suit. Whom could Mathubai sue? Could she sue Ramabai? Govind is anxious that Mathubai should not be driven even to sue her own brother, and that if there was any threat of a suit, Ramabai should step into the breach by giving to Mathubai out of her own purse an allowance of Rs. 10 a month. Govind could easily have provided this Rs. 10 out of the surplus income he left for Trimbak. But he acted with something of the pride of a large landowner and asked his own widow to pay this pittance personally if those primarily responsible for Mathubai''s maintenance failed in their duty. This did not prevent opponent 5 from instigating Mathubai to bring a suit against Ramabai on the strength of this clause in the will. The learned Judge has in my opinion given this clause a wrong twist as he has done to several other provisions of the will. Similarly with regard to the Rs. 6,000 given to Dhondubai. The testator gives Rs. 6,000 out of his own divided portion:

Though this gift has been given to her, my suggestion is that Balkrishuna Mahadeo or Trimbak Balkrishna should give her any amount they like from their own share.

31. These words are not appropriate to an arrangement where reciprocal promises for consideration are made. Yet the provision is referred to as showing that Govind did not think of himself as a separated member of a family. Surely, if what Trimbak would do to members of his own group was so doubtful, Govind would not trust to the sole care of Trimbak his own widow who was admittedly his main concern. Can it be doubted that Govind would prefer commanding to begging? He could place himself in a position to order things of his own right: would he prefer making some family arrangement in which his widow would remain under the obligation of a nephew who could not be trusted to take care of his own sisters?

32. The learned Judge has also referred to the fact that Govind has purported to make arrangements as if the whole estate were joint. I agree that Govind in one or two passages seems to forget the change that must follow the severance. He died soon after. He would not after separation any more have been the manager of the whole property. The mere expression of his desires would not, after separation, have the same effect as they no doubt had when he was the manager of the family. He speaks as one accustomed to implicit obedience. The direction that Mathubai should stay with Balkrishna savours of this. His mandate that Nijsure should be continued as a clerk on the same salary, shows the same human tendency to forged

that his powers had been altered by the severance and would soon end with his life. Nothing is more significant of this frailty on his part than the faith that his brother-in-law, the present petitioner, a very small pensioner, would be able--on occasion arising--to stand on a footing of equality with the pleader P. P. Khare and his nephew Trimbak-Trimbak the manager of the large inam estates. The petitioner was in fact unable to hold his own against Trimbak as soon as Govind died. All these provisions seem to be based on the vain assumption of one forgetful that the seeming deference with which the petitioner may have been treated during the lifetime of a powerful brother-in-law, was based on circumstances that would come to an end as soon as the brother-in-law died.

33. I have covered I think most of the considerations referred to by the learned Judge in his judgment. They must be made to bear on the alleged distinctions formulated by me under five beads, between the contents of the document in question and the contents of a will under the Succession Act, Section 2(h). If this is attempted it becomes still more clear that none of the considerations relied on leads to the establishment of the distinctions. Some of the arguments on behalf of the respondents are however not covered. One main contention of Mr. Jayakar was that the Vyavasthapaks (an expression that is officially rendered as executors, administrators, managers or trustees) appointed under Clause 11 of the document must be considered not as executors but as persons entering into a bilateral family arrangement with Govind. He argued that Clause 11 must be taken with the words written by Trimbak at the end of the document: "I agree to the aforesaid disposition and have the full intention of trying to carry it out as far as possible"; that read together they make the document a bilateral document, i.e. in view of these provisions the document must be construed as containing the terms of an agreement between Trimbak and Govind.

34. How utterly opposed to the terms of the document such a construction is, has I think sufficiently appeared. The document begins by referring to itself as a deed of disposition executed by Govind. The words of Clause 11 are "for making the aforesaid disposition of my share I have appointed Vyavasthapaks". Is it possible to construe these words as Mr. Jayakar invites us to do?--as not meaning that the authority is conferred on Trimbak by appointment on the part of Govind, but that the document as a whole is an agreement between Trimbak and Govind, and that it was Trimbak who agreed to do certain things and that Govind is the promisee? That is how the document must '' be construed if it is to be taken as a family arrangement. This argument ignores the mention of that we other Vyavasthapaks. To apply the argument to them is still more difficult: difficult as it is to apply it to Trimbak. It seems reasonably clear that Trimbak was appointed executor for the reasons stated by Mr. Karve in his evidence. He was appointed executor so that he may not be able to contend that the interest of Govind had not been severed and that Govind had no authority to make a will. In answer to such a contention this document could have been produced Trimbak having accepted the executorship

on the basis that Govind had separated himself and that he had made a will, could neither '' have feigned ignorance of the separation, nor asserted invalidity. The terms of the will contradict the suggestion that the consent of Trimbak was not as an executor but as a coparcener and as the presumptive sole survivor, promising to carry out the terms of a family arrangement with another coparcener, whose interest is about to come to an end. Part of this argument was the contention that Govind nowhere states that he was treating himself as a separated member. To question that he so states is to ignore the principal terms of the document where Govind''s separated interest is repeatedly mentioned. Then it was argued that the main provisions of the document are in favour of the widow and that they are merely such as the law by itself would make; that the document merely makes the widow''s rights under the ordinary law more stringent and more definite. How is this'' relevant to the construction of the document-and to which parts of the document? This argument makes it common ground that the main object that the testator had in mind was to make the widow independent. This in itself is a sufficient answer to one of the five heads under which I stated the respondents'' arguments—the argument that the document was intended to speak from its execution and not the death of Govind. What were the alter-native methods available to Govind for making provisions for his widow? If he remained joint she would be entitled to mere maintenance at the mercy of the surviving coparceners. His state of health made it impossible to partition the property by metes and bounds. It took the opponents several years to come to a partition, and still a large portion of a property is left unpartitioned. He could have left his widow with her legal life interest in his separated property. In that case she would hardly have been able to participate in managing her inam lands; she would hardly have been able to act as a partner in the money-lending business. Govind accordingly severed his half-share, but wisely provided that instead of the widow being left in management of her difficult life interest, a fixed sum per year should be made secure for her. So far as one can judge, a liberal balance was left over for Trimbak, as an inducement against raising difficulties in giving to the widow what Govind considered a dignified competence.

35. Assuming that these provisions are of the same nature as a widow''s rights under the ordinary law, but that they make her rights more stringent, more definite and more extensive, that assumption does not give to the document a meaning different from that which it bears on the face of it. Giving the words their exact meaning, the purpose and object of the document admits of no doubt. The testator definitely stated that he had a half, share in the property. Thereupon if he had done nothing else, his widow would have been entitled to a life interest in the property and after the widow the property would have devolved by law upon the daughters of the testator. He thought that considering the nature of the property it would be better and wiser to provide that the other members of the family should, during the lifetime of the widow, give her something which if not the exact equivalent was in

the circumstances a sufficient exchange for what she would get as the income of her half-share. He was not concerned then to provide any further with regard to his unmarried daughters. They were by law entitled to be the heirs. He did provide that their heirship should not be liable to be disturbed in the only way in which it might be disturbed, viz. by an adoption on the part of the widow. The prohibition to adopt accords with the whole scheme" underlying the will—that nothing should come between the heirship of his daughters who by law were entitled to be the heirs of the property on the death of the widow. It is significant that he says that she may bring up opponent 5 as her son but does not permit her, still less desire her, to adopt him. He adds—this again is not without meaning—that if he likes to stay with her he may do so, otherwise he should go and stay with his own father. Surely this excludes reading into the document any desire on his part that the whole property should be taken by survivorship by Trim-bak or his sons. It may be admitted that Govind does not indicate that he expected the opponents to behave in quite the mean and selfish manner that they have adopted towards his widow. On the other hand, there is no justification for the suggestion that he was completely deceived as to their merits and deserts.

36. Certain events took place after the death of Govind, to which also the learned Judge refers as apparently helping to the interpretation of a document which is clear in itself. I do not see how the conduct of third parties can bring the Court to give to the document a meaning different from that which the words clearly bear. Similar objection has already been made by me to several arguments mentioned before. Subject to it, I shall refer to two or three circumstances on which great reliance was placed. One of them, perhaps the most important, is the fact that the opponents proceeded to partition the property, and according to the learned Judge no steps were taken either by Ramabai or her brother, the petitioner, to take care of the interest of Ramabai while the partition was being made. When the whole of the circumstances are considered, when the available means of enforcing her rights in a Court of law and the expenses of doing so are borne in mind, this conduct hardly needs any explanation. How could this unprotected widow be expected to fight these powerful, and by all indication unscrupulous, nephews of her husband? They have contested every inch of the ground. They did not admit the execution of the document. They did not admit the correctness of the copies, or the availability of secondary evidence. They still vehemently deny its validity. I suggest no doubt on the interest of Govind having been severed. What I do consider doubtful is, whether instead of demanding the rights which had been crystallized for her by her husband into an annual payment sufficient for her purposes, it would have been wise for the widow to demand a partition of the estate, taking upon herself all the trouble of managing it in the teeth of opposition, with all the uncertainties of Immovable property as well as a money-lending business. But I repeat that that decision on her part cannot have the slightest effect on the construction of the document. Then it is said that in certain execution proceedings the names of Balkrishna and Trimbak

were put in as being the representatives of Govind on his death. It is seriously suggested that there is some recondite difficulty in determining the meaning of the testator when he says "both of us agreed that we are separate from to-day in a symbolical way," when he says:

our property, business and dealings are to be divided equally�one share belongs to me and the other to Trimbak. In this way the partition is made and each has become the owner of his own share;

when he says:

the joint property of us two brothers is as stated above and I have got a half share in the same and the disposition of it should be made as under,

when he refers to his half share in the residential house and his half of the income of the Immovable property, when his half share in the vasul (recoveries) and his half share is contrasted with Balkrishna''s half share and when he throughout deals with his half share for the purpose of his disposition, it is suggested that the words "my half share" do not mean his half severed share, the time, mode and reasons for severing which'' he has recited at length, but that these words mean merely his interest in the coparcenary property�an interest of which, Lord Westbury says, it cannot be predicated that any individual member has a certain definite share or that it is the subject of ownership in any defined shares. For the purpose of so interpreting the document we are invited to derive light from the statements made in execution proceedings by the clerk Nijsure in out of the way places. He says on one occasion that Govind died leaving as his heir and legal representative, his elder brother in the joint family. On another occasion Balkrishna is called the heir of his brother. Then "his heir his own full brother". Such statements are solemnly put forward as overriding the clear words of the document and as establishing that the document does not mean what it says �that there was no separation but that) the property continued to be joint. Far from giving any importance to these statements of Nijsure they should not in my opinion have been allowed to be proved. They seem to me to be entirely irrelevant.

37. The only other matter that I need refer to is the failure to apply for probate for so long. But why should probate have been: obtained ? Probate is only required for the purposes that I have already stated. It becomes necessary ordinarily for obtaining a decree against a debtor or recovering property belonging to the deceased. "When the executor desires to give effect to the will, out of property in his own possession, no probate is necessary. The learned Judge says that Mr. Khare took no steps to prove the will and from this he infers that there must be some insuperable objection to the claiming of partition the nature of which is unknown. Why should Mr. Khare who was willing to give effect to the will incur the expense and trouble of obtaining probate? After Share''s death in 1913, there seems for the first time to have arisen some difficulty in the widow getting her Rs. 2,000. At that

time, no doubt, the petitioner might have come forward and attempted to exercise his powers as executor. How difficult it would have been, all the circumstances of the present proceedings indicate. It might have been a ruinous litigation on behalf of Bamabai. She certainly was wisely advised to prefer, as I have already stated, the crystallized interest arranged for by her husband in bis separated property, without attempting to antagonise her nephew by asking that the property be divided off, or that her brother should as executor of Govind be placed on a footing of more than equality with his nephew.

38. In my opinion therefore "none of the reasons stated either by the learned Judge or in argument before us lead to the conclusion that the document must be construed in any sense at variance from its plain terms. Its plain terms are to the ''effect that Govind had separated himself, had turned his interest in the joint estate into a tenancy-in-common so that he might have the power of disposition; that he exercised his power by directing the various dispositions contained in the document; and that he asked the persons mentioned in clause 11 of the document to carry out his directions as his executors with reference to his separated property. Amongst them the petitioner is one, and he is entitled to obtain probate of the will. Two documents were tendered as secondary evidence of the will. One is a copy of portion of the will verified by the signature of Trimbak. This bore serial No. 38 and was originally marked as Ex. D, and then as Ex. 251 (p. 243 of the record). The learned Judge has accepted it as better evidence than the other copy-which was serial No. 37 (on p. 24), later marked by us as Ex. 251-A on p. 143 of the record�though the latter is a copy of the whole will. For the reasons given* by the learned Judge we agree with him in this preference. Accordingly when there is any variance between the copies, Ex. 251 and Ex. 251.A, preference will be-given to Ex. 251. Ex. 251-A will operate, where Ex. 251 is defective. In one respect a variance has been pointed out be us viz. at the end of clause 6 the words "or his children" appear in Ex. 251 but are omitted from Ex. 251-A. The proper order should have been that under the Succession Act, Section 237, probate be granted of the copies of the will (subject to the preference to which I have just referred), until the original or a properly authenticated copy of it is produced. The application for probate which is under appeal will accordingly be referred back to the. District Court. The learned District Judge] will take it upon his file and in the light of our judgments will proceed to deal with the petition for probate in accordance with law. The appeal will be allowed with, costs throughout on opponents 4 and 5. Costs of opponents 1 to 3 will come-out of the estate of Govind. Costs of the receiver''s application will be costs in the appeal. No order in Civil Application No. 812 of 1935. Cross-objections dismissed with costs.

Broomfield, J.

39. The learned District. Judge has written a very full and pains, taking judgment, and except in the matter of construction of the Vyavasthapatra, I am in complete

agreement with him. He is manifestly right in holding that the copies, Exs. 251 and 251-A, are legal and sufficient evidence of the contents of a, document which was duly executed by Govind on 30th July 1894. There is no need to discuss the evidence justifying; these findings of fact as there is no longer any serious dispute on this point. Learned counsel'' for opponent 5 very fairly, and wisely I think, has made no attempt to support his client''s allegations that Govind was incapable of making and never did'' make the Yyavasthapatra and that the documents produced in proof of its terms-are forgeries. It is now conceded that the Yyavasthapatra is Govind''s deed, that its-provisions have been carried out for the most part, if not entirely, and that by virtue of its provisions, opponents 4 and 5 are at any rate bound to pay to Ramabai Rs. 2,000 a year.

40. On the question of construction, I think, the learned Judge is clearly wrong. With great hesitation as he admits he came to the conclusion that Govind did not intend the document to have effect as a will and did not intend to separate himself from the joint family. His finding on the first point is evidently the result of his finding on the second. But the two matters are quite distinct and for the purposes of a probate application the question whether Govind had legally separated himself from the joint family is hardly relevant, however important it might be in a suit for possession of the property. At any rate it is only relevant because, as my learned brother says, the opponents have chosen to make it practically their sole ground of contention in the appeal. The grant of probate to an executor does not confer upon him any title to property which the estator had no right to dispose of: Behary Lall Sandyal v. Juggo Mohun Gossain (1879) 4 Cal. 1. The Court is not justified in refusing probate because the testator had no power to dispose of some or even all of the property he purported to deal with: Barot Parshotam Kalu v. Bai Mali (1893) 18 Bom. 749 Probate is decisive only as to the genuineness of the will and of the right of the executor to represent the estate. It decides no question of the disposing power or the existence of disposable property: Bal Gangadhar Tilak v. Sakwarbai (1902) 26 Bom. 792. It is not the province of the Gourt in probate proceedings to go into questions of title and it has long been the settled practice of this High Gourt in applications for probate or letters of administration not to enter into the question whether the deceased''s property is joint or separate: Ochawaram Nanabhai v. Dolatram Jamietram (1904) 28 Bom. 644 Probate gives no efficacy to the provisions of the will; it is merely proof of its contents: Khaw Sin Tek v. Chuah Hooi Gnoh Neoh AIR 1922 P.C. 212."

41. ''Will'' is defined in Section 2, Succession Act, as meaning the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. I think it is not possible to read the provisions of this Vyavasthapatra, the terms of which have been given in substance by my learned brother and are set out in greater detail in the District Judge''s judgment, without coming to the conclusion that it is a will.'' Vyavasthapatra, deed of settlement, is no doubt a neutral term. But it may perfectly well be applied to a will as was done for

instance in Lakshmi v. Subramanya (1889) 12 Mad 490 Govind died very soon after the execution of the deed and it was obviously written in contemplation of death. The expression "meanwhile my health has become worse and I am not confident about my life" is almost a stock phrase in wills. Many of the provisions of the deed, for instance, those as to payments to be made to Govind''s widow and as to her residence with his nephew Trimbak and acting under the latter''s advice and so on, obviously relate to the period after his death and could not be conceived of as taking effect in his lifetime. I think this is generally speaking true of the deed as a whole. Then also three persons are appointed Vyavas-thapaks to carry out the dispositions. This word may or may not have been used as the technial equivalent of executor, but it is clear at any rate that these persons were only intended to function after Gobind''s death, and they are appointed to carry out all the provisions of the deed. I think the animus testandi is obviously present. It is quite true, as the learned District Judge says that Gobind has made no provision for and apparently .did not contemplate or desire the partition of the family estate''s by metes and bounds. Nor has he provided for the devolution of his separate share on the death of his widow. But he was a lawyer of long experience; he cannot be supposed to have been in ignorance of the legal effect of his declaration of his intention to separate his interest in the estate.

I and Trimbak have both of us agreed that we are separate from to-day in a symbolical way. It is in this way: that whatever moveable and Immovable property, business and dealings exist to-day are to be divided equally, one share belongs to me and the other to Trimbak. In this way the partition is made and each has become the owner of his share.

42. The language could hardly have been clearer. Then it is provided that Ramabai was to have half the income but was not to require accounts if she were paidBupees 1,500 a year and if necessary she was to have half the residential house in Poona for her residence. Out of recoveries made in the money-lending business, debts were to be paid and from the balance Ramabai was to get Rs. 500 out of Gobind''s share. This money was to be invested and Ramabai was to have the income. The legacies provided for in the deed were all to come out of Govind''s half share. I can see no justification for the District Judge''s view that there was "some insuperable objection to the claiming of a partition of Gobind''s share" in spite of the recital in the document as to his having separated from the family from the date of the deed. Although Govind may not have desired '' actual partition, there is no substantial reason to believe that he prohibited it. It is at least doubtful if the prohibition would have had any legal effect if he had. The District Judge has attached far too much importance to the conduct of members of the family and their advisers after Govind''s death, a very unsafe criterion of the intentions of Govind himself. As is now admitted, the express provisions in the Vyavasthapatra were carried out or mainly carried out, and because opponents 4 and 5 chose to ignore what was merely implicit in the deed and divided the property among themselves, and Ramabai and

the petitioner, her brother, raised no objections to this, it cannot be assumed, contrary to the clear language of the deed itself, that Govind did not intend to separate his interest in the estate and to dispose of it after his death so far as he thought it necessary to do so. It is to be noted that Ramabai herself has obtained either by voluntary payment or under decree of Court the share of the income to which are was entitled under the Vyavasthapatra. It is argued that she could have claimed partition of Govind''s share of the Immovable property. Assuming that she could, it is extremely doubtful if she would have been well advised to do so. It is not at all difficult to understand her resting content with what she had an assured provision for her life, rather than face protracted and possibly uncertain litigation in pursuit of more; The daughters are the only persons whose interests could be said to have been vitally affected by opponents'' dealing with the estate, which was all done sub. ject to Ramabai's rights. The daughters may perhaps not have known the provisions of the will. Even if they did, they have no right to Govind''s estate during the lifetime of the widow, and subject to possible defences which do not concern us in this proceeding, they can presumably recover their share in it after her death in spite of the fact that the opponents have chosen to include it in their own shares. It must be borne in mind that when the opponents separated between themselves, sufficient property was kept joint to pay Ramabai her share of the income.

43. Mr. Jayakar who has argued the case on behalf of opponent 5 has supported the District Judge''s view that the Vyavasthapatra should be regarded as a family arrangement and not as a will. He says the deed shows a desire to preserve the property in the family while making defined and enforceable provision for the rights of the widow and daughters which they have under Hindu law, but which under Hindu law are undefined and precarious. The reference to notional partition by agreement was for the purpose of validating the gifts to relations which otherwise would have been invalid. The family was to be kept intact and not disrupted. The learned counsel relied on Govind''s prohibition of adoption by his widow, his direction to Ramabai to treat the opponent, Janardan, as a son and to stay with Trimbak and to be guided by his advice and on the direction to Mathubai to stay with Ramabai and similar directions to other relations. Stress is also laid on the fact that Trimbak himself was made a Vyavasthapak and on the fact that he endorsed the deed signifying his agreement and his intention of trying to carry it out as far as possible. This construction of the deed is a little different from that of the learned District Judge. Mr. Jayakar does not adopt the extreme view that Govind did not intend to separate his interest at all. He conceded apparently that there was by agreement a notional separation of his interest. But the argument was that this was merely for the purpose of validating the specific bequests or gifts and had no effect otherwise. I am not satisfied that this was Govind''s intention.

44. The features in the deed on which Mr. Jayakar relies may all be explained, I think, by Govind''s desire that all the members of the family should continue to live

together in amity as long as possible in spite of the legal separation. But, in any case, if there was by declaration or agreement a legal separation of Govind''s interest, the legal consequences must follow, whatever his intention may have been. He might have disposed of the whole of his estate in any way he liked. He chose to dispose of the income and not the corpus; but that he continued to be a coparcener in respect of the corpus and that the corpus devolves according to the law of the coparcenary is a proposition which I am quite unable to accept. Besides, on this view there was at any rate a separation of interest which validated the specific dispositions made in the deed. Therefore to that extent, at any rate, the deed is a legal declaration of the intention of a testator with respect to his property which he desired to be carried into effect after his death, that is to say, it is a will within the definition. There is one other small point. The learned advocate for opponent 4 raised an objection that the deed required registration. This point was not taken in the trial Court nor by learned counsel for opponent 5. I think there is no sub-stance in it. We find that the Vyavasthapatra is a will and as such admittedly it did not require registration. The suggestion is that in so far as it effected a severance of Govind''s interest the deed required to be registered. But the answer is that the severance was not effected by the deed. It merely recited a severance which had taken place already. I agree with the order proposed by my learned brother.