ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

1884 *February* 19.

PUNCHOO MONEY DOSSEE (PLAINTIFF) *v.* TROYLUCKO MOHINEY DOSSEE (DEFENDANT).

Hindu Law, Will—Construction of will—"Malik."

N. had two wives, one of whom died in his life time, leaving a daughter (the plaintiff), and *K.* who survived him, the mother of another daughter (the defendant). *N.* died having, in February 1844, made his will which contained the following passage :—

"Whatever I have of movable and immovable property, my wife *K.* is the malik thereof: she will pay whatever debts there exist and receive whatever dues there are receivable; and I have given commandment (permission) to my wife to adopt a son. When the adopted son attains his age he will become the malik of the whole of my property and will perform the shrad and tarpan of my father and father's father; and in the event of any good or evil befalling the said adopted son, she will again adopt a son * * * and upon the adopted son attaining his age, he will become 'the malik' of the whole of the property."

K. who survived the testator, did not adopt, but took possession of the property and remained in possession till she died in 1875; and after her death the testator's children held the properties in equal shares, with the exception of a house, which the defendant had taken sole possession of. The plaintiff brought this suit for partition, and for an account of that part of the property which had been in sole possession of the defendant. The defendant contended that her mother took an absolute estate under the will, and that she as her heir was entitled to the whole estate.

Held, that the use of the word "malik" as applied to the widow did not necessarily mean that she should take an absolute estate, and that the directions in the will to adopt, and that the adopted son should become malik, rather indicated an intention on the part of the testator that the widow should only take a limited estate, and that the word "malik" as applied to the widow could not therefore be interpreted as giving her a larger interest.

APPEAL from a decision of WILKINSON, J., dated 9th July 1883.

This was a suit practically for the construction of the will of one Narain Dutt (although partition and an account were asked for also), who died on the 1st February 1844, having made his last will and testament on the same date. The testator left him sur-

viving a widow, Kristo Kaminey Dossee, and by her a daughter (the defendant) Troylucko Mohiney Dossee, and two daughters by a wife who predeceased him, *viz.*, Punchoo Money Dossee (the plaintiff) and Nemoye Money Dossee. The portion of the will material for the purpose of this report ran as follows:—"Whatever I have of immovable and movable property and ready money anywhere, my wife Sreemutty Kristo Kaminey Dossee is the malik or proprietress thereof. She will deal with my debts and dues agreeably to the particulars below; she will pay whatever debts exist and recover and receive whatever dues there are receivable; and I have given commandment (permission) to my wife she will adopt a son; when the adopted son attains his age he will become the malik or proprietor of the whole of my property, and will perform the shrad and tarpan of my father and father's father, and in the event of any good or evil befalling the said adopted son, in that case she will again adopt a son." Kristo Kaminey Dossee died in 1875 without having adopted a son, having taken possession of the property of the testator; and after her death her two daughters, the plaintiff and defendant, had been in possession of the properties in equal shares, with the exception of the house in question, and some movable property which the defendant had taken sole possession of.

Mr. *Bonnerjee* and Mr. *Beeby* for the plaintiff.

Mr. *Mitter* for the defendant.

WILKINSON J. (after setting out the facts) continued:—

I am asked to say whether under these words Kaminey Dossee took an absolute interest in the immovable property, or whether she only took the ordinary interest of a Hindu widow. The word "malik" means "absolute owner;" "malik" applied to a man means "absolute owner;" and Mr. Mitter points out the same word is used to the son to be adopted, and contends that the same meaning should be attached to the word when applied to Kaminey Dossee. If the will stopped with the direction to pay the debts, it would clearly indicate that she was to receive the absolute interest in the property, and I think if she took that interest, she retained it till her death as no son was adopted. Although the word "commandment" is used, it is not a correct translation.

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The Bengali word is "anoowrutty" which means "permission" and implies discretion on the part of the two widows to adopt or not. Mr. Beeby supports the contention that she took only a life interest, and quotes the case of *Koonj Behari Dhur* v. *Prem Chand Dutt* (1 ; and *Soorjeemoney Dossee* v. *Denobundo Mullick* (2), in which the canon of interpretation was laid down, *viz*: "Primarily the words of the will are to be considered; they convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and when this is the case, no doubt these circumstances must be regarded and amongst these circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out."

Here taking the words it seems to me when a man leaves property and says he or she shall be malik it means absolute owner, and the only meaning which the language bears must be put upon it. As regards the law a widow would take a life interest, but though the law is against her taking other than a life interest, it seems to me the words are not dubious and give her an absolute interest. The words in the will are not mandatory but permissive. There is nothing to compel her to adopt, and as she died without adopting a son, that property descends to her daughter; that being my opinion in the case, there is no necessity to give any directions, and the suit will be dismissed with costs on scale No. 2.

The plaintiff appealed.

Mr. *Bonnerjee* (with him Mr. *Beeby*) for the appellant. The question raised is whether in default of the adoption there is an absolute estate to the wife. The lower Court has ordered us to pay the costs, notwithstanding that it was a suit for the construction of the will. We also offered to go into evidence to prove that the property was joint, and that we were in possession of a portion of the property and had a right to possession, but we were not allowed to do so. I submit there are no words used in the will which would give the widow anything more than an ordinary widow's estate. The lower Court has decided that "malik" means "absolute owner:" as to this

(1) I. L. R., 5 Calc., 684. (2) 6 Moore's I. A., 526, at p 553.

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it is unnecessary to make use of any special words for a Hindu to give an heritable and alienable interest. Unless a husband in a gift to his wife makes it clear that the estate which he gives is an heritable and alienable estate, the widow only takes the estate that the law gives her. The intention of the testator here was that an adoption should be made; this intention is shown very strongly, and it seems, therefore, that he had no intention that the property should go to a person (*viz.*, to his widow) who could not perform his shrad; and if the widow had an absolute estate, she could have given it away and defeated the intention of the testator altogether.

As to the word "malik," in *Moulvi Mahomed Shumsool Hooda* v. *Shewukram* (1) a statement was made in a document of a testamentary character, that his "widow was and none other should be his heir and malik," the Privy Council held that the widow did not take an absolute estate, but only a life estate. [CUNNINGHAM, J.—That case seems on all fours with the present case, except that there, there were actual persons who were in existence to become heirs and malik, whereas in this case the gift is contingent as it were, as the widow was only permitted to adopt, and might not call the future malik into existence.] Yes, but we have the testator's intention.

In *Raj Lukhee Dabia* v. *Gookool Chunder Chowdhry* (2) a testator gave all his property to his widow by testamentary deed of gift, (disqualifying her from selling or alienating it) in trust for his sons when they came of age; the sons died before attaining majority: the Court held that the widow did not take an absolute estate.

The case of *Mussamat Kollany Koer* v. *Luchmee Pershad* (3), mentioned in Mayne, p. 398 (3rd edition) may be relied on by the other side: The testator says "that his widow and daughters are his heirs, and maliks and that all his property will devolve on them." Mr. Justice Mitter held that the widow took an absolute estate; but the decision did not depend on the word "malik" alone, but the whole of the will was taken into consideration.

(1) 14 B. L. R. 226 : L. R., 2 I. A., 7.
(2) 13 Moore's I. A., 210; 8 B. L. R. P. C. 57.
(3) 24 W. R., 395.

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In the case of *Prosonno Coomar Ghose* v. *Taraknath Sircar* (1) a testator used the words, "I give to my wife, her heirs and assigns my estate for ever," and Mr. Justice Phear held that the wife took only an estate for life; this, however, was overruled by the appellate Court.

In an unreported case decided by Garth, C.J., and Bose, J., Regular Appeal 340 of 1880, a widow mortgaged her proprietary right ("hakiut and milkiut,") and the Court held that the word meant an absolute estate; the word "milkiut" is the same as "malik," but in that case two words were used, *viz.*, "hakiut milkiut:" we only have one.

I submit that "malik" simply means "executrix according to the tenor of the will;" the testator clearly defines what the widow's duties as malik would be, *viz.*, to pay his debts, and then says, the adopted son on attaining full age shall be "malik" of the whole estate.

In *Koonj Behari Dhur* v. *Prem Chand Dutt* (2) Jackson, J., held that a Hindu widow takes no more right by will over property of her husband than she would get by a gift in her husband's life time. There is always a presumption where an estate is given to a Hindu widow that the estate given is that only of a Hindu widow, and that presumption is strengthened when the widow has power to adopt.

Mr. Kennedy (with him Mr. *Hill*) for the respondent, contended that the Court could not speculate as to what the intention of the testator was, and as to what the effect of the will would be, but the will must be looked at and read and its direction followed out; and that the lady had no power of alienation under the circumstances. He referred to *Dyabaqha*, ch. IV, V, I, s. 3, to the effect that the property became *stridhan*; and cited the cases of *Mussamat Kollany Koer* v. *Luchmee Pershad* (3) and *Sreemutty Pabitra Dossee* v. *Damoodur Jana* (4) to show that the widow took an absolute estate.

The judgment of the Court (GARTH, C.J. and CUNNINGHAM, J.) was delivered by

GARTH, C.J.—The question in this case is, whether under

(1) 10 B. L. R., 267. (2) I. L. R., 5 Calc., 684.
(3) 24 W. R., 395. (4) 7 B. L. R. 697: 24 W. R., 397 (note).

the will of Narain Dutt, his widow Kristo Kaminey Dossee took an absolute interest in his property, or only the ordinary estate of a Hindu widow.

Narain had two wives. His first wife died in his life time, leaving one daughter, the plaintiff. His second wife, Kristo Kaminey Dossee, was the mother of the defendant.

Narain made a will, dated the 1st of February 1844, which was in these terms :—(reads the passage set out ante p. 343).

After the testator's death his widow Kristo Kaminey Dossee did not adopt a son. She took possession of his property, and remained in possession till she died in the year 1875.

One of the daughters mentioned in the will died; and only the plaintiff and the defendant were alive at the time of the widow's death; and they have ever since enjoyed the larger portion of the testator's property in equal shares.

But there is a house in Neemoo Khansamah's Lane, and some movable property, of which the defendant, it appears, has been in sole possession, and the plaintiff has brought this suit for a partition of the testator's estate, and for an account of that part of the property which has been in the sole possession of the defendant.

This suit induced the defendant to raise the question, whether she as her mother's heir is not entitled to the whole estate as against the plaintiff, on the ground that under the will her mother took an absolute interest, and the Court below decided in her favour.

The learned Judge appears to have considered that the words of the will, describing the defendant's mother as "*the malik*" of the property, were sufficient to shew that he intended her to take an absolute interest.

From this decision the plaintiff has appealed; and having heard the case argued on both sides, we expressed an opinion in the course of Mr. Kennedy's address to us on the part of the respondent, that the view which had been taken by the learned Judge could not be upheld.

It appears to us that he attached too much weight to the meaning of the word "malik." It is true that in some cases the use of that word in a will or other instrument has, coupled

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with other expressions, been considered as evincing an intention to pass an absolute or proprietary interest. But the word by no means necessarily imports that intention. There are other cases, where, although that word was used, it has been held that an absolute interest did not pass. In *Moulvi Mahomed Shumsool Hooda* v. *Shewukram* (1), a Hindu testator, after reciting the deaths of his son and others, declared "only *D.K.*, widow of my son (who, too, excepting her two daughters, *S.* and *D.* has no other heirs), is my heir. Except *D.K.* none other is or shall be my heir and malik. Furthermore to the said *D.K.* these very two daughters, together with their children who shall be born to them, are and shall be heir and malik."

In holding that this disposition did not give the widow more than a life interest in the estate, Couch, C.J., referred to the rule laid down in *Soorjeemoney Dossee* v. *Denobundo Mullick* (2), that in construing a will one of the circumstances to be regarded is "the law of the country in which the will is made and its dispositions are to be carried out, that the intention of the testator was that the estate should be kept in his own family, and that malik meant merely 'immediate heir.' This view was affirmed in the Privy Council, their Lordships observing that "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with regard to devolution of property, and that having regard to these considerations, they ought not to hold that the widow took an absolute estate, which she was at liberty to alienate."

Much reliance has been placed on the observations of Mitter, J., in *Mussamat Kollany Koer* v. *Luchmee Persad* (3), but that case does not appear to govern the present, because it was held that the language of the will imported a distinct intention on the part of the testator that his widow and daughter should immediately on his death take a joint interest in his estate, and the contention which the Court had to consider, and which it disallowed, was that according to Hindu Law a gift to a female, though absolute in terms, conveyed merely a limited interest similar to that of

(1) 14 B. L. R. 226; L. R. 2 I. A. 7. (2) 6 Moore's I. A. 526.
(3) 24 W. R., 395.

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a Hindu widow. In the present case we do not consider that the words of the will indicate an intention on the testator's part that his widow should take an absolute estate. The direction to the widow to adopt a son, to adopt a second son in case of the first dying, and that on attaining majority the adopted son should become malik indicate, in our opinion, very clearly the limited nature of the widow's interest. Nor again does our present ruling in any way conflict with that of Couch, C.J., in *Prosonno Coomar Ghose* v. *Taraknath Sircar* (1), because there the words of the will, in the opinion of the Court, "unequivocally showed that it was the testator's intention that his wife should become the absolute mistress of his estate" and, there being nothing in the will to displace that intention, the mere fact of there being two sons of the testator, who were thus disinherited, was not considered to justify the construction of the will according to which the widow merely took as trustee for the sons.

In each case we must endeavour to ascertain the true meaning of the instrument, and here it appears to us that the testator did not intend his widow to take an absolute interest in the property. It seems evident that he intended her to adopt a son; and in the event of that son's death, to adopt another; and he provides that in either case, when the son comes of age, he should become the malik of the property.

This fact of itself seems to indicate that, so far as his wishes and intentions were concerned, they were opposed to his widow taking an absolute interest. He evidently only intended her to hold the property until his adopted son came of age; she would then, in the ordinary course of law, take the estate of a Hindu widow until a son was adopted, and under the provisions of the will she would also be a trustee for her son until he came of age; but in either case, so long as she was possessed of the property and had the management of it, she might properly be described in the will, and called in common parlance, the *malik* or *proprietress*.

In point of fact the widow did not adopt a son: and in point

(1) 10 B. L. R., 267.

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of law, whatever her husband's intention may have been, she was at liberty to disregard them in that respect.

So far as the costs are concerned, we find that the parties have proposed an arrangement amongst themselves, which we are quite prepared to confirm; namely, that the costs on both sides shall be paid out of the estate. A decree will therefore be made for partition of the property in accordance with the prayer of the plaint, it being declared that the plaintiff and defendant are entitled, for the reasons we have given, to the whole of the testator's estate as his co-heirs, and we direct, with the consent of the parties, that the costs on either side in both Courts shall be paid out of the estate.

Appeal allowed.

Attorney for appellant: Baboo *P. N. Bose.*

Attorney for respondent: Baboo *K. D. Bhunjo.*

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

1884 *January* 29.

OMRUNISSA BIBEE AND OTHERS (DEFENDANTS) *v.* DILAWAR ALLY KHAN (PLAINTIFF).*

Land Registration Act (Beng. Act VII of 1876,) *ss.* 52, 55—*Declaratory decree—Specific Relief Act (I of* 1877), *s.* 42—*Jurisdiction of Civil Courts —Possession, Confirmation of.*

The Civil Courts have no jurisdiction to make a decree reversing an order for the registration of the name of any person made by a registering officer under Beng. Act VII of 1876.

All that the Civil Courts can do is to declare the title of an individual, or to give him a decree for possession, and then the registration officers would, as a matter of course, proceed to amend their registers in accordance with the rights of the parties as settled by the Civil Courts.

An order made under s. 55 of Beng. Act VII of 1876, prevents the person against whom it is made, from relying on his previous possession, in a subsequently instituted suit for confirmation of possession. An order made under s. 52 of the same Act has not that effect.

* Appeal from Appellate Decree No. 931 of 1882, against the decree of Baboo Jebun Kristo Chatterjee, Subordinate Judge of Pubna and Bograh, dated the 7th March 1882, affirming the decree of Baboo Nogendro Nath Roy, Munsiff of Shayadpore, dated the 26th March 1881.