APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1888.
Jan. 31.
Feb. 10.

VYDINADA (PLAINTIFF), APPELLANT,

and

NAGAMMAL (DEFENDANT No. 2), RESPONDENT.*

Hindú Law—Will—Construction—Gift to husband and wife—Joint tenancy—Survivorship—Alienation by husband to creditor invalid.

A Hindú, by his will, granted jointly to his brother's son and Nagammal, the wife of latter, certain land with power of alienation. The recitals in the will showed that the husband was included in the gift not because of his relationship to the testator but because he was the husband of Nagammal:

Held that the grantees were joint tenants and not tenants in common and that the joint tenancy was not severed by an alienation of the land by the husband to a creditor.

APPEAL from the decree of D. Irvine, District Judge of Trichinopoly, reversing the decree of A. Kuppusámi Ayyangár, District Múnsif of Trichinopoly, in suit No. 368 of 1886.

Ramasami Pillai, by his will, dated 29th February 1884, made a gift of his land to his brother's son, Rangasami, and Nagammal, the wife of Rangasami, jointly. On the 26th April 1885, Rangasami mortgaged this land to the plaintiff to secure the repayment of Rs. 450-4-0 and died shortly afterwards.

This suit was brought to recover the money due under the mortgage-deed (exhibit A).

Nagammal pleaded that her husband had no power to alienate the land.

The Múnsif held that, even if Nagammal had a joint right over the land, her husband had also a right of disposition over it, and decreed the claim.

On appeal, the District Judge held that Rangasami had no separate interest in the land and dismissed the suit.

The further facts necessary, for the purpose of this report, are set out in the judgment of the Court (Collins, C.J., and Parker, J.).

Subramanya Ayyar for appellant.

Bháshyam Ayyangár for respondent.

* Second Appeal No. 473 of 1887.

The following authorities were cited:—*Rewun Persad* v. *Mussumat Radha Beeby*(1), *Hirábái* v. *Lakshmibái*(2), *Dias* v. *DeLivera*(3), *Caldwell* v. *Fellowes*(4), *Mathurá Naikin* v. *Esu Naikin*(5), and Williams' Real Property, ed. 15, p. 166.

The Court (Collins C.J., and Parker, J.) delivered the following

JUDGMENT:—The question before us is as to the right construction of the will (exhibit B). It is addressed by Ramasami to his deceased brother's son, Rangasami, and recites that the testator had protected Nagammal since she was an infant of three months old and had married her to Rangasami; that both of them had remained under his protection; and that they were now protecting him in his old age. The will then goes on "after my death you and the said Nagammal shall enjoy after me all the nanja, punja, &c., free of obstruction from generation to generation with power of alienation and shall remain in good condition. You, Rangasami (in the singular), shall enjoy without any objection as an heir to my assets and liabilities."

The words of gift are distinctly in favor of both and include a power of alienation also in favor of both. The recitals clearly indicate that Rangasami was included in the gift, because he was the husband of Nagammal and not because he was the testator's nephew. The execution of the document to him as well as the last clause may be accounted for by the fact that Rangasami was a grown-up man, while Nagammal was a young girl; but we are clearly of opinion that the testator's intention was that Nagammal as well as Rangasami should take under the will. The question remains whether they took as joint tenants or as tenants in common. It is contended on appeal that they took as tenants in common and that, even if they took as joint tenants, the tenancy has been severed. In support of these contentions, we were referred to *Rewun Persad* v. *M. Radha Beeby*(1), *Hirábái* v. *Lakshmibái*(2), *Dias* v. *DeLivera*(3), *Caldwell* v. *Fellowes*(4).

In *Rewun Persad's case*, an estate was left to a tenant for life, and then to the testator's brother B, and his sons C and D, B and C died during the life of the tenant for life and it was held that

(1) 4 M.I.A., 137. (2) I.L.R., 11 Bom., 69, 573.
(3) L.R., 5 App. Ca., 123. (4) L.R., 9 Eq., 410.
(5) I.L.R., 4 Bom., 573.

VYDINADA v. NAGAMMAL. C and D took vested interests as tenants in common, the actual enjoyment of the expectant interest being postponed till the termination of the life estate; so that C's widow (C and D being divided brothers) was entitled to succeed to C's share, but in this case the Privy Council was of opinion that the instrument itself would have operated as a division so as to prevent D from succeeding to his deceased brother's share as an undivided brother.

In *Hirábái* v. *Lakshmibái*, the testator left his widow, Hirábái, and adopted son, Nathu, as the "heirs of his property." On the death of Nathu without issue, his widow claimed his share and the Courts held that the two heirs had taken as tenants in common, but that Hirábái only took a Hindú widow's interest in the moiety. The principle enunciated was that laid down by the Privy Council in *Mahomed Shumsool* v. *Shewukram*(1) that the intention is to be looked at for guidance, and the meaning to be attached to the words of the will may be affected by the surrounding circumstances. It was there considered that the words of the will did not give, and it was repugnant to general Hindú custom to presume that the testator intended to give his widow more than the qualified interest of a Hindú widow in her moiety.

Against this authority, we are referred to the judgment of Couch, J., in *Mathurá Naikin* v. *Esu Naikin*; but in that case the co-heiresses were daughters of a dancing-girl and the will declared they should be "mutual heiresses to one another should anything happen to either."

Applying the principles enunciated by the Privy Council to the present case, the words of the testator clearly imply a gift of the whole estate to both with power of alienation to be enjoyed by both. Having regard to surrounding circumstances, the objects of the gift were husband and wife, it is probable that the testator did not contemplate the eventuality which has arisen, but believed and intended they would both jointly enjoy the property during their lives and that their children would take it afterwards. We think that the tenancy which they took was distinguished by unity of possession, of interest, of title, and by unity of the time of the commencement of such title, and these are the four unities of a joint tenancy. An application of the same principles of decision, which led the Bombay High Court in *Hirábái* v. *Lakshmibái* to

(1) L.R., 2 I.A., 14

find that in that case a tenancy in common was intended, would lead us in the special circumstances of this case to believe that the intention was to create a joint tenancy.

The question then remains whether the tenancy has been severed by the parties. We think it has not, and that no intention to effect such severance can be presumed from the execution of exhibit A. The case to which we are referred (*Caldwell* v. *Fellowes*) was a very different one, in which three sisters, who were joint tenants, had their interests in the joint estate settled upon them by their marriage settlements, and it was held that the joint tenancy had been severed by the settlements.

On these grounds, we are of opinion that the whole estate has now vested in Nagammal by survivorship and dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KALIANASUNDRAM AND OTHERS (PETITIONERS), APPELLANTS,

and

EGNAVEDESWARA (PLAINTIFF), RESPONDENT.*

1887. Oct. 28. Nov. 4.

Civil Procedure Code, s. 583—Claim for mesne profits on reversal of decree for possession of land executed.

A decree for possession of immovable property having been executed was reversed on appeal. The defendant applied under s. 583 of the Code of Civil Procedure for restitution of the mesne profits taken by the plaintiff. The lower courts dismissed the application on the ground that the proper remedy was by suit:

Held that the defendant was entitled to the relief claimed.

APPEAL against the order of J. A. Davies, Acting District Judge of Tanjore, confirming the order of T. A. Krishnasámi Ayyar, District Múnsif of Mannargudi, in execution of the decree in suit No. 439 of 1881.

Mr. *Powell* for appellants.

Seshagiri Ayyar for respondent.

The facts appear from the judgment of the Court (Collins, C.J., and Parker, J.).

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* Appeal against Appellate Order No. 39 of 1887.