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RAM LAL v. MEDHI HUSAIN.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondent, Saiyid Mehdi Husain: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents, Ashgar Husain and Aga Jani: Messrs. *Hore & Pattison.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

1890. *March* 28.

DEBENDRA COOMAR ROY CHOWDHRY AND ANOTHER (DEFENDANTS NOS. 1 AND 2) *v.* BROJENDRA COOMAR ROY CHOWDHRY (PLAINTIFF) AND ANOTHER (DEFENDANT NO. 3).*

PROSUNNOMOYI DASI (DEFENDANT NO. 3) *v.* BROJENDRA COOMAR ROY CHOWDHRY (PLAINTIFF) AND OTHERS (DEFENDANTS NOS. 1 AND 2).*

Hindu Law—Will—Widow's share on partition—Right to deprive by Will a widow of her share on partition.

Under the Hindu Law in Bengal a person has the right to dispose of his property by will so as to deprive his widow of her share on partition.

Rhobunmoyee Dabea Chowdhrani v. *Ramkissore Acharj Chowdhry* (1) followed.

RAJ COOMAR ROY CHOWDHRY by his will dated 9th Magh 1281 (21st January 1875) gave, devised and bequeathed, subject to a provision for the maintenance of the worship of an idol and the performance of the Doorga Pooja and certain specific bequests therein mentioned, all his immoveable and moveable properties by the 4th clause in the following terms:—"My third son, Debendra Coomar, and my youngest son, Brojendra Coomar, and my two grandsons, Surendra Coomar and Jotindra Coomar, these four persons, shall be the real heirs to my moveable and immoveable properties, the moneys advanced as loans, the conveyances and horses, and all the properties and goods and chattels that I have." The testator appointed his sons Debendra Coomar and Brojendra Coomar executors of his will, and left the entire management of his estate in their hands during their lifetime. The name of his

* Appeals from original decrees Nos. 171 and 231 of 1888, against the decrees of Baboo Krishna Chunder Chatterjee, Subordinate Judge of 24-Pergunnahs, dated the 20th of July 1888.

(1) S. D. A. Rep., 1860, p. 485.

widow Prosunnomoyi Dasi (defendant No. 3) was nowhere mentioned in the will, nor was there in it any provision regarding her maintenance or residence in the testator's dwelling-house, called Barakuti, or elsewhere. Raj Coomar Roy Chowdhry died on 14th Magh 1281 (26th January 1875), leaving him surviving a widow, Prosunnomoyi Dasi (defendant No. 3), three sons, Rajendra Coomar Roy Chowdhry, the eldest, Debendra Coomar Roy Chowdhry, the third (defendant No. 1), and Brojendra Coomar Roy Chowdhry, the youngest (plaintiff), and two grandsons Surendra Coomar Roy Chowdhry (the son of Rajendra) and Jotindra Coomar Roy Chowdhry (defendant No. 2), who was the son of the testator's predeceased second son Norendra Coomar.

On 22nd April 1875 probate of the will was granted to the executors, Debendra Coomar and Rajendra Coomar, by the District Judge of the 24-Pergunnahs.

On 11th Bhadro 1282 (26th August 1875) Surendra Coomar died unmarried; and the 4 annas which he took under the will descended to his father Rajendra Coomar, who conveyed the same in equal shares to the plaintiff Brojendro Coomar and to the defendant Debendra Coomar by an *ikrar*, dated 17th Bhadro (1st September 1875). Brojendra and Debendra thus became entitled to a 6-annas share each of the testator's properties. Rajendra died in Aughran 1282 (November-December 1875).

On 2nd Magh 1291 (14th January 1884) the plaintiff Brojendra Coomar and Debendra Coomar and Jotindra Coomar (defendants Nos. 1 and 2) separated in mess, when some moveable property and Government securities forming part of the testator's estate were partitioned among them.

An attempt at an amicable partition according to the above shares of the Barakuti residence and the unpartitioned portion of the testator's estate fell through by reason of Prosunnomoyi Dasi (defendant No. 3) insisting upon being made a party to the partition proceedings.

On 14th September 1887 the plaintiff brought this suit for a declaration of his rights and those of Debendra and Jotindra (defendants Nos. 1 and 2) and also for a declaration whether the widow Prosunnomoyi Dasi (defendant No. 3) was upon partition entitled to any share of her husband's estate and for partition of the same.

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In his plaint the plaintiff set forth the above facts, and further stated that Debendra and Jotindra (defendants Nos. 1 and 2) admitted that the widow was entitled to maintenance and to suitable accommodation for her residence in the Barakuti house; but denied that she had any right upon partition to a share of the testator's properties. The plaintiff submitted that upon partition the widow took a Hindu mother's share and claimed a 6-annas share himself. The widow Prosunnomoyi Dasi (defendant No. 3) contended that, notwithstanding the will, she was entitled to a fifth share for the estate of a Hindu mother upon partition of her deceased husband's estate; that upon a true construction of the will she was entitled to the same share; and that in any event she was entitled to maintenance and suitable accommodation for her residence in the Barakuti house.

The defendants Debendra and Jotindra alleged that they had always been and were still agreeable to an amicable partition of the Barakuti house and the unpartitioned portion of the testator's properties, and that the proposal for an amicable partition mentioned in the plaint fell through by reason of the conduct of the plaintiff who was instigating the widow (defendant No. 3) to claim a mother's share in order that he might thereby decrease the shares of the defendants and augment his own by participating in the proceeds of the widow's share, and that the plaintiff had brought this suit with that object. They submitted that the defendant Debendra Coomar and the plaintiff were each entitled to a 4-annas share under the will and a 2-annas share under the *ikrar* of 17th Bhadro 1282 (1st September 1875) executed by Rajendra Coomar, and that the defendant Jotindra was entitled to the remaining 4-annas share, under the will. They further submitted that the widow (defendant No. 3) took nothing under the will, and that inasmuch as the heirs of the testator took not by right of inheritance, but by devise, his widow was not entitled to a Hindu mother's share, as she would otherwise have been under the Hindu Law. They repeated their offer to the widow of suitable maintenance and accommodation for her residence in the Barakuti house.

The Subordinate Judge was of opinion that the intention of the testator was to disinherit his eldest son Rajendra Coomar, and the words in the 2nd clause of the will "My eldest son Rajendra

Coomar will have no hand in the management of my zemindaries, but his son Surendra Coomar, who is my elder grandson, will be his heir and will enjoy his (Rajendra Coomar's) proper share, and Jotindra Coomar, who is the son and heir to my second son, deceased, is to be regarded as being entitled to a share of my assets equal to that of his father, and will have a right to enjoy it accordingly," clearly showed that the testator did not make any bequest to Jotindra, but simply recognized what rights he had under the Hindu law, and that as Surendra was not his heir, and therefore not entitled to a share of his estate, the testator took care to clothe him with the character of a donee and to give him Rajendra's one-fourth share. The Subordinate Judge was also of opinion that Debendra, Brojendra, and Jotindra being heirs, the 4th clause of the will did not confer on them any special rights, but was a mere recognition of existing rights; that there was no actual gift to them, any rate it was not expressed in clear and unequivocal terms; that there was nothing in the will nor was any circumstance proved by evidence that went to show that the intention of the testator was to deprive his widow of her rights upon the partition of his properties by his sons and grandsons; that there was no allegation or proof that he disliked his wife, and the presumption was that he loved her and would have made some provision for her if he had willed away his properties; and that the absence of some such provision and the intention of the testator which was to be gathered from all these circumstances favoured the widow's contention. Accordingly the Subordinate Judge held that the provision for the maintenance of the worship of the idol and the performance of the Doorga Poojah and all the bequests, including the bequest of the Barakuti house, were valid, and that the will operated to exclude the widow from any share therein. The Subordinate Judge further held that under the 4th clause of the will Surendra took a 4-annas share of the residue of the testator's properties; but that as regards the remaining 12-annas share which were claimed by Debendra, Brojendra, and Jotindra, the testator had died intestate, and that the partition being among two sons and one grandson, the widow was entitled to a fourth or 3-annas share therein.

The defendants, Debendra Coomar and Jotindra Coomar, appealed to the High Court from this decision of the Subordinate Judge in

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so far as he held upon the construction of the 4th clause of the will that the testator had died intestate as to the 12-annas share of the residue of his estate, and that his widow Prosunnomoyi Dasi was entitled to a fourth share thereof.

Prosunnomoyi Dasi (defendant No. 3) also appealed to the High Court against this decision in so far as it excluded her from the Barakuti dwelling-house and from the remaining one-fourth share.

The two appeals were heard together.

Mr. *J. T. Woodroffe*, Dr. *Rash Behary Ghose*, and Baboo *Jogesh Chunder Dey* for the appellants, Debendra Coomar and Jotindra Coomar (defendants Nos. 1 and 2).

Mr. *Evans* and Baboo *Kamini Kumar Guho* for the plaintiff-respondent, Brojendra Coomar.

The *Advocate-General* (Sir *G. C. Paul*), Baboo *Nilmadhub Bose* and Baboo *Bepin Behari Ghose* for the respondent Prosunnomoyi Dasi (defendant No. 3).

Mr. *Woodroffe*.—The testator's sole intention was not the exclusion of Rajendra, though it may have been the prominent reason for his making the will he did. Nor do the other provisions of the will flow out of this ntention. The view taken by the lower Court, that the sole object of the testator was to exclude his eldest son Rajendra, and that the will merely provided for his exclusion and did not contain any disposition of his estate, is ill-founded. The will, besides excluding Rajendra, does in fact dispose of the estate, and gives interest to persons, the beneficiaries thereunder, other and different from that which they would have taken under Hindu law. A husband has, subject to his wife's right to maintenance only, full power to dispose of all his property—*Sorolah Dassi* v. *Bhoobun Mohun Neoghy* (1). I rely upon *Comulmonee Dossee's case*, which, together with other suits and proceedings which arose out of the will of one Muddun Mohun Byšack, is reported by Sir Francis Macnaghten in his Considerations of the Hindu Law, original edition, pp. 77-93. In that case, as pointed out by Sir Francis Macnaghten, Comulmonee's claim to a share upon

(1) I. L. R., 15 Calc., 292.

partition was defeated by the will of Muddun Mohun, which the Court construed into an intention of the testator that upon a partition by his sons his widow should not be entitled to participate as she would otherwise have been under the Hindu law. By his will, Muddun Mohun did in effect himself make a partition of his property among his sons, and the will operated so as to make the shares allotted to them as if it were their self-acquired property, as in the case of *Jugmohundas Mangaldas* v. *Mangaldas Nathuboy* (1), where the Bombay Court held that property devised to a son was the self-acquired property of the son. There being no property left to partition, the ordinary rule of Hindu law, by which a mother is entitled to a share upon partition, did not apply in *Comulmonee's case*. Clearly then it follows from that case that a husband can by will deprive his widow of her right to have a share upon partition between her sons.

The case of *Kishori Mohun Ghose* v. *Moni Mohun Ghose* (2), on which the other side will most probably rely, is distinguishable from *Comulmonee's case* and also from the present case. There the Court held the widow was entitled to a share only because there was in that case no bequest to the sons in the will.

As to the term "heirs" used in the 4th clause of the will:—The term "heirs" is not a mere statement that the person would be entitled to succeed as in case of intestacy: so to read it would bring in a grandson as an heir to supersede his father. The word "heirs" has been construed frequently as a word of purchase—*Kooldebnarain Sahoo* v. *Wooma Coomaree* (3), *Nanee Tara Naikin* v. *Allarakhia Soomar* (4), *Jugmohandas Mangaldas* v. *Mangaldas Nathuboy* (1), *Brickley* v. *Brickley* (5), *Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore* (6), Jarman on Wills, pp. 74-76. The lower Court is wrong in holding that, Debendra and Jotindra being heirs, the will does not give them any special rights, and therefore they take by descent. Jotindra also gets a share subject

(1) I. L. R., 10 Bom., 528.
(2) I. L. R., 12 Calc., 165.
(3) 1 Marsh., 357.
(4) I. L. R., 4 Bom., 573.
(5) L. R., 4 Eq., 216.
(6) 9 B. L. R., 377; L. R. I. A., Sup. Vol., 47.

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to certain conditions, which, whether void or not, show the intention of the testator.

The lower Court is entirely wrong in holding that the testator died intestate as regards the 12-annas share, because if the true construction of the 4th clause be that there is no bequest and it is set aside or struck out, Rajendra would come in and claim a share out of the 12 annas. Then the sole intention (as the lower Court calls it) of the testator of excluding Rajendra, the eldest son, would be defeated. The will contains no express words disinheriting him, and an heir at law cannot be disinherited by negative words [*Jotindra Mohan Tagore* v. *Ganandra Mohan Tagore* (1)], and so if there be an intestacy with regard to any portion of the estate, Rajendra would not be excluded. Debendra and Jotindra never refused the widow suitable maintenance and accommodation, and are even now willing that her maintenance should be fixed by the Court in the most liberal way it thinks fit. The plaintiff Brojendra is supporting the mother with a view to get an additional share, because if the mother should get a share it would mean that so long as she lived he would enjoy two shares at the expense of Debendra and Jotindra. As regards the widow's appeal for residence in the Barakuti dwelling-house, my clients do not contest it, but reiterate that assent which they all along have given.

Mr. *Evans* for the respondent Brojendro Coomar:—A widow can claim a share unless excluded. In this will there is no provision for excluding her from maintenance, and if the right to maintenance remains, all the rights incidental thereto must remain. The widow is entitled to a share in lieu of maintenance when the sons inherit her husband's properties and partition among themselves. Dayabhaga, Chap. 3, s. 2, verse 29.

The *Advocate-General* for the respondent Prosunnomoyi Dasi also contended that the widow was entitled to her share; and proceeded to argue on behalf of the widow's right of residence, but was stopped by the Court, as this right had not been contested by Debendra and Jotindra.

Dr. *Rash Behary Ghose* in reply.—The Dayabhaga, Chap. 3, s. 2, verse 29, says that in a partition between sons of ancestral property, the mother is entitled to a share equal to a son, but it is silent as

(1) 9 B. L. R., 377; L. R. I. A., Sup. Vol., 47.

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to what her share should be when the father has given his property to his sons by will. The Dayabhaga only provides for the mother's share upon partition in the case of an intestacy, when the sons take by descent; but it nowhere contemplates a case like the present, where the testator has in effect partitioned his property among his sons and grandsons, and so left no property to be partitioned.

The judgment of the High Court (TOTTENHAM and O'KINEALY, JJ.) was as follows:—

These two appeals have been instituted by the three defendants in the original suit which was brought against them all by the plaintiff for the partition of family property left by his father, who died in January 1875.

The father was Raj Coomar Roy Chowdhry: the plaintiff is the youngest son: defendant No. 1 was the third son; defendant No. 2 is the son of Raj Coomar's second son, who predeceased him; and defendant No. 3 is Raj Coomar's widow. The eldest son and his son are both dead.

The matter now in dispute arises out of the provisions of the will of Raj Coomar, and the question is whether the widow, defendant No. 3, is entitled to any share of the estate on the partition now sought. The plaintiff in his plaint did not question her claim to a share, but alleged that the defendants Nos. 1 and 2 disputed it. And these defendants have contested it throughout the suit and appeal, while they do not deny her right to maintenance.

The widow herself claims a share of the estate.

The defendants Nos. 1 and 2 objected to the suit on the ground that the plaintiff had not included the whole of the property in which they and himself were interested. This objection, overruled by the lower Court, has been put forward again in appeal, but has not been seriously pressed.

As to the substantial matter in dispute, the Court below held that, as regards one-fourth of the estate and as to the whole of the family residence of Raj Coomar Roy Chowdhry, the will operated to exclude the widow from any share on partition; but that as regards the remaining three-fourths of the estate Raj Coomar died intestate, and that the widow was therefore entitled on this partition to have 3 annas out of the 12 annas.

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In one of the appeals before us her right to this share is contested; and in the other appeal the widow objects to being excluded from the other quarter share of the estate and to being excluded from the family residence called the Barakuti.

Probate of Raj Coomar's will was granted to plaintiff and defendant No. 1, two of his sons. We have to determine the meaning and effect of that document. It first recites the properties of the testator; then it recites that he had four sons, whose names are mentioned, and that the second son was dead, and his son a minor. It proceeds to state that the eldest son being addicted to vice and having left the paternal house, it was inadvisable to place any of the property in his hands; and this fact is given as the reason which rendered it necessary to make a will. The testator next dedicates a portion of this property for the worship of an idol and for the performance of the Doorga Pooja; and then he specifically bequeathes to his third and fourth sons and to his two grandsons, the children of the eldest and second sons, the whole of his Barakuti residence with the land pertaining thereto, and to his eldest son he gives own share in an ancestral dwelling-house. To this son he further bequeathes a monthly allowance of Rs. 75, but he gives the share of the estate, which would otherwise have been his, to his son Surendra Coomar. And he wills that his third and fourth sons and the two grandsons shall be the real heirs of all his property, the management remaining in the hands of the two sons during their life-time.

We do not agree with the conclusion arrived at by the Subordinate Judge that there is any case of intestacy arising upon this will. The object that the testator had before his mind was to deprive his eldest son of his inheritance, and if, as the Subordinate Judge says, there is no bequest in the 4th paragraph of the will, the result would be that the desire of the testator to deprive his eldest son of the property would have failed. We think that the plain reading of that paragraph is that the third son, Debendra Coomar, and the youngest son, Brojendra Coomar, and the two grandsons, Surendra Coomar and Jotindra Coomar, shall be his successors to all his moveable and immoveable properties, and that no intestacy has ensued.

In regard to the other question, viz., whether the lady has a right to a share on partition, we are inclined to think that the opinion expressed by the Judge in the Court below in regard to the other share is correct.

In the case of *Bhoobunmoyee Dabea Chowdhrani* v. *Ramkissore Achary Chowdhry* (1), the right of a Hindu in Bengal to make a will affecting his property was discussed, and it was decided, in conformity with the reference from the Judges of the Supreme Court in 1836, that in Bengal a widow has no indefeasible vested right in the property left by her husband, though she has by virtue of her marriage a right, if all the property be willed away, to maintenance.

It therefore appears clear to us, following that decision, that if the testator in this case intended to will away his property so as to deprive the widow of her share on partition, he had perfect power to do so.

The intention of the testator is to be gathered from the will, and in that he gave Debendra Coomar and Brojendra Coomar, who are his heirs, the same interest as he gave to Surendra Coomar and Jotindra Coomar, who could not succeed by the will to any interest in the property. We think, therefore, that the estate or interest given to each of these was the same, and that the interest was an out-and-out interest unclogged and unfettered by any other devise.

The conclusion that we arrive at, therefore, is that as regards this property the lady is not in a position to claim, as of right, under the Hindu law a share in the partition of this property. If that were so, the grandsons, Surendra Coomar and Jotindra Coomar, instead of receiving one-fourth of the property devised, would be only entitled to one-fifth. This, we think, is clearly opposed to the intention of the testator as portrayed in the will. But though we are unable to give the widow-appellant the relief she asks, we can and do declare that she is entitled to suitable accommodation in her late husband's dwelling-house, the Barakuti. And this must be provided for her when the partition is made.

All parties admit that she is entitled to maintenance, and it will be for them to consider whether this should take the form of a

(1) S. D. A. Rep., 1860, p. 485.

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money allowance, or whether a portion of the landed property be assigned to her for her life in lieu of maintenance.

The result is that the appeal of the defendants Nos. 1 and 2 succeeds to the extent of reversing the lower Court's finding that as to three-fourths of the estate of Raj Coomar Chowdhry there was intestacy, and its order that the widow obtain 3-16ths share on partition be set aside.

The widow's appeal must be dismissed, excepting only that she is to get suitable accommodation assigned to her in the Barakuti.

The plaintiff-respondent will pay the costs of appellants.

Appeal 171 *allowed in part.*
Appeal 231 *dismissed.*

C. D. P.

Before Mr. Justice Prinsep and Mr. Justice Rampini.

1890 *May* 8.

RADHA SHYAM SIRCAR (PLAINTIFF No. 1) *v.* JOY RAM SENAPATI AND OTHERS (DEFENDANTS) AND OTHERS (PLAINTIFFS NOS. 2 AND 3).*

Hindu Law—Alienation—Alienation by Hindu widow of a portion of her estate with consent of some of the reversioners—Suit by other reversioners to set aside alienation.

The principle enunciated by the Full Bench in the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (1) is not applicable to a case where some only of the reversioners have consented to an alienation by the widow, and where therefore only a portion of the widow's estate has been alienated.

IN this case the plaintiffs alleged that the zemindari of mouzah Pandia belonged to one Joy Narain Ghose who died, leaving a widow, named Avimani Dasi, and that Avimani Dasi succeeded to the property as his heiress, and remained in possession thereof till the 13th November 1884, when her death took place; that the defendants Nos. 2, 3, 4, and 5 were at the time of her death the only reversionary heirs of her husband alive, and as

* Appeal from appellate decree No. 259 of 1889, against the decree of J. B. Worgan, Esq., Judge of Cuttack, dated the 18th of December 1888, affirming the decree of Baboo Radha Krishno Sen, Subordinate Judge of Cuttack, dated the 5th of January 1887.

(1) I. L. R., 10 Calc., 1102.