The 7th June 1870.

Present:

The Honble L. S. Jackson and F. A. Glover, *Judges.*

Joint Hindoo family—Suit by member —Separation.

Case No. 11 of 1870.

Regular Appeal from a decision passed by the Officiating Judge of Moorsheda-bad, dated the 4th October 1869.

Mooktakeshee Debee (Defendant) *Appellant,*

versus

Oomabutty (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellant.

Baboo Sreenath Doss for Respondent.

In a suit by the mother and guardian of one of two nephews to set aside a hibbanamah under which defendant, who was the wife of their uncle, claimed to hold separately one-third of the property in dispute, it having been objected that the property being, according to plaintiff's allegation, joint and undivided, the suit should have been on the part of all the co-sharers interested, plaitniff was permitted in appeal to have herself placed on the record as plaintiff in her double capacity of guardian of both the infants.

The principle contained in the judgment of the Privy Council in the case of Appoovier *versus* Rama Subha Aiyan, namely, that there might be among the members of an undivided Hindu family an operative division of title without a corresponding division of the subject matter to which that title relates, was held not to apply in a case where there was no deed or agreement between the parties contemplating the subject of separation, but only vague expressions and statements contained in petitions not directed to that particular subject.

Jackson, J.—The facts out of which the present suit has arisen are fully stated by the Zillah 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 hibbanamah in dispute be a valid document, Kasheenath Roy is one, and his two nephews, sons of his deceased brothers, namely, Grish Narain Roy and Mohendro Narain Roy, are the other two.

The suit was brought by Oomabutty, the mother and guardian of Mohendro Narain, for the sake of setting aside the hibbah under which the defendant Mooktakeshee, who is Kasheenath'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 appears, is the guardian of Grish Narain as well as of Mohendro Narain, 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 Kasheenath, 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 hibbah relates has been and is divided as to interest, or whether this Hindoo family continues to be a joint undivided Hindoo family in estate.

We have been very much pressed with a definition of an undivided Hindoo family in Hindoo Law, contained in the judgment of the Judicial Committee of the Privy Council in the case of Appoovier *versus* Rama Subha Aiyan in XI Moore's Indian Appeals,* where the judgment commences at page 88. The passage on which the appellant relies is this—"According to the true notion of an undivided family in Hindoo Law, no individual "member of that family, whilst it remains "undivided, can predicate of the joint and "undivided property, that he, that particular "member, has a certain definite share. No "individual member of an undivided family "could go to the place of the receipt of rent, "and claim to take from the Collector or "receiver of the rent a certain definite share. "The proceeds of undivided property 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 enjoyment by the members of an "undivided family. But when the members "of an undivided family agree among them-

8 W. R., Privy Council, 1.

"selves with regard to particular property, "that it shall thenceforth be the subject of "ownership in certain 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 agreement 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 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 *ijmalee* 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, conversely, that if such separation was not made out and if the property continued to be the common property of a joint Hindoo family, the co-sharer, Kasheenath, had no power to make the hibbah which is before us in this case, and that, consequently, the defendant had no title under the hibbah.

The result, therefore, I think must be that the plaintiff must succeed so far as to obtain a declaration from the Court that the hibbah is not a valid instrument and that the defendant has no title thereunder. Regard being had to the circumstances of the case and to the fact that Mookhtakeshee is the wife of the co-sharer, Kasheenath, 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 Oomabutty 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 Mookhtakeshee may retain, will not be in the quality of owner under the hibbah, but simply out of her relation to Kasheenath, 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 Grish Narain's interest in the property.

The respondent is entitled to her costs of this appeal.