APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Agha Haidar.

MUSSAMMAT JIO (DEFENDANT) Appellant

versus

MST. RUKMAN AND ANOTHER (PLAINTIFFS)
MUHAMMAD UMAR, (DEFENDANT) } Respondents.

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Nov. 23.

Civil Appeal No 1553 of 1922.

Will—Construction of—where language clear—Bequest to two persons—Whether creates joint tenancy or tenancy in common—Hindu Law.

Mst. Jio and her husband succeeded to five shops and a house under the will of her mother declaring them owners and heirs thereto. During the lifetime of her husband, *Mst.* Jio mortgaged two of the shops under deeds which recited that the money was required for repairs to the mortgaged property. After her husband's death *Mst.* Jio executed sale-deeds purporting to alienate more than half the property to which she had succeeded under the will. The husband's reversioners brought the present suit for a declaration that the sale, being without necessity, was not binding upon them.

Held, that though the intention of the testator is a very important element in the construction of a will, nevertheless when the language is clear and unambiguous the will must be construed in accordance therewith. *Mst.* Jio was, under the will, full owner of her half share.

And, the devise in favour of two persons, *i.e.*, the daughter and her husband without specification of their shares, created a tenancy-in-common and not a joint tenancy, and the widow did not succeed to her husband's share by survivorship.

Kishori Dubain v. *Mundra Dubain* (1), *Gopi* v. *Mst. Jaldhara* (2), *Ram Piari* v. *Krishna Piari* (3), *Bai Diwali* v. *Patel Bechardas* (4), and *Umrao Singh* v. *Jio* (5), followed.

(1) (1911) I. L. R. 33 All. 665.
(2) (1911) I. L. R. 33 All. 41.
(3) (1921) I. L. R. 43 All. 600.
(4) (1902) I. L. R. 26 Bom. 445.
(5) 39 P. R. 1909.

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Held therefore, that in regard to *Mst.* Jio's half of the property the sale was good, but having acquired only the status of a Hindu widow *qua* the half left by her husband, she could not alienate it without necessity.

First appeal from the decree of Bhagat *Jagan Nath, Senior Subordinate Judge, Delhi, dated the 27th April 1922, declaring that the sale by* Mst. *Jio in favour of Muhammad Umar of half a shop in excess of her own share shall not affect the reversionary rights of the plaintiffs.*

SARDHA RAM and BISHAN NARAIN, for Appellant.

JAGAN NATH AGGARWAL and LAL CHAND MALHOTRA, for Respondents.

The judgment of the Court was delivered by—

AGHA HAIDER J.—This appeal arises out of a suit brought by the plaintiffs for a declaration that the sale made by *Mussammat* Jio, defendant No. 1, in favour of Muhammad Umar, defendant No. 2, with respect to one-half share of certain property was without necessity and ineffectual against their rights as reversioners. They admitted that *Mussammat* Jio had rights of ownership in the other half of the property. *Mussammat* Jio and Muhammad Umar, her transferee, pleaded that the sale was for necessity and, therefore, the plaintiffs had no right to challenge the alienation.

In order to understand the case properly we must go back to the year 1891 when a widow *Mussammat* Sunder made a will in respect of five shops and one house in favour of *Mussammat* Jio, her daughter, and her son-in-law Ram Saran. Under that will she provided that after her death her daughter (*Mussammat* Jio) and her son-in-law (Ram Saran) should succeed to the entire property detailed in the will and that

they were to be owners of, and heirs to, the property in every way. *Mussammat* Jio executed two mortgage-deeds dated, respectively, the 11th of May 1909 and the 18th of June 1909. They were in respect of two shops and the mortgagee under both these mortgage-bonds is one Jainti Parshad. The first mortgage was for Rs. 300 and the second for Rs. 99. Both these documents contained recitals to the effect that money was required for the repairs of the shops included in the mortgages. In 1913 we come to a third mortgage in respect of those very two shops for a sum of Rs. 900 in favour of the same mortgagee, Jainti Parshad. This sum of Rs. 900 was partly in satisfaction of the two prior mortgage-deeds of the year 1909 and also " for the purpose of defraying food expenses and effecting repairs, etc., to the mortgaged property ". This last mortgage was with possession like the two previous ones. It may be noted that at the time of these three mortgages the husband of *Mussammat* Jio, Ram Saran, was alive. He died about fifteen months before the filing of the present suit, that is to say some time early in 1920. After his death, on the 18th of August 1920, *Mussammat* Jio executed the two sale-deeds in favour of defendant No. 2, Muhammad Umar, under which she transferred three shops and a half share in the house. The total consideration for these two sale-deeds is Rs. 8,000. In the sale-deed relating to the three shops there is a recital of the mortgage bond of 1913 in favour of Jainti Parshad and it is further mentioned that after satisfying the mortgage of Jainti Parshad, the purchaser, Muhammad Umar, has been put in possession of the property as an absolute owner.

A plaint was filed on behalf of the plaintiffs which, curiously enough, does not bear any date. We

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find a document purporting to be an amended plaint printed at page 24 of the paper book, also without a date. In this plaint the plaintiffs claimed as reversioners of Ram Saran, the late husband of *Mussammat* Jio, and, as stated above, they said that the sale of the property in favour of Muhammad Umar was without any necessity and was, therefore, not binding upon them. The Court below has decreed the suit of the plaintiffs to the extent of only half of the shop, holding that under the terms of the will of the year 1891 *Mussammat* Jio was the full proprietor of half the property, *i.e.*, half of the house and 2½ shops. The sale-deeds in favour of Muhammad Umar in respect of the three shops has been held to be invalid only to the extent of half the shop.

Mussammat Jio has come up in appeal to this Court, and her contention is that under the terms of her mother's will and, according to the intention of the testatrix, she was entitled to the whole of the property left by her mother, *Mussammat* Sunder, and that the name of her husband was more or less a surplusage. This contention is directly against the clear language of the will of 1891 and cannot be entertained for a moment. It is true that the intention of the testator is a very important element in the construction of a will but at the same time when the language is clear and unambiguous, the question of finding out the intention of the testator does not arise—the will has to be construed according to its plain language.

It was further argued that there was a joint tenancy created under the terms of the will of 1891 and that as a consequence on the death of Ram Saran, *Mussammat* Jio became the full owner of the whole property by right of survivorship. This contention

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of the appellant is contrary to a large volume of case-law on the subject, *vide*, e. g., *Kishori Dubain* v. *Mundra Dubain* (1), *Gopi* v. Mussammat *Jaldhara* (2), *Ram Piara* v. *Krishna Piari* (3), *Bai Diwali* v. *Patel Bechardas* (4) and *Umrao Singh* v. *Jio and another* (5). These cases, in substance, lay down that when a deed of gift or a will is in favour of two persons without any definite specification of the extent of their shares, they take as tenants-in-common and *not* as joint owners. In fact the case of *Kishori Dubain* v. *Mundra Dubain* (1), clearly lays down that the principle of joint tenancy is unknown to Hindu Law except in connection with the joint Hindu family. This being so, there is no force in the contention of the appellant that *Mussammat* Jio on the death of her husband took the whole property by survivorship.

The learned counsel for the appellant tried to justify the sale of the extra half of the shop on the ground of necessity, by arguing that the sale-proceeds of half of the shop went towards the payment of the mortgages in favour of Jainti Parshad and for subsequent repairs of the property. We have noticed, however, that the mortgages in favour of Jainti Parshad were executed during the lifetime of Ram Saran so that *Mussammat* Jio did not at the time occupy the position of a Hindu widow. She was the full proprietor of half of the property and it was only after the death of the husband that she acquired the status of the Hindu widow *qua* the other half of the property left by her husband. If she borrowed money in order to repair her own shops during the lifetime of

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her husband, it cannot be argued on her behalf that after the death of her husband she was justified in selling part of the property which came into her possession as a Hindu widow, in order to pay off the mortgages executed by her for meeting the expenses of those repairs. There is no satisfactory evidence of any repairs having been executed after the death of her husband to the property which came into *Mussammat* Jio's possession as a Hindu widow and in fact there are no recitals in the two sale deeds in suit about any recent repairs having been made or contemplated. This being so, neither *Mussammat* Jio nor the transferee from her has discharged the *onus*, which heavily lay upon them, of proving necessity for the sale of half of the shop over and above her own share.

In the absence of any evidence that debts were incurred by her for any legal and valid necessity we hold that the judgment of the learned Subordinate Judge is correct and we dismiss this appeal with costs.

N. F. E.

Appeal dismissed.