

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.
PROSUNNO KOOMAR GHOSE (DEFENDANT) v. TARRUCKNATH
SIRKAR (PLAINTIFF).

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 July 29 &
 Aug. 20.
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 Jan. 3.

Hindu Law—Will—Gift absolute to Widow—1 inheriting of Sons.

A Hindu died, leaving a widow, two infant sons, and a daughter, and having made a will in English, of which the following is the material portion:—"I give, devise and bequeath unto my wife *L D* and her heirs and assigns for ever all my real and personal estate and effects, and do appoint my said wife sole executrix of this my will." *Held* (reversing the decision of Macpherson, J.) that the wife took an absolute estate with full power of alienating the property, and not merely as trustee and manager for the infant sons.

See also
 14 B L R 226
 11 B L R 292
 11 B L R 466

It is not necessary that there should be an express declaration of the testator's desire or intention to disinherit his sons if there is an actual gift to some other persons expressed in clear and unequivocal words.

APPEAL from a judgment and decree of Macpherson, J., dated the 5th of June 1872.

The facts of the case appear fully in the judgment of

MACPHERSON, J.—The subject of dispute in this suit is certain property which originally belonged to one Hurrundo Sirkar. The plaintiff and the defendant are both grandsons of this Hurrundo, but, unfortunately for the defendant, according to Hindu law, occupy very different positions, the plaintiff being the son of a son, while the defendant is the son of a daughter.

Hurrundo Sirkar died in 1833, leaving a widow Luckymoney Dossee, and two sons Shamachurn and Woomachurn, and a daughter Raymoney. Shamachurn died in 1859 without issue, but leaving a widow named Rampreosi Dossee, who died in 1855 or 1856. Woomachurn died in 1854, leaving one son, the plaintiff. Raymoney, the daughter of Hurrundo, is still alive, and the defendant Prosunno Coomar Ghose is her son.

Supposing, Hurrundo Sirkar to have died intestate, so that his son Shamachurn and Woomachurn succeeded to his property, according to the ordinary rule of Hindu law the whole estate would now belong to the plaintiff, to the exclusion of the defendant: for Shamachurn and Woomachurn would have

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taken in equal shares. On the death of Shamachurn, his widow Rampreosi would have taken a widow's life-interest in his share of the estate; upon her death his mother Luckymoney would have succeeded; and on Luckymoney's death the share would have gone to the present plaintiff as the next heir of Shamachurn. But the real state of the case, however, is that Hurronundo Sirkar died leaving a will, and the defendant Prosunno Coomar Ghose contends that under that will his whole estate vested absolutely in Luckymoney, to the entire exclusion of his children, and that Luckymoney Dossee in her lifetime made a gift to him (the defendant) of the six-anna share of the family dwelling-house, which is the subject of this suit. There is no doubt that the question which has been raised is one of great importance to Hindus, as bearing upon the question of the principles upon which the Courts ought to act in construing wills made by Hindus.

Hurronundo Sirkar made a will in English, which was apparently prepared by an English attorney, but which is signed by the testator himself in Bengali. It consists of only a few lines, and the following is the material part of it:—"I give, devise, and bequeath unto my wife Sreemutty Luckymoney Dossee and her heirs and assigns for ever all my real and personal estates and effects, and do appoint my said wife sole executrix of this my will."

Luckymoney Dossee, in February 1834, obtained probate of this will from the Supreme Court, and from that time onwards until her death in October 1858, she had the control and management of the property left her by her husband, and dealt with it as if it was her own. At the same time, however, her sons Shamachurn and Woomachurn, who were young children at the time of the death of their father, always lived with her, and substantially had the enjoyment of this property along with her; and on the evidence of the defendant Prosunno Coomar himself, it appears that Shamachurn and Woomachurn, after they attained to years of discretion, used to assist her in the management of the property, although everything was done in her name.

Luckymoney, on one or two occasions, sold portions of the property which belonged to Hurronundo's estate; and on these

occasions the conveyances seem to have been made by her. One of these conveyances, a Bengali bill of sale, dated the 3rd of February 1849, has been put in, and in that she states that she sells the property, her husband having given a "*torneyníma* will" in her name. While this bill of sale was given by Luckymoney as being the person having the right to convey, it is to be noticed (and it is a material fact) that Shamachurn and Woomachurn, the two sons, who were the natural heirs of Hurronundo, sign the conveyance as witnesses, a proceeding well understood among natives as indicating that these sons, being parties having an interest, gave their consent to the sale being made.

Shamachurn's widow Rampreosi having died, we find that very shortly thereafter Luckymoney executed a deed of gift to the defendant Prosunno Coomar Ghose of the property which is the subject of this suit. That deed of gift is dated the 18th of October 1856, and in it the property is described as being property "which was given (to me), and has been held and enjoyed by me up to this time." Two or three months before her death, Luckymoney made a will, which is useful as showing what she considered to be her position with reference to this property. She says:—"My husband, the late Hurronundo Sirkar, having made a will on the 22nd day of September of the English year 1833, granted all his moveable and immoveable property to me. Thereafter, upon his death, I, having obtained the whole of his property by virtue of his will, am possessing and enjoying the same from that time up to the present as owner of the right of gift (and sale thereof), and I have alienated some of these properties." Then she says that she has already given out of the properties granted by her husband a six-anna share of the family house to the defendant Prosunno Coomar Ghose by deed of gift, and she goes on to bequeath the remaining immoveable properties which she then had, and her entire moveable property to her son's son Tarrucknath Sirkar. She then proceeds to appoint the defendant Prosunno Coomar Ghose as executor and manager during the plaintiff's minority, and to declare that the whole estate should go to Prosunno Coomar Ghose absolutely, in the event of the plaintiff dying

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a minor without issue, or of his renouncing the Hindu religion.

This will confirms the view that Luckymoney herself considered that she was absolute owner of the property, and had the right to dispose of it at pleasure; and I have no doubt the whole family thought the same thing. Thus we find that, during the minority of the plaintiff, his mother filed a bill in equity in the supreme Court against the present defendant Prosunno Coomar Ghose, the object of which was merely to have Luckymoney's will construed, and to have an account of her estate taken, no question being raised in that suit as to the rights of Luckymoney under Hurrundo's will, or as to the rights of the plaintiff as heir of Hurrundo, or of Shama-churn. These proceedings are only material now, as showing that some years ago the plaintiff's mother and guardian did practically treat Luckymoney as having a good and absolute title under the will to the property of Hurrundo Sirkar.

The plaintiff attained the age of eighteen years, as he states in his plaint, sometime in the year 1871; and, taking advantage of his exemption from the ordinary provisions of the law of limitation by reason of his minority, he now seeks for a declaration that Luckymoney did not, under the will of Hurrundo Sirkar, become the absolute owner of the property, and that she had no right to alienate any portion of it, or to give to the defendant the six-anna share of the dwelling-house which she gave by the deed of the 18th October 1856. The plaintiff's contention, in fact, is that although, according to the literal meaning of the words used in Hurrundo's will, the whole estate of Hurrundo Sirkar was given to Luckymoney absolutely, still, on the proper construction of the will, that is to say, if the will be construed not with reference to English law, but with reference to Hindu law, and to the habits and customs of the Hindus, the Court ought to hold that the will gave her no absolute interest, but merely appointed her to be trustee and manager of the estate for the benefit of the sons of the testator.

I think that the plaintiff's contention is right. Considering that the will is the will of a Hindu; considering that he had at that time two infant sons; and considering that there is

no expression or indication anywhere of a desire to disinherit his sons, and that there was no reason why he should desire to disinherit them. I think I must assume that he did not mean to disinherit them, and that the will must be read as merely making over the property to the wife to be held by her in trust for the infant heirs. I agree with Phear, J., in what he says in his judgment in the case of *Rooploll Khettry v. Mohima Churn Roy* (1), (decided on the 12th September 1870). I think

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(1). *Before Mr. Justice Phear.*

ROOPLOLL KHETTRY AND ANOTHER
v. MOHIMA CHURN ROY.

The 12th Sept. 1870.

KISTO CHUNDER DASS, a Hindu, died in March 1864, possessed, amongst other property, of a house No. 8/12, in Rajah Gooroodas' Street, and leaving him surviving three sons, Radhanath Dass, Bonomally Dass, and Troyluckonath Dass. In February 1862, Kisto Chunder made a will, of which he appointed Radhanath executor, and which was to the following effect:—

"I, Sree Kisto Chunder Dass, execute this *willnāma*, or testamentary instrument, to the following purport or effect:—I being very ill, and my body being inconstant and mortal, knowing this, in my sound mind I make my will. The whole of my estate, both real and personal, and the existing shop which I have, you are the proprietor and owner of the whole, and I have appointed you my executor, that is to say, my attorney.

You will supply the expenses of the household, and will supply the food and raiment of the family, and carry on the existing shop; and will perform as usual the religious observances of the family, and you will further perform the worship of Eshur Sreedhur Thakoor in the manner in which it is now being done, and you will perform my *shrāddhs*, &c. The whole of the religious acts, and the protection of all the real and the personal estate, will be attended to by you, and you will conduct the existing shop, and collect all dues and pay all debts. All power

is vested in you. Whatever you do, I agree to; no one else has any power left to him, and I am making my will in sound mind. If, after my decease, any other of my heirs object to this will, the same is inadmissible and void, and you will pay the undermentioned legacies to the undermentioned parties:—

Sree Ramkanaye Dass, station Churruckdangah. Particulars of legacies." (After the witnessing clause, came a list of the legacies.) "Thakoor Soor, &c., Rs. (25) twenty-five; purohit or family priest, Rs. (10) ten. You will give to my eldest daughter, Sreemutty Raneer Dasseer, Rs. (200) two hundred. You will give to my second daughter, Sreemutty Woomascondoree Dasseer, Rs. (150) one hundred and fifty. You will give to my youngest daughter, Sreemutty Teencowree Dasseer, Rs. (150) one hundred and fifty."

After Kisto Chunder's death, Radhanath applied for probate of his will, but a *caveat* was entered by Bonomally. An arrangement was then come to between the two brothers, whereby it was agreed (*inter alia*) that, if Bonomally would withdraw his opposition, Radhanath should pay him Rs. 3,000 and the costs incurred by him; that Bonomally should release his claim against the house No. 8/12; but that, notwithstanding the devise to Radhanath, the house should remain the joint property of the three brothers. The release by Bonomally was drawn up and engrossed, and a decree by consent passed in favor of Kisto Chunder's will. Radhanath, however, paid only Rs. 1,300 of the Rs. 3,000, and