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in the right. I think she should first be asked to produce her documents of title, and give other information that may be required. If she refuses, then she must be examined, but at her own house, in accordance with the custom of her community and only after the examination of Rahimbhoy Alládinbhoy, the results of which may render her examination unnecessary. At the same time I do not think the applicant, Rahmubhoy Hubibbhoy, who belongs to the insolvent's family and is involved in a bitter family quarrel, should direct the examination. I think it will be more certainly directed to its sole legitimate object—the benefit of creditors and the estate—if it is undertaken by the bank. As the bank has made a separate application of a similar character, I can safely assume its readiness, and I, therefore, order the summonses to issue returnable in a month's time. The bank to apply to the Official Assignee to conduct the inquiry, and if he declines to do so, then the bank to conduct the inquiry. The payment of dividend to Rahimbhoy Alládinbhoy to be postponed till the first Court day, at least one week after the close of the examination.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

LAKSHMIBA'I, (PLAINTIFF), *v.* HIRA'BA'I AND ANOTHER (DEFENDANTS).*

1886. *September* 21.

Will—Hindu will—Construction—Joint tenancy—Tenancy-in-common—"Heirs of my property," effect of these words in Hindu will.

Bhojráj died in 1876, leaving Hirábái, his widow, and Nathu, an adopted son, him surviving; and he directed by his will that Hirábái and Nathu should be "the heirs of his property." Nathu died childless in 1880, leaving the plaintiff, Lakshmibái, his widow, him surviving. Hirábái, thereupon, took possession of all Bhojráj's property, claiming as a joint tenant with Nathu under the will to be entitled by survivorship on Nathu's death.

Held, that, under the will, Hirábái and Nathu had been tenants-in-common, and not joint tenants; and that the plaintiff, therefore, as Nathu's widow, was entitled to Nathu's share.

In the expounding of Hindu wills the Court should presume that the holder did not intend to depart from the general law beyond what he explicitly declares.

* Suit No. 102 of 1886.

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Bhojráj, while he had constituted his widow, Hirábái, as one of his heirs contrary to the general principles of Hindu law, which only gave her a right to maintenance, was silent as to how far her right of heirship was to extend. That right was to be construed in a manner most consistent with the general principles of Hindu law; and to hold that a joint tenancy had been created between Hirábái and Nathu, would be in distinct derogation of the joint-family system, which is the keystone of Hindu law. It would be, in effect, to exclude the son's family, for the benefit of the widow, in total disregard of the relations and obligations of a Hindu family. The fact of Nathu dying childless, was an accident which could not be presumed to have been in the testator's contemplation.

THE first defendant in this case was the widow of one Bhojráj Dessur. The plaintiff was the daughter-in-law of the defendant, being the widow of one Nathu Bhojráj, who was the adopted son of Bhojráj Dessur.

Bhojráj Dessur died on the 27th September, 1876, leaving his widow, Hirábái, and his adopted son, Nathu Bhojráj, his only heirs and next of kin. The said Nathu Bhojráj died intestate in 1880 without issue, leaving his widow, the plaintiff Lakshmibái, him surviving.

The plaintiff alleged that the defendants had taken possession of all the property of Bhojráj Dessur, setting up the authority of a will left by him, dated the 22nd September, 1876, which will, however, had never been proved.

The plaintiff, as widow of Nathu Bhojráj (the adopted son of Bhojráj Dessur), claimed to be entitled to the whole of the property left by the said Bhojráj Dessur, or, in the event of the said will being proved, to the interest which the said Nathu Bhojráj took in the property of the said Bhojráj Dessur under the terms thereof.

The defendants denied that the plaintiff was entitled to anything more than maintenance out of the estate of Bhojráj Dessur.

By a Judge's order, dated the 24th June, 1886, the case was ordered to be set down for hearing on the preliminary issue, as to whether the plaintiff had any, and what, right to the estates of Bhojráj Dessur under his will mentioned in the pleadings.

On behalf of the defendants it was contended that, under the terms of the will, the whole of the property of Bhojráj Dessur

was left to the defendant Hirábái (his widow) and his adopted son, Nathu, *jointly;* and that upon Nathu's death, in 1880, it went to Hirábái by survivorship, so that Lakshmibái took nothing.

The following are the material portions of the will:—

"Clause first as follows:—*As my heirs to my property are my son Bhái Nathu Bhojráj and my wife* Bái Hirábái, making in all two persons. They are truly to take out power (probate) from the High Court at Bombay in respect of my properties (property): on (or to) the same no one (else) has any right (or) claim in any manner whatever."* * * * * .

"Clause sixth:—May God forbid it; and in case my decease (or) death should take place, then (funeral, &c.) outlays are truly to be made after me agreeably to the customs of our caste, and for pilgrimage here and at Bombay, *as my heirs two persons* and Bhái Dáyábhái Kalyánji may deem proper." * * * * * * * * * * * * * *

"According to what is written above, the above-mentioned sums are truly to be paid (set apart) on the *dharma* (religious and charitable) account; and they are truly to act according to the above-mentioned conditions; and *the (said) two persons have been appointed heirs* to my property; and they are truly to obtain power (probate) in respect of my immoveable and moveable property and effects at Bombay. If any person whatever should oppose them, then the claim, &c., of such (person) shall not prevail in any way whatever; and the whole property shall truly reach *(go to) my (said) heirs two persons;* and out of the rent of my houses that may be received and (out of) the interest that may be received, my wife Bái Hirábái and my son Bhái Nathu Bhojráj together shall maintain themselves; and Bhái Dáyábhái Kalyánji is truly to take care and trouble of (and for) my estate (houses and lands) and my moneys. For *his trouble my heirs, two persons,* shall truly pay him Rs. 1,000 *per* year. Further, if at any time there should arise any disagreement between my wife, my son, *i.e.,* the mother and the son themselves, then Bhái Dáyábhái Kalyánji is (to act) as *upri* (superior) over the said two persons. He is truly and properly to advise, persuade, and guide them. Further, there is a debt due to me by Bhái

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Dáyábhái Kalyánji. As to whatever debt there appears to be due (to me) from the account of Bhái Lakhamsi Bhojráj & Co., and of Bhái Dáyábhái Kalyánji & Co., and all that, I, as to whatever debt there appears to be due to me in (these) two accounts up to the 30th of *Asoo Vad* of *Samvat* 1932, (17th October, 1876), I make a gift of and forgive the same. The same are truly to be debited to my account; and thus (the said two) accounts of Bhái Dáyábhái Kalyánji are truly to be squared (and written off); and as to whatever moneys may hereafter become receivable from and payable to him, those are truly to be received (from) and paid (to him) in a proper manner. Further, *my heirs, two persons,* shall for (his) trade lend to Bhái Dáyábhái Kalyánji & Co.. Rs. 25,000. If he at any time should require more, even then he may according to his credit truly borrow the same (from them). Further, if my son Bhái Nathu should wish to carry on trade, then he shall not trade separately (from Dáyábhái), but he may keep a small share in Dáyábhái Kalyánji & Co., and thus he may truly trade (with him). Further, in my books, moneys appear to be due to me from people. The same are to be demanded and recovered from them; and, further, there are my mother-in-law and my wife's brother's wife (or widow), making in all two persons. My heirs shall truly maintain them as long as they may live; and above I have directed Rs. 1,000 *per annum* to be paid to Bhái Dáyábhái Kalyánji for (his) trouble, the same shall truly be paid (to him) always. Thus I, in my lifetime, make (have made this) my will. This will I have made of my accord and pleasure and in sound mind and consciousness, and without having taken any intoxicating drug (as) drink, I have made (this) will. The same is truly agreed to and approved of by me and my heirs and representatives; and whatever business my heirs, two persons, may do, is truly to be done with the advice of Bhái Dáyábhái Kalyánji."

Lang (with *Macpherson* and *Inverarity*) for the plaintiff:—If the will gave the property to Hirábái and Nathu in joint tenancy, then on Nathu's death the whole went to Hirábái by survivorship, and the plaintiff, (Nathu's widow), takes nothing.

We contend that this could not have been the intention of the testator. If that is the construction of the will, then even if Nathu had left sons they would have been excluded, and the whole property would equally have devolved, at his death, upon Hirábái. The testator could not have intended that. It would be contrary to the principles of Hindu law, which are to be kept in mind when construing Hindu wills: see *Mahomed Shumsool* v. *Shewukrám*[1]; *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*[2]. The testator by his will provides liberally for his nephew. It is not likely that he could have intended to disinherit his grandsons, if he should have any, and give everything to his widow, Hirábái. We contend that the will gives the estate to Hirabái and Nathu successively for life. The fee is undisposed of by the will. It really devolved upon Nathu as the adopted son at the death of the testator, but it was subject to a bequest to Hirábái for her life.

He cited Mayne's Hindu law, para. 357.

Telang (*Russell* with him) for the defendant:—We are not to speculate as to what, under any possible set of circumstances, the testator might have intended. We must look at the facts as they existed. Nathu was a young man, twenty years younger than Hirábái, so that the testator did not contemplate that he would die before Hirábái. Clearly, the testator did not contemplate the events that have happened, and so we cannot consider what he intended under present circumstances. We must look only to the will, and to the legal effect of the words used.

We admit that Hindu wills are to be construed, according to Hindu usage and feeling, as laid down in the cases cited. But the principle, that the Court leans against an intestacy, applies to Hindu wills as well as to English wills. The other side suggests that the will merely gives two successive life-estates to Hirábái and Nathu, and omits to deal with the fee after the death of those two persons. The Court should hold that the testator disposed of all his property if the will is open to that construction. But there are express words in the will showing an intention to dispose of the fee, *e.g.*, "they are the heirs of my

(1) L. R., 2 Ind. Ap., at p. 14. (2) 6 Moore's Ind. Ap., 1.

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property." See, also, the sixth clause: "If any person, &c. * * * * * *"

We say the will disposes of the whole property. It gives a joint estate to Hirábái and Nathu with benefit of survivorship. In the hand of the survivor the estate is, of course, to be subject to the restrictions which result from the status of the survivor. In this case the widow being the survivor she takes it just as in the ordinary case of a wife taking property under her husband's will. She takes for life, and on her death the estate goes to her husband's heirs. If Nathu had left sons, they would be excluded, as has been suggested by the other side. After Hirábái's death they would come in as the testator's heirs. The result would be the same as if the will had given the property, not to the two, but to Hirábái alone. There is nothing whatever in the will to show a severance of interest. By English law there would unquestionably be a joint tenancy.

[SCOTT, J.:—According to your construction, Nathu's son, if he had one, would have been excluded, at all events during Hirábái's life. That would be a great deviation from Hindu usage.]

That may be so, but we cannot conjecture that the testator contemplated all these possible contingencies. The words of the will clearly create a joint tenancy; and the fact that a curious result is produced, ought not to influence the Court in construing them—*Jairám Narronji* v. *Kuverbái*[1]; *Luxmibái* v. *Ganpat Morobá*[2]; *Luxmibái* v. *Ganpat Moroba*[3]; *Prosunno Coomar Ghose* v. *Tarrucknath Sirkar*[4]; *Seth Mulchand* v. *Bái Manchá*[5].

The effect of the words "A. B. is my heir" is to give the whole property—*Mahomed Shumsool* v. *Shewukrám*[6].

Lang in reply:—Where the Courts in India have held that they will lean to a construction which creates a joint tenancy, they have done so in order to support the joint-family system. In this case such a construction would lead to results directly opposed to that system.

(1) I. L. R., 9 Bom., 491, at p. 510.
(2) 4 Bom. H. C. Rep., O. C. J., 150.
(3) 5 Bom. H. C. Rep., O. C. J., 128, at p. 132.
(4) 10 Beng. L. R., 267.
(5) I. L. R., 7 Bom., 491.
(6) L. R., 2 Ind. Ap., at p. 14.

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September 30. SCOTT, J.:—One Bhojráj Dessur died in September, 1876, being possessed of considerable property, and leaving him surviving his adopted son, Nathu Bhojráj, and his widow Hirábái. He left a will, which has been duly proved, and the question raised in this preliminary issue is the construction of that will. The adopted son has died childless, leaving his widow, Lakshmibái, the present plaintiff. Lakshmibái now claims to be entitled to the interest her husband took under the will, whilst Hirábái, the defendant and widow of the testator, claims to be entitled, under the will, to the whole estate for her life.

The expressions in the will, which I have to interprete, are the following:—"As my heirs to my property there are my son, Nathu Bhojráj, and my wife, Hirábái, making in all two persons. They are truly to take out probate from the High Court at Bombay in respect of my properties. On the same no one has any right or claim in any matter whatever." Then follows a description of his property, and then the will continues . . . "And the two persons have been appointed heirs to my property, and they are truly to obtain power (probate). . . and the whole property shall truly reach (go to) my heirs, two persons. And out of the rent of my houses that may be received, and out of the interest that may be received, my wife Hirábái, and my son Nathu Bhojráj, together shall maintain themselves." The other material provisions are to the effect that one Dayábhái Kalyánji is to manage the property, to act as referee in disputes, and to have Rs. 1,000 a year for his trouble, as well as advances from the property for the purposes of his trade.

The above passages are obviously susceptible of more than one meaning. The ambiguity lies in the use of the word "heirs." Does it give the testator's widow more than a widow's estate? Does it convey a joint estate with the right of survivorship, or does it convey a tenancy-in-common, when, though the possession is undivided, the estates are distinct and pass to the respective representatives? Mr. Telang in his argument on behalf of the testator's widow did not, in the absence of express terms giving a heritable right or power of alienation, press his claim for more than a widow's estate. That point is settled law

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—*Koonjbehari* v. *Premchand*[1]; West and Bühler, 312. But he insisted on her right to an estate in joint tenancy to the extent of her life enjoyment of the whole.

I think that in the expounding of wills the Court should presume that the testator did not intend to depart from the general law beyond what he explicitly declares. In this case the testator has declared his intention to give his widow a right of heirship in his property together with his son. This disposition is contrary to the general principles of Hindu law, by which the widow, when there are sons, is excluded from all right but that of maintenance. But the testator, whilst he constitutes his widow one of his heirs, is silent as to how far her right of heirship is to extend. It is clear that right must be construed in the manner most consistent with the general principles of Hindu law. Their Lordships of the Privy Council say in *Mahomed Shumsool* v. *Shewukrám*[2]: "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 respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." In another case, *Sreemutty Soorjeemoney* v. *Denobundoo*[3], the Judicial Committee say: "The Hindu law no less than the English law points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition. . . . . 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...Amongst the 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."

(1) I. L. R., 5 Calc., 684. (2) L. R., 2 Ind. Ap., at p. 14-15.

(3) 6 Moore's Ind. Ap., at p. 550.

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We must, therefore, in this case consider the circumstances and the law. The real question to decide is, whether the widow took as joint tenant or tenant-in-common under the will. Cases were cited to show that, in accordance with the spirit of Hindu law, the Courts in India should favour joint tenancy. I have found no case which lays down that rule as a universal principle. I have only found cases where the particular question would have been inequitably decided if the English leaning towards a tenancy-in-common had prevailed. The fact is, that neither rule can be of universal application. Jarman on Wills (Vol. II, p. 211,) explains the leaning, in England, in favour of tenancies-in-common as "an anxiety which has been dictated by the conviction that this species of interest is better adapted to answer the exigencies of families than joint tenancy." Now, undoubtedly, in the present case the tenancy-in-common interest would best answer family exigencies. A decision in favour of joint tenancy would be in distinct derogation of the joint-family system, which with its corollary, religious obligations, is the keystone of Hindu law. It would be, in effect, to exclude the son's family to the benefit of the testator's widow, and this would be in total disregard of the relations and obligations of a Hindu family. The fact of the son dying childless, is an accident which I cannot presume to have been in the testator's contemplation. Without express and explicit words to the contrary, which the will does not contain, I think I am bound to presume the testator intended to preserve the ordinary rules of devolution and the general principles of law, save so far as he departed, in terms, from them. I must hold therefore, that he desired to respect the family system, and did not intend to deprive his son's family, even for a time, of all share in the property in case his son predeceased his widow. The plaintiff, therefore, is entitled, as next heir to her husband, to succeed to his share under the will.

Costs reserved.

Judgment for plaintiff.