APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Tyabji.

1913. February 17 and 18.

K. KRISHNAMACHARIAR (PLAINTIFF), APPELLANT,

v

V. KRISHNAMACHARIAR (DEFENDANT), RESPONDENT.*

Hindu Law—Minor—Will—Incapacity to make—Contract, incapacity to make—Majority, age of, for making a will—Indian Majority Act (IX of 1875), sec. 3, effect of—Onus of proving majority, on propounder of a will—Onus of proof, immaterial, where whole evidence recorded—Indian Evidence Act (I of 1872), sec. 32 (5) and (6)—Recital in a father's will as to son's age, admissibility of—Indian Evidence Act (I of 1872), ss. 35 and 82—Register of births and deaths admissibility of, under—Indian Evidence Act (I of 1872), sec. 145—Document, intended to contradict witness, not put to witness, inadmissibility of—Horoscope, when admissible.

A Hindu minor though not governed by the Hindu Wills Act or the Indian Succession Act cannot make a will and the age of majority for the purposes of making a will is determined by the Indian Majority Act.

Subbayya v. *Kondayya* (1906) 16 M.L.J., 135, *Deheram Bulleya* v. *Somanchi Seetharamayya* (1911) 2 M.W.N., 383, *Bhagirathi Bai* v. *Vishwanath* (1905) 7 Bom L.R., 72, *Bai Gulab* v. *Thakorelal* (1912) I.L.R., 36 Bom., 622 and *Hardwari Lal* v. *Gomi* (1911) I.L.R., 33 All., 525, followed.

Per TYABJI, J. (C.J. *Obiter*)—When the defence of minority of the testator is raised to invalidate a will, the onus is on the party setting up the will to show that the testator was of full age when he made it and in the matter of onus, minority and testamentary incapacity stand on the same footing. *Smee* v. *Smee* (1879) 5 P.D., 84 and *Bhagirathi Bai* v. *Vishwanath* (1905) 7 Bom. L.R., 72, followed.

A horoscope which is not spoken to either by its writer or by one who had special means of knowledge as to its correctness is inadmissible in evidence.

Per WHITE, C.J.—The question, on whom the onus of proof lies is not of much importance when the whole evidence has been recorded.

Chaudhry Mohammad Mehdi Hasan Khan v. *Sri Mandir Das* (1912) 17 C.W.N., 49 (P.C.), followed.

A recital in a testator's father's will mentioning the age of the testator is admissible to prove the age of the testator under section 32, clauses (5) and (6) of the Evidence Act and illustration (*l*) to that section.

Oriental Government Security Life Assurance Company, Limited, v. *Narasimha Chari* (1902) I.L.R., 25 Mad., 183 at p. 207, *Ram Chandra Dutt* v. *Jogeswar Narain Deo* (1893) I.L.R., 20 Calc., 758, *Deheram Bulleyya* v. *Somanchi Seetharamayya* (1911) 2 M.W.N., 383 and *Subramanian Chetti* v. *Doraisinga* (1904) 24 M.L.J., 49, followed.

* Appeal No. 108 of 1911.

A register of births and deaths kept under Madras Act III of 1899 is a public document and a certified copy thereof is admissible under sections 35 and 82 of the Evidence Act.

A document by which it is intended to contradict a witness will not be admissible in evidence under section 145, Evidence Act, unless it is put to the witness or unless it is otherwise admissible under the Act.

Per curiam: Under the Hindu common law a minor cannot make any disposition of property during his life-time, *e.g.*, a gift; and consequently he cannot make any disposition of his property to take effect after his death.

APPEAL *in forma pauperis* against the decree of D. G. WALLER, the acting District Judge of Chingleput in Testamentary Original Suit No. 37 of 1909.

The necessary facts are given in the District Judge's Judgment, which is as follows:—

"This is a suit under the Probate and Letters of Adminis-"tration Act of 1881. Plaintiff sues as the father and guardian "of the widow of one V. Krishnamachari; the latter died "towards the end of April 1909, leaving a will (Exhibit A) in "favour of his minor widow.

"Defendant contends that the will is not genuine and that "Krishnamachari was a minor at the time of his death.

"The following issues were framed:—

"(1) Was the deceased a major or a minor at the time "of his death?

"(2) If he was a minor, can the will in question be "admitted to probate, assuming it to be genuine?

"(3) Is the will in question genuine?

"(4) To what relief, if any, is plaintiff entitled?

"*Issue* (1).—I have no doubt that Krishnamachari was a "minor at the time of his death. On plaintiff's side there is a "certain amount of oral evidence that Krishnamachari was a "major. A horoscope (Exhibit C) is also produced to show that "he was born in December 1889. It is however a worthless piece "of evidence. There is plenty of documentary evidence to the "opposite effect. Exhibit I is a will in favour of the deceased by "his adoptive father, dated 4th November 1906. In it the "deceased is described as 13. The explanation offered is that his "age was understated in order to prolong his minority, his "conduct not being satisfactory. The reply to this is that "Exhibit I contained a proviso that rendered such a precaution "unnecessary. By that proviso the deceased was to be kept in a

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"state of tutelage for 10 years after attaining his majority. To "meet this, it is explained that the age was understated owing "to legal advice that the above proviso was not sustainable in "law. This explanation is, I think, an afterthought. Again in "Exhibit II a school admission register of 2nd October 1905 "the deceased was described as 13 years old. It is argued that it "is the practice, in this country, for school boys to understate "their ages. Even if such a practice exist, it cannot be recog-"nized or relied on.

"Again, in Exhibit III (Extract from the death register of "1909 in Sriperumbudur) the age of the deceased at his death "is given as 16. There can be no manner of doubt that this "information was furnished by one of plaintiff's own witnesses "(Plaintiff's witness No. 9).

"There can, I think, be no doubt that deceased was only "about 16 when he died. I therefore find issue (1) against "plaintiff.

"*As to issue* (2).—No reported decision on this point has "been quoted. Two unreported decisions, one from Madras and "one from Bombay *Subbayya* v. *Kondayya*(1) and *Bhagirathi* "*Bai* v. *Vishwanath*(2) have been cited. They are to the effect "that a minor cannot make a will. Following these decisions, I "would answer the second issue in the negative.

"It is unnecessary to decide whether the will is a genuine "one. In view of the finding on the first two issues, the suit "must be dismissed with costs."

Plaintiff preferred this appeal.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

S. Srinivasa Ayyangar for the respondent.

WHITE, C.J.

WHITE, C.J.—In this case I propose to deal first with the question of law. Can a Hindu minor make a will?

It was practically conceded by Mr. Ramachandra Ayyar that under the Hindu Common Law a minor cannot make any disposition of property during his life-time. There can, I think, be no question that that is so. It has been so laid down in various authorities. I need only refer to the passage in Colebrooke's Digest of Hindu Law to which Mr. Srinivasa Ayyangar called our attention this morning. Title II, Chapter 4, section 23, and

(1) (1906) 16 M.L.J., 135. (2) (1905) 7 Bom. L.R., 72.

Narada, Title I, Chapter 2, section 39. If the law is that a Hindu minor cannot make a valid gift during his lifetime it is difficult to see on what principle it can be said that he can make a valid disposition of property which is only to take effect after his death. The argument of Mr. Ramachandraier or at any rate the argument which he advanced yesterday—as I understood him, was this: The Hindu Wills Act and the Succession Act both enact that a Hindu minor cannot make a will; the question of the capacity of the man who made the will before us is not governed by either the Hindu Wills Act or the Succession Act; there is therefore no express prohibition and it follows that he can make a will. It seems to me it is only necessary to state that proposition in order to show absurdity but its unsoundness. Not only is there no authority in support of the view that a Hindu minor can make a will, but all the cases are the other way. I do not propose to discuss them but I would refer to *Subbayya* v. *Kondayya*(1), *Deheram Bulleya* v. *Somanchi Seetharamayya*(2), *Bhagirathi Bai* v. *Vishwanath*(3), *Bai Gulab* v. *Thakorelal*(4), and *Hardwari Lal* v. *Gomi*(5). These are all the authorities which hold that a Hindu minor cannot make a will. My finding with regard to the question of law is that a Hindu minor cannot make a will.

Then as to the facts; and before dealing with them it is necessary to determine, when would the minority of the man who purported to make this will have terminated? In my opinion the Indian Majority Act of 1875 applies to this case. There is a saving clause in section 2 of the Act dealing with capacity and in that saving clause it is provided that "Nothing in the Act shall affect the capacity of any person to act in certain matters (namely) marriage, dower, divorce and adoption." The question of the capacity of a person to make a will is not included in the saving clause. That means—so it seems to me, as a matter of construction,—that when a question arises as to the capacity of a person to make a will on the ground of minority the question as regards the age at which minority ceases is governed by the Indian Majority Act. The point arose in two reported cases and this was the view there taken. See *Bai Gulab*

(1) (1906) 16 M.L.J., 135.
(2) (1911) 2 M.W.N., 383.
(3) (1905) 7 Bom. L.R., 72.
(4) (1912) I.L.R., 36 Bom., 622.
(5) (1911) I.L.R., 33 All., 525.

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v. *Thakorelal*(1) and *Hardwari Lal* v. *Gomi*(2). I think this view is right.

We have had considerable discussion with reference to the question as to on whom the burden of proof lay on the party propounding the will or on the party opposing it. Now, if it was necessary for me to express a final opinion in the matter, I should certainly be inclined to hold that, when the defence of minority is raised, the onus is on the party setting up the will to show that the person who made the will was of full age when he made it. Speaking for myself, I cannot see why the rule which applies in the case of alleged testamentary incapacity by reason of mental deficiency should not apply where the defence alleged is testamentary incapacity by reason of not being of an age at which the law recognizes the power of a man to dispose of his property at his death. With regard to the question of onus, where the will is impugned on the ground of testamentary incapacity, I think the law is clear. In Tristram and Coote's Probate Practice on page 407, the learned authors say " where the defence of incapacity has been pleaded, the burden of proof rests upon those who set of the will," and the authority cited, *Smee* v. *Smee*(3) supports the proposition there laid down. The same view was taken in AMEER ALI and WOODROFFE'S Evidence Act, page 564, and by SIR LAWRENCE JENKINS, J., in *Bhagirathi Bai* v. *Vishwanath*(4) although it does not appear that there had been a full discussion on the question. See too Williams on Executors, 10th edition, page 12, under the heading " Persons incapable from want of discretion." In Williams on Executors the incapacity from want of discretion, that is the mental deficiency, is placed on the same footing as incapacity on the ground of minority. Further in the Indian Succession Act we find that sound mind and not a minor are bracketed together. So in view of what I have said, if it is necessary to decide this matter, I should be strongly inclined to hold that once the defence of minority is set up, it is for the party propounding the will to prove that the alleged testator was a man of full age. With regard to the cases which Mr. Ramachandrier cited, I think they were all cases of contract and in the case of contract of course if the plea of infancy is set up it is for the

(1) (1912) I.L.R., 36 Bom., 622.
(2) (1911) I.L.R., 33 All., 525.
(3) (1879) 5 P.D., 84.
(4) (1905) 7 Bom. L.R., 72.

party who sets up the plea to prove it. The question of capacity is, as it seems to me, a wholly different matter. However, as I have said, I do not think I need express a final opinion as to this because, where we have the whole of the evidence, it is not a matter of much importance on whom the onus lies. In this connection I would refer to a recent decision of the Privy Council in *Chaudhry Mohammad Mehdi Hasan Khan* v. *Sri Mandir Das*(1).

[Then his Lordship dealt with the question whether the testator was a major when he executed the will and in discussing the evidence thereon observed as follows] :—

The plaintiff produced a document which he says is the horoscope of the deceased. That is spoken to by his 9th witness. An objection was taken to the evidence of this witness with reference to the horoscope that the witness was not the writer and that he had no personal knowledge of its correctness . . . The man who made the horoscope is not called and apparently all that the witness says with reference to the horoscope is that the deceased man's natural father gave the horoscope to the deceased man's adoptive father and by some means or other which are not stated it got into the possession of the witness.

[After rejecting the horoscope and the oral evidence of the 9th witness thereon on the grounds of the objection above stated his Lordship went on as follows] :—

We have Exhibit I, which is relied on by the defendant, and that is a will which was executed by one Appalachari, the adoptive father of the deceased, on November 4th, 1906 . . . Now in the will of 1906 the boy is described as 13, "my adopted son, aged about 13." . . . With regard to the question of the admissibility of this document for the purpose of showing the age of the boy when he purported to make a will, I think it is admissible under section 32 of the Evidence Act. Mr. Ramachandrier called our attention to *Nil Monee Chowdhry* v. *Zuheerunissa Khanum*(2). In that case it was held that an incidental recital in a will was not evidence of age. That case was wholly different. In this case it is not an incidental statement contained in a recital, but the words are used for the

(1) (1912) 17 C.W.N., 49 (P.C.) (2) (1867) 8 W.R., 371.

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purpose of describing the adopted son of the testator, who under the testator's will was to be the sole beneficiary. I think the statement is admissible under section 32, clauses 5 and 6, of the Evidence Act and under illustration(*l*) to that section, as the authority in support of this view, I may refer to *Oriental Government Security Life Assurance Company, Limited.* v. *Narasimha Chari*(1), *Ram Chandra Dutt* v. *Jogeswar Narain Deo*(2), *Deheram Bulleya* v. *Somanchi Seetharamayya*(3) and *Subramanian Chetty* v. *Doraisinga*(4) the authorities to which Mr. Srinivasiengar called our attention this morning. . . .

The third document on which the defence relies is Exhibit III which is a certified copy of the death certificate of the deceased. The Register is a public document kept under the provisions of the Madras Act III of 1899 and the certified copy is the evidence—see sections 35 and 82 of the Act. In the certified copy the age of the deceased at the time of his death is given as 16 and the party who gave the information is stated to be plaintiff's 9th witness. . . .

. . . But for some reason or other it is difficult to know why, he (defendant's vakil) refrained from putting this certified copy of the death certificate of the deceased to the witness and from asking him in so many words, if he did not give the information to the village munsif which the entry purports to show that this witness gave. The document is not admissible in evidence under section 145, as it was never put to the witness. But it seems to me, as a certified copy of a public document it is evidence that when the boy died he was stated to be only 16. . . .

So taking the evidence as a whole—although it may possibly leave room for doubt—my view is that it has been shown that the deceased was not a major when he made the will which has been propounded. This being the conclusion at which I have arrived, I hold as a matter of law, that the will is ineffective. I think the Judge was right and that the appeal must be dismissed with costs.

The appellant will pay the Court fees due to Government which he would have paid if he had not been allowed to appeal as a pauper.

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(1) (1902) I.L.R., 25 Mad., 183 at p. 207.
(2) (1893) I.L.R., 20 Calc., 758.
(3) (1911) 2 M.W.N., 383.
(4) (1904) 24 M.L.J., 49.

TYABJI, J.—The authorities on pure Hindu law unaffected by the legislative enactments of British India lay down that if a Hindu "boy or one who possesses no independence transacts anything, it is declared an invalid transaction by persons acquainted with the law" —Narada, I. 39 (Sacred Books of the East, volume XXXIII, page 52).

Similarly in Colebrook's Hindu Law Books (3rd Edn., 1864, Madras, volume I, page 453) Book II, chapter IV, section II, art. 53, it is stated from 'Narada':—"What has been given by men agitated with fear, anger, lust or *the pain of* an incurable disease, or as a bribe or in jest, or by mistake, or through any fraudulent practice, must be considered as ungiven."

"So must anything given by a minor, an idiot, *a slave or other* person not his own master, a diseased man, one insane or intoxicated, or in consideration of work unperformed." See also *ibid*, Book I, chapter V, 187 (volume I, page 201 of the same edition), where it is laid down on the authority of 'Catyayana'—that—"On the death of a father *his debt* shall in no case be paid by his sons incapable from non-age of conducting their own affairs, but at their full age of *fifteen years* they shall pay it in proportion to their shares; otherwise they shall dwell hereafter in a region of horror."

As a consequence of this rule of Hindu law, viz., that, until a Hindu attains full age, he shall be incompetent to perform juristic acts, it has been held that in British India a Hindu cannot make a will unless he has attained majority under the Indian Majority Act, section 3: *Bai Gulab* v. *Thakorelal*(1), *Deheram Bulleyya* v. *Somanchi Seetharamayya*(2), *Bai Gulab* v. *Thakorelal*(1), *Hardwari Lal* v. *Gomi*(3) and *Subbayya* v. *Kondayya*(4).

The reasoning on which the decisions laying down this proposition of law have generally proceeded is that for making a gift the attainment of majority as defined in the Indian Majority Act is necessary, and that the Hindu law of wills is an extension of the law of gifts, and that, consequently, a Hindu who is not competent to make a gift is not competent to make a will. Hence in the case of a Hindu the age of competence to make a will must be the same as the age of competence to make a gift.

(1) (1912) 14 Bom. L.R., 748.
(2) (1911) 2 M.W.N., 383.
(3) (1911) I.L.R., 33 All., 525.
(4) (1906) 16 M.L.J., 135.

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It has been argued before us however, that though the Hindu law of wills may have originally been an extension of the law of gifts, the age of competence in regard to the two matters might yet become differentiated, inasmuch as, even if we accept that the Hindu law of gifts has in British India been altered by the operation of the legislative enactments referring thereto, still the Hindu law of succession (of which the law of wills forms part) is specifically required to be enforced in British India, and there is nothing in the legislative enactments referring to the law of wills which alters the original Hindu law in that respect—assuming of course that we are dealing with a case such as the present, to which the Hindu Wills Act does not apply. Hence it is argued that the age of testamentary competence under Hindu law as applicable in British India must be determined irrespectively of all legislative enactments and purely, in accordance with the rules of Hindu law. In support of this argument, the Indian Majority Act, the Indian Contract Act, section 11, the Transfer of Property Act, section 7, the Indian Trusts Act, section 10, and similar provisions in the Indian Succession Act and the Hindu Wills Act have been referred to, and it has been pointed out to us that there is an absence of any specific legislative provision fixing the age at which testamentary competence is attained by a Hindu (whose will is not governed by the Hindu Wills Act) and that there is no section laying down that testamentary capacity is in such a case to be subject to the provisions of section 3 of the Indian Majority Act. It has been further contended that the provisions of the Indian Majority Act cannot affect any branch of the substantive law, but that the true effect of the Indian Majority Act is merely to explain how the other legislative enactments of British India must be interpreted—in other words, that the Indian Majority Act must be taken merely as providing a definition of the words of 'majority' and 'minority.' The argument was founded on the following considerations :—Section 3 of the Indian Majority Act, which has the appearance of being the operative section of the Act (section 2 being rather in the nature of a saving clause), does no more than state that a person shall be deemed to have attained majority at 18 or 21 years; again there is an absence of any express legislative provision to the effect that the attainment of majority is necessary for competence to perform all juristic acts (except such

juristic acts as refer to matters specified in section 2 of the Indian Majority Act), and at the same time we have the fact that the legislature has deemed it necessary to enact the sections which lay down that in regard to transactions such as contracts and trusts, attainment of majority is necessary for giving them validity.

It seems to me, however, that in passing the Indian Majority Act it could not have been the intention of the legislature merely to provide definitions of the terms 'majority' and 'minority.' Had that been the case, section 2 of the said Act would not have provided that nothing contained in the said enactment shall affect the '*capacity* of any person *to act*' in the matters therein referred to. That such a provision was considered necessary clearly indicates that the enactment was intended to affect the capacity to act in regard to all other matters notwithstanding that the Act contains no affirmative provision to the effect that in all matters not saved by section 2, a person shall be deemed to have the capacity to act only when he attains majority under section 3. Again, had the Act merely provided definitions of terms, section 11 of the Indian Contract Act would not have been affected by those definitions unless there had been some statutory provision that majority for the purposes of the transactions governed by the Indian Contract Act shall be determined in accordance with the Indian Majority Act, and this is not done either by any amendment of the Indian Contract Act (the Majority Act having been passed after the Indian Contract Act) or by any provision contained in the General Clauses Act. On the Indian Majority Act being enacted, it was evidently assumed that "the law to which he (viz., the person contracting) is subject" referred to in the Indian Contract Act, section 11, became the law as laid down in the Indian Majority Act. Now it has never been questioned that on the passing of the Indian Majority Act, section 11 of the Indian Contract Act became subject to the latter Act, and it seems to me to be clear that if this was so the Indian Majority Act must be taken equally to have altered the Hindu law of the age of capacity to act in all matters except in those matters which are specifically excepted in section 2 of the Indian Majority Act. If this is so, then it follows that even where the Hindu Wills Act does not apply, it is necessary for a Hindu to attain majority under the Indian Majority Act, section 3, before he can validly make a will.

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TYABJI, J.

I should have had little to add to what has been said by the learned Chief Justice as regards the facts of this particular case, had I not felt more doubt about the effect of the documents on which the respondent relies. Considering the manner in which Exhibit III was produced before the Court, the late stage at which it was produced, and that it was not put to the plaintiff's ninth witness although his cross examination was evidently based entirely on Exhibit III, and bearing in mind that the document, as it comes before us, has the appearance of being tampered with, it seems to me that Exhibit III ought to have very little weight as a piece of evidence.

In my view of this case, however, this circumstance ought not to affect our decision because I think that it is for the applicant in Probate proceedings to prove that the testator was competent to make the will which is propounded, and it seems to me to be clear, that before a person can be considered to be competent to make a will, it must be shown that he is under no disability from unsoundness of mind, but also (if and in so far as proof of the fact is necessary under the circumstances of the case) that he is under no disability from minority. There is a dictum of Sir LAWRENCE JENKINS in *Bhagirathi Bai* v. *Vishwanath*(1) which would have been of great assistance to us in coming to the same conclusion, had it not been expressed in a case where the question of minority was not directly concerned and had it not appeared that learned Judge had neither cited to him nor considered any authority on this particular point, which has the appearance of being referred to incidentally. But even with this qualification, it shows that Sir LAWRENCE JENKINS considered the attainment of the age of majority to be on the same footing for the purposes of proving the will, as possession of a sound mind. Various text-books entitled to considerable weight, on the subject of Probate Practice in England have been cited to us and they also proceed on the basis that minority is considered in England in the same light as unsoundness of mind for the purpose of deciding whether the testator was competent to make a valid will. Thus, in Tristam and Coote on Probate Practice, 14th edition, at pages 407 and 408, it is laid down that if the defence of incapacity has been

(1) (1905) 7 Bom. L.R., 72 at p. 93.

pleaded, then the burden of proof rests upon those who set up the will; and a reference is later on made by the same authors to the Wills Act in England, which permits the plea of minority to be raised in order to establish want of capacity in the testator. *Ibid.*, page 435. Now these passages show that in the opinion of the learned authors, though as a general rule the propounder of a will is not required or expected to give positive evidence of the testator having attained majority, yet it is in the power of those who contest the validity of a will to challenge the propounder thereof to prove in all strictness every ingredient making up competence to make a will including the fact that the testator had attained majority. The authority cited by the learned authors as the basis of this proposition [*Smee* v. *Smee*(1)] seems to me to support it, and I think that the proposition is grounded on principles which are applicable under the law in British India, no less than in England. See also Williams on Executors, 10th edition, volume I, pages 8, etc., page 12 and the Encyclopædia of the Laws of England, volume XI, page 8, and compare as regards the burden of proof in such a case, *Woomesh Chunder Biswas* v. *Rasmohini Dassi*(2), *Oriental Government Security Life Assurance Company, Limited* v. *Narasimha Chari*(3), and *Chaudhry Mohammad Mehdi Hasan Khan* v. *Sri Mandir Das*(4). Looked at from this stand-point, I cannot hold that the will in question has been proved or that probate of the will ought to be granted to the applicant. I therefore agree that this Appeal should be dismissed with costs.

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(1) (1879) 5 P.D., 84 at pp. 91 and 92.
(2) (1894) I.L.R., 21 Calc., 279 at pp. 290 and 291.
(3) (1902) I.L.R., 25 Mad., 183, at pp. 207, 209.
(4) (1912) 17 C.W.N., 49.