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notice. The respondent has cited *Mussamat Jusoda Koonwar* v. *Baboo Gouree Byjnath Sohae Sing* (1) and *In the matter of the Petition of Phul Koer* (2) of which the marginal note runs thus :—"Though actual partition by metes and bounds is not necessary to a separation between the members of a joint Hindu family, yet there must be some unequivocal act or declaration on the part of the family of their intention to separate." And with reference to the case of *Appovier* v. *Rama Subba Aiyan* (3), cited by Mr. Piffard, he brings forward the judgment of Justices L. S. Jackson and Glover in *Muktakasi Debi* v. *Ubabati* (4), in which the former learned Judge says :—"It seems

(1) 6 W. R., 139.
(2) *Ante*, p. 388.
(3) 11 Moore's I. A., 75.
(4) *Before* Mr. *Justice L. S. Jackson and* Mr. *Justice Glover.*
The 7th June 1870.

MUKTAKASI DEBI (DEFENDANT) *v.* UBABATI, *alias* UMABATI, GUARDIAN OF MAHENDRA NARAYAN ROY AND GIRISH NARAYAN ROY, MINORS (PLAINTIFF.)*

Baboos *Kalimohan Das* and *Rames Chandra Mitter* for the appellant.

Baboo *Srinath Das* for the respondent.

THE judgment of the Court was delivered by

JACKSON, J.—The facts out of which the present suit has arisen are fully stated by the Zilla Judge before whom it was tried. It seems, therefore, unnecessary to re-state those facts at any great length.

The gist of the matter is this that the property to which the suit relates, whether divided or undivided, is the property of three persons, of whom, unless the hibbanama in dispute be a valid document, Kasi Nath Roy is one, and his two nephews, sons of his deceased brothers, namely Girish Narayan Roy and Mahendra Narayan Roy, are the other two.

The suit was brought by Umabati, the mother and guardian of Mahendra Narayan, for the sake of setting aside the hibba under which the defendant Muktakasi, who is Kasi Nath's wife, claimed to hold separately one third of the property in dispute. One of the objections taken by the defendant, which was unsuccessful before the Judge, but which was again urged before us in appeal, was that the property being, according to the plaintiff's allegation, joint and undivided, she was not competent to maintain this suit in her capacity as guardian of one of the co-sharers, but the suit should have been on the part of all the co-sharers interested. After the argument had proceeded some length, we intimated our opinion that the plaintiff, who, as it happens, is the guardian of Girish Narayan as well as of Mahendra Narayan, should have herself placed on the record as plaintiff in her double capacity of guardian of both the infants. This has, accordingly, been done, and the requisite amount of stamp duty has been paid, so that the suit now represents the interests of the co-sharers, excepting Kasi Nath, whose share is now in question.

I may say that the only question we have had to consider on this appeal is, whether the property, to one-third of which the hibba relates, has been and is divided as to interest, or whether this Hindu family continues to be a joint undivided Hindu family in estate.

*Regular Appeal, No. 11 of 1870, from a decree of the Officiating Judge of Zilla Moorshedabad, dated the 4th October 1869.

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to me it would be going very much beyond what their Lordships intended in that case were we to attribute to vague expressions and statements contained in petitions, not directed to that particular subject, the effect of solemn deeds or agree-

We have been very much pressed with a definition of an undivided Hindu family in Hindu law contained in the judgment of the judicial Committee of the Privy Council in the case of *Appovier* v. *Rama Subba Aiyan* (1). The passage on which the appellant relies is this.—"According "to the true notion of an undivided "family in Hindu law, no individual "member of that family, whilst it re-"mains undivided, can predicate of the "joint and undivided property, that "he, that particular member, has a "certain definite share. No undividual "member of an individed family could "go to the place of the receipt of rent, "and claim to take from the collector or "receiver of the rents, a certain definite "share. The proceeds of undivided pro-"perty must be brought, according to the "theory of an undivided family to the "common chest or purse, and then dealt "with according to the modes of enjoy-"ment by the members of an undivided "family. But when the membors of an "undivided family agree among them-"selves with regard to particular pro-"perty, that it shall thenceforth be the "subject of ownership, in certrin defined "shares, then the character of undivided "property and joint enjoyment is taken "away from the subject-matter so agreed "to be dealt with, and in the estate "each member has thenceforth a definite "and certain share, which he may claim "the right to receive and to enjoy in "severalty, although the property itself "has not been actually severed and "divided."

Now we must bear in mind for what purpose this definition was set forth. Looking at the facts of that case, it evidently was with advertence to the contention by the appellant that a division in such a case as this meant a division by metes and bounds, and that there could be no operative division of title until such a division had taken effect upon the property; and their Lordships, repudiating any such view held that there might be an operative division of title without a corresponding division of the subject-matter to which that title relates; and then, applying the principle so enunciated to the particular case, their Lordships show that the members of the undivided family had agreed amongst themselves with regard to the particular property, to have a written deed executed embodying their intentions, of which the words are set out in the judgment, and which indicate quite unmistakeably the intention of the parties to separate and to enjoy that which had been joint property in definite specified shares.

It seems to me that it would be going very much beyond what their Lordships intended in that case were we to attribute to vague expressions and statements contained in petitions, not directed to that particular subject, the effect of solemn deeds or agreements between the parties whether reduced to writing, or not, but agreements contemplating the very subject of separation.

In this case there is not only no document in which an agreemet to separate is embodied, but there is no evidence that the members of the family came together with any such intention, or made any such agreement. It is only sought to be shown, or to be inferred, from vague random expressions in certain petitions, or from the evidence of certain persons who have been cited as witnesses in this case, that as to portions of the property rents had been separately collected; but there is no documentary evidence, there is nothing beyond some verbal assertions; and as to the petitions

(1) 11 Moore's I. A., 75.

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ments between the parties whether reduced to writing or not but agreements contemplating the very subject of separation." I fully concur in these remarks, and I altogether fail to see that the decisions, either of the Privy Council or of this Court, warrant us in saying that a mere definition of an interest in a joint estate, in terms of a fraction of the whole, without any indication of intention to divide interest and liabilities, is sufficient to constitute a legal dissolution of a joint family. No doubt, the expression of a joint tenant's interest in the joint estate, as a half or a third or any other fraction, is not strictly consistent with the theory of the joint family property as set forth in the judgment in *Appovier* v. *Rama Subba Aiyan* (1); but as a matter of fact, it is extremely common, and, by no means necessarily implies any intention to abandon interests in the entire property, or to withdraw from common liabilities.

In this particular case, the first document relied on, *viz.*, the petition of 2nd October 1841, though it certainly sets forth that upon which the defendant relies, every one of those petitions contains, together with the vague statements relied upon, a positive assertion that the parties are at this moment in a state of *ijmali*, or joint property. There is a certain presumption in favor of the family continuing joint, and I think that, in the circumstances of the case, the Judge was quite right in concluding that the defendant, on whom the burden of proof lay, had not discharged herself of that burden by showing that the family were separate in estate. There can be no doubt that if such separation had been made out, the plaintiff could have no interest which would enable her to maintain the present suit; but it also follows conversly that, if such separation was not made out, and if the property continued to be the common property of a joint Hindu family, the co-sharer, Kasi Nath, had no power to make the hibba which is before us in this case, and that, consequently, the defendant had no title under the hibba.

The result, therefore, I think, must be that the plaintiff must succeed so far as to obtain a declaration from the Court that the hibba is not a valid instrument, and that the defendant has no title there under. Regard being had to the circumstances of the case, and to the fact that Muktakasi is the wife of the co-sharer Kasi Nath, who is manifestly, from the evidence, a lunatic, and incapable of managing his own affairs, I think it is not necessary that the decree should run so as to direct the ejectment of Umabati from the land, and therefore, I think, the decree of the Court below ought to be modified to this extent; but it will remain clear from the judgment and decree now made in this case that any possession which Mukhtakasi may retain will not be in the quality of owner under the hibba, but simply out of her relation to Kasi Nath, one of the co-sharers.

The costs of the suit will, of course, include the costs which the plaintiff incurred by payment of excess stamp duty here, representing Girish Narayan's interest in the property.

The respondent is entitled to her costs of this appeal.

(1) 11 Moore's I. A., 75.

the three brothers were entitled to equal thirds in the property held by them, and might, if so minded, thereafter make a partition into three eqal parts, at the same time distinctly recites that they were at the date of the petition holding the whole jointly, and it is evident from a perusal of the document that the object of it was solely to guard againat any one or more of them laying claim to any portion of the property held in his or their separate names as his separate property. So far is this document from indicating any separation in 1841 that it proves just the contrary, and it is impossible to overrule the express declaration of continuing joint ownership, because the parties have given definitions of their shares by describing them as what they would be if any one claimed a partition. I would go further and say that even if, for common convenience, they took the rents and profits of the estates in certain defined shares, yet in the face of this distinct declaration that the community of interest remained unbroken, it would be no evidence of separation. Passing from this, the earliest to the Inoome Tax returns of 24th December 1869, one of the latest documents put in, in which it is said that the former returns were made jointly, but that there had subsequently been a separation, I am not prepared to admit that this statement is conclusive evidence of separation. The Judge below, looking at the whole of the evidence, has come to the conclusion (a correct one, I think) that this statement was a mere device to evade payment of Income Tax. Unless there was a distinct understanding among the parties to separate their interests and liabilities, the fact that they made a false statement for their common benefit in a particular matter is wholly immaterial. The statement would be evidence and of the strongest character, if believed; but when found to be false, it is of no effect whatever. It is the intention of the parties to have no further community of profit and loss which is material, and not their expressions, except so far as these are evidence of intention. I do not propose to go through the whole of the oral and documentary evidence which has been read and commented upon. Much of it is inconclusive, and might consist with either state of facts. Those documents which specify the shares of the parties in the transactions referred to therein are quite in

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keeping with their petition of 1841. The evidence does not raise the slightest doubt in my mind as to the absence of any separation, and it was for the party pleading separation to prove it. I would dismiss the appeals with costs.

Appeals dismissed.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Ainslie.

SRIMATI BRAMAMAYI DASI, REPRESENTATIVE OF THE LATE KRISHNA KISHOR GHOSE (PLAINTIFF) *v.* JAGES CHANDRA DUTT AND OTHERS (DEFENDANTS.)*

1871
Sept 5.

Hindu Will—Construction of Hindu Will—Issue—Act XXI of 1870—*Succession Act* (X *of* 1865), *s.* 102.

Where a testator directed in his will that (1st) "on the death of either of my four sons leaving lawful male issue, such issue shall succeed to the capital of principal of the respective shares of his or their deceased father or fathers, to be paid or transferred to them respectively on attaining the full age of twenty-one, years;" (2nd), "if either of my four sons shall die leaving male issue, and the whole of such issue shall afterwards die under the age of twenty-one years and without male issue, the share or shares of the sons so dying shall go and belong to the survivors of my said sons and to my two grandsons (named in the will) for life and their respective male issue, absolutely after their death; and (3rd), "on the death of either of my sons without leaving any "male issue," his share is to go and belong to the survivors of my said sons and my two grandsons (named in the will) for life, and their respective male issue absolutely after their death in the same manner and proportions as hereinbefore described respecting their original shares." It was *held*

1*st*—That a vested interest was conferred upon the issue immediately upon the death of the father. The expression "to be paid or transferred to them respectively on attaining the age of twenty-one years" was a mere attempt to defer the period of payment to or enjoyment by such issue.

2*nd*—That the gift over was void, because the event on which it was to take effect might be indefinitely remote, even if the words "male issue" be construed as meaning sons. The meaning of "male issue" is not confined to sons alone.

3*rd*—That, in accordance with the ruling in *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (1), a gift by a Hindu to a person not ascertained or capable of being ascertained at the time of the death of the testator cannot

*Regular Appeal, No. 235 of 1870, from a decree of the Judge of 24-Pergunnahs, dated the 25th August 1870.

(1) 4 B. L. R., O. C., 103.