

Original Suit No. 1209 of 1865.

CHHABILA' MA'NCHAND and GOVARDHAN MA'NCHAND, *Plaintiffs.*

v.

JADA'VBA'I, widow of Zummakrám Náná; (2) BECHAR ZUMMAK'RÁM; (3) VITHAL ZUMMAK-RÁM, infant sons of Zummakrám Náná, represented by defendant No. 1—their mother—sued as their guardian; (4) and (5) JAGJI'VAN BHOTU and AMBA'BA'I, his wife, the granddaughter of Chhagan Govind; (6) JETHIBA'I, widow of Govind As'arám; (7) JADA'VBA'I, widow of Mánchand Bechar, and mother of the plaintiffs; (8) DEVKU'VARBA'I, widow of Ranchhod Bechar. } *Defendants.*

Hindú family property—Evidence of Partition.

The fact of the members of two branches of a Hindú family being separate in food and worship is quite compatible with their never having been separate in estate.

A document providing separate house accommodation for the members of each of the two branches points rather to a division of enjoyment than to a division of ownership or estate.

The absence of attestation by castemen to documents, by which a Hindú affects to deal with his property as though he were separate in estate, is a circumstance which throws suspicion on the fact of an alleged separation; as the presence of such would be satisfactory evidence of a state of things generally believed to be true at the time.

Bequest of property in *dharm* to the Caste.

THIS suit was brought by the plaintiffs, as the sole surviving male members of an undivided Hindú family: claiming to be entitled to the entirety of a dwelling-house and premises, situated in Cross Row at Mumbádevi in Bombay, subject to the right of defendants Nos. 6, 7, and 8, respectively, to maintenance; and, failing that relief, that the shares and interests of the plaintiffs and defendants respectively therein may be ascertained and declared by the court.

Mayhew and Reid for the plaintiffs.

The Advocate General (Hon'ble L. H. Bayley) and *Green* for the first, second, and third defendants.

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The other defendants did not appear; but, due proof having been given of their having been respectively served with process under the provisions of Sec. 60 of the Code of Civil Procedure, the hearing of the suit proceeded as against all the defendants; and the following issues were framed:—

(1) Whether Bechar Govind and Chhagan Govind became separate in estate, as in the 2nd paragraph of the written statement alleged, or at any, and if so at what, subsequent time; (2) Whether the dwelling-house and premises claimed in the plaint were purchased by Bechar Govind and Chhagan Govind, as in the 3rd paragraph of the written statement alleged; (3) Whether the plaintiffs are entitled to the entirety of the said dwelling-house and premises, as claimed in their plaint; (4) Whether the first, second, and third defendants, or any of or either of them, are entitled to any, and if so to what, part of the dwelling-house and premises claimed in the plaint.

The facts are fully stated in the judgment.

In the course of the argument the following authorities were cited:—*Roe v. Pattison* (a); *Doe dem. Booley v. Roberts* (b); *Thomson v. Shakspear* (c); *Paton v. Randall* (d); *Morice v. Bp. of Durham* (e); *Nicholls v. Butcher* (f); *Lake v. Craddock* (g); *Sreemuty Anundomohey Dosee v. Doe* (h); *Doe dem. Mackenzie v. Pestonji* (i); *Akháchari v. Rámachendrágga* (j); *Webbe v. Lester* (k); 4 Cruise's Digest, 244 *et seq.*; Taylor on Evidence, 4th ed., p. 553 *et seq.*; Strange's Hindú Law, *passim*.

Cur. adv. vult.

- (a) 16 East 221. (b) 11 A. & E. 1,000. (c) 6 Jur. N. S. 182.
(d) 1 Jac. & W. 189. (e) 9 Ves. 399. (f) 18 Ves. 193.
(g) 1 Wh. & Tu. L. Ca. Eq. 120. (h) 8 Moore, Ind. App. 43.
(i) Perry, Or. Ca. 531. (j) 1 Mad. H. C. Rep. 393.
(k) 2 Bom. H. C. Rep. 55.

NOTE.—As to the Hindú Law on the Evidence of Partition, see 1 *Strange, H. L.*, pp. 225-230 (chap. 9, § 4),—citing the *Dáya-bhága* of *Jímúta-vahan*, Chap. xiv.; the *Mitákshará* of *Vijnyánesv'ara*, Chap. II., Sec. XII. (quoting *Yájnavaalkya*, 2, 150, *Nárada*, 13, 35-40, *Manu*, 3, 69); the *Vyaváhara Mayákhá*, Chap. IV., Sec. VII., § 27 *et seq.*; and 2 *Strange, H. L.*, 387-398, containing Remarks by *Colebrooke* and *Ellis*.—ED.

ARNOULD, J.—The plaintiffs and defendants in this suit are members of the Soni (or goldsmith) caste, and most of them natives of Pirán-Pattan, a town in the dominions of His Highness the Guicowar, some sixty miles or so north-west of Ahmedábád, standing on the site and among the ruins of the once famous city of Anhilwár or Anhilpur, the capital of an early Hindú dynasty of Gúzerát kings (whose history, together with that of Pirán-Pattan or Anhilwár, is told in a very interesting manner by my late lamented colleague, the Hon'ble A. Kinloch Forbes, in his learned and ingenious work the “Rás-Málá”). Pirán-Pattan is now comparatively a decayed place, but it is still, as it always was, remarkable for the ingenuity of its artificers, especially of its workers in gold and silver and its setters of precious stones (*jadia*). Many of these artizans belonging to the Soni or goldsmith caste, come to make money by the exercise of their craft in “the great and prosperous seaport town of Bombay”—returning in their mature age, to enjoy what they have thus earned, to their native city of Pirán-Pattan.

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The head of the family to which the plaintiffs belong was Govind As'árám, a native of Pattan, of the Soni caste, who, after having long practised his trade in Bombay, returned to his native city, and died there about A. D. 1825. Govind As'árám left two sons, Bechar Govind and Chhagan Govind, and also a widow, Jethibái, who still survives, and is the sixth defendant on this record. Of his two sons, Bechar Govind (who was by some fourteen or fifteen years the elder) died at Pirán-Pattan about 1850. Chhagan Govind also died at the same place about 1860. The great question in the present suit is, whether these two brothers were divided or undivided in estate.

It will be necessary, in order to understand the case, to state briefly the steps of the family descent from these two brothers, Bechar Govind and Chhagan Govind. Taking Bechar Govind's branch first: Bechar himself, as already stated, died about 1850, leaving two sons, Mánchand Bechar and Ranchhod Bechar. Mánchand Bechar died about 1853,

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leaving a widow, Jadávbái (the seventh defendant in this suit), and two sons by her, Chhabilá Mánchand and Govardhan Mánchand, who are the two plaintiffs in this suit. Ranchhod Bechar died very shortly after his brother Mánchand, leaving no issue, but a widow, Devkuvarbái (the eighth defendant in this suit). The plaintiffs, therefore, are the sole surviving male representatives of the family of Govind As'árám in this branch; being the grandsons of Bechar Govind, and the great grandsons of Govind As'árám. Next taking the branch of Chhagan Govind, the younger of the two sons of Govind As'árám. Chhagan Govind had only one son, Magan Chhagan, who died before his father, leaving one daughter, Ambábái (who and her husband, Jagjivan. Bhotú, have been respectively made defendants 4 and 5). Ambábái is thus the granddaughter of Chhagan Govind, and the plaintiffs are his grandnephews, the grandsons of his brother Bechar Govind.

As I can find no authority in Hindú law for the position that a granddaughter, as such, can inherit, it appears to me that Ambábái can have no claim by way of inheritance as against the plaintiffs, and this quite independently of any opinion the Court may form on the point as to the brothers Bechar and Chhagan having been divided or undivided in estate. The plaintiffs, as the grandsons of Bechar and grandnephews of Chhagan, are the nearest surviving male representatives of both these brothers, whether divided in estate or undivided, and accordingly as the evidence in the case shows, Chhabilá, as the elder of the two, lit the funeral pile and performed the funeral ceremonies both of his grandfather Bechar and of his granduncle Chhagan. Whether the plaintiffs are entitled or not to inherit Chhagan's share as well as Bechar's share in the family property, depends on the question—which is a question of evidence—whether Chhagan or Bechar were or were not divided.

But, to resume the narrative of Chhagan's branch: Chhagan, as already stated, died at Pirán-Pattan in 1860.

He left behind him two widows, Gúlábbái, by far the elder (who died in 1862), and Putlibái, a young widow (who died in 1864). Putlibái was the daughter of Zummakráam Náná, a Soni of Bombay. Chhagan married her at Bombay in 1856 (about four years before his own death), and on his marriage with her executed a document (exhibit No. 1 in the suit) by which (dealing with his property as though he had been separated in estate from his deceased brother Bechar) he gave all his property in absolute ownership to his two wives, Gúlábbái and Putlibái, and failing a son, to the survivor. Putlibái, the surviving widow, made her will on the 13th of June 1864, leaving Chhagan's property at Pirán-Pattan to his granddaughter Ambábái, the fifth defendant, who resides there, and the property in Bombay (including the house and premises of which the plaintiffs in the present suit claim the entirety) for such "good purposes" as her father Zummakráam and "the whole Sonis in Bombay should think proper." Zummakráam Náná, who was left sole executor of this will, died soon after Putlibái (January 1865). He seems to have entered into possession as heir of Putlibái, and his widow Jadávbái and her two infant sons are the first, second, and third defendants on the record. They are only nominal defendants; the suit is really defended by the Soni caste of Bombay, who, under the residuary disposal in Putlibái's will, consider that they have a claim on the residuary estate for caste purposes, and with this view have imposed a contribution of Rs. 10 on every head of a house in the Soni caste in Bombay, visiting non-payment with the penalty of outcasting.

The plaintiffs originally instituted their suit so far back as September 1864. That suit and also an intermediate suit, filed in September 1865, were both withdrawn, from difficulties as to the proper parties to make defendants (under Sec. 97, Civil Procedure Code); and finally the present plaint was filed on the 9th of December 1865. The property to which in this suit the plaintiffs claim to be entitled, consists of a dwelling-house and premises "in Cross Row, near Mumbádeví," which, as alleged in the 4th para. of their plaint, was

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(together with another neighbouring house in the same part of the Native Town) purchased in A. D. 1842 by Bechar Govind and Chhagan Govind in their joint names, *partly out of monies and moveables of their father, Govind As'árám, which had come to them on his death, and partly out of monies acquired by them in a partnership business which they had carried on, and, at the time of the purchase, still continued to carry on, in Bombay as goldsmiths and jewel setters (jadia).*

The plaint, after setting out the relations of the family as already detailed, alleges, in its 16th and 17th paras., that the plaintiffs, "as the sole surviving male members of an undivided Hindú family," are entitled to the entire of the dwelling-house and premises, so jointly purchased as alleged by the brothers Bechar Govind and Chhagan Govind in 1842, subject to the right of maintenance of Jethibái, the widow of old Govind As'árám (defendant No. 6) of Jadávbái, the widow of Mánchand Bechar and mother of plaintiffs (defendant No. 7), and of Devkúvarbái, widow of Ranchhod Bechar and paternal aunt of plaintiffs (defendant No. 8). Subject to these admitted rights of maintenance, the plaintiffs pray that they may be declared entitled to the entirety of the dwelling-house and premises the subject of the suit, or, failing that, that the Court will declare the rights and interest of the plaintiffs and defendants respectively.

The written statement, put in nominally by the first defendant, Jadávbái, for herself and the second and third defendants (really by the Soni caste of Bombay), alleges in its 2nd para. that Bechar Govind and Chhagan Govind became separate in estate in August 1830, and executed mutual releases. In the 3rd para. it alleges that the dwelling-house and premises claimed in this suit were purchased by Bechar and Chhagan, not out of, or by means of, any ancestral estate, but by monies contributed by them in equal shares, and which belonged to them respectively as separate property; that the rents of the property so purchased were divided equally between Chhagan and Bechar till Bechar's death—then between

Chhagan on one side and Mánchand and Ranchhod Bechar on the other; that on the death of Mánchand and Ranchhod the plaintiffs succeeded to their share, and that since the death of Chhagan a similar division of the profits has been made between plaintiffs and the widows of Chhagan. In its 4th para. the written statement alleges that under the will of Chhagan Govind, dated 9th of April 1855, and a codicil thereto, dated 25th of October 1856, his two widows, Gúlábbái and Putlibái, became absolutely entitled, on his death (which took place on or about the 18th of October 1860), to his share and interest in the property claimed in this suit. It then avers that Putlibái survived Gúlábbái, and thus became entitled to the whole of Chhagan's share; that Putlibái by will bequeathed her interest to her father, Zummakráam Náná, and appointed him her executor; and that the first, second, and third defendants claim to be entitled to such interest as the heirs either of Zummakráam Náná, or of Putlibái, and deny that the plaintiffs are entitled to the *entirety* of the dwelling-house and premises, the subject of this suit.

The principal question in the case was that raised by the first issue, viz., whether Bechar Govind and Chhagan Govind ever became separate in estate. That they were separate in food and worship was abundantly shown by the evidence, but this is quite compatible with their never having been separate in estate. The evidence adduced to show that they were separate in estate was—(1) *oral*: consisting of caste reputation as to their having been separated, and of declarations alleged to have been made from time to time by the two brothers to their caste-fellows—that they were separate, had executed releases, &c.: (2) *documentary*, which principally rested, first, on an alleged release of the 16th of August 1830 (exhibit No. 3); secondly, on an English deed of conveyance of 30th of April 1842 (exhibit No. 4); thirdly, on two documents of 9th of April 1855 and 25th of October 1856, put forward and relied upon by the defendants as respectively the will and codicil to the will of Chhagan Govind (exhibits 1 and 2); fourthly, on two documents, both dated 29th of April 1861, showing an equal division, after Chhagan's

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death, of the rents and profits of the property in dispute between the plaintiffs and Chhagan's widows.

Now, as to the oral evidence, in so far as it consists of evidence of alleged reputation in the caste, it is, in my judgment, rendered of extremely little, if of any, value, by the clear proof that has been given that the real defendants in this suit are the Soni caste in Bombay. Witness No. 8, a witness, and a zealous one, for the defence, said in cross-examination to Mr. *Mayhew*: "You do not know; the counsel for the widow and children are really fighting for the 'Dharm'—for the caste—not for the half-share of the widow and children;" and he then explained, "There has been a caste meeting in Bombay about this suit. Chhagan's will (exhibit No. 1) and a will of Putlibái (exhibit No. 7) were produced; and they said the property was given in 'Dharm' to the caste, and told Chhabilá (the elder of the plaintiffs) to consent to the property being so given. Chhabilá declined. The caste outcasted Chhabilá and Govardhan, the whole of Bechar's branch, and they got hold of Zummakráam Náná (the deceased husband of the first defendant), who was present at the caste meeting. Rs. 10 was fixed as a sum to be paid by each family in the caste to carry on this litigation. Chhabilá's uncle (*i. e.*, witness No. 12, the brother of the plaintiff's mother) would not pay the Rs. 10, and so they turned him out of caste." With the exception of this witness, who was called for the plaintiffs, it appeared that all the Soni witnesses had paid this Rs. 10—one of them, also a witness for the plaintiffs, who had been outcasted on a first refusal to pay, had paid it as the price of his re-admission into caste. Under such circumstances as these it would obviously be out of the question to place dependence on such statements as those made by the witnesses called for the defence, to the effect that the separation of the two brothers was well known in the caste, and that the two brothers had, on different occasions, spoken of their having been separated and executed releases. Such evidence, always vague and unsatisfactory, becomes, in my opinion, quite valueless under the circumstances disclosed in this case.

Turning to the documentary evidence, the first document in point of date is that of the 16th of August 1830 (exhibit No. 3). It is relied upon by the defendants, either as itself constituting a "phárkhat" or release between the two brothers, or as evidence that a separation in estate had then already taken place between them. It is a very obscure document, and, indeed, unintelligible, without reference to the then state of the family and the family dwelling-place or dwelling-places as disclosed in the evidence. From the evidence it appears that Govind As'árám, the father of Bechar and Chhagan, owned two houses in Pirán-Pattan (occupied by him during his life-time, according to the evidence, as one house). These two houses stood back to back, having their fronts in two parallel streets. The streets in Pirán-Pattan generally terminate at one end in a *cul-de-sac*—at the other end there is a high archway with a gate which can be closed at pleasure, thus making each separate street a sort of separate fortress. The town houses in Gújarát (according to ground-plan inserted at Vol. II., p. 254, of that excellent work "Rás Málá," already cited) are almost all built on one model. They are entered from the street by a few steps on each side of which is a small terrace or *ótlah*. Then comes a large apartment, and then an open court with a water-tank in the centre and a cook-room at the side; beyond this at the back of the open courtyard are other rooms and storehouses. Most of the houses have an upper storey reached by a ladder to the right of the groundfloor entrance, and the front rooms of the upper storey communicate with the back rooms by a passage running under an awning—a sort of covered gallery along one and sometimes along both sides of the centre open court. The evidence is, that the two houses standing back to back which belonged to, and were occupied by, Govind As'árám down to his death, were each of them built on this plan, and that there had originally been a communication on the groundfloor from the back of one house into the back of the other, which had since been filled up, and also a communication from the upper storey of one house to the upper

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storey of the other, which latter communication has been throughout in constant use by the members of the two families, and is still existing. In one of these two houses thus communicating with one another in the rear—in the house, viz., that had its main entrance in Khiji-pádá-kidki street, lived, after Govind's death, the elder brother, Bechar, and his family; in the other, which opened on the parallel street of Kháki-pádá-kidki, lived Chhagan and his family, But, besides the two brothers and their families, there was Jethibái, the widow of Govind As'árám—the stepmother—to be accommodated. Now the stepmother in a Hindú family suddenly descending from the position of mistress of a household into that of member of a family in which there are other and younger mistresses, is apt to be a very considerable domestic affliction; “as a general rule,” said witness No. 10, “admitting of no exceptions, stepmothers quarrel with the rest of the family.” “No one,” said witness No. 8, “could bring his stepmother inside the same house as his wife.” Now, the document of 16th of August 1830 (exhibit No. 3) appears to have been made with the primary intention of providing Jethibái with separate quarters consisting of the whole upper storey of Chhagan's house (the house opening into Kháki-pádá-kidki). Chhagan, who was some twelve or fifteen years the younger brother, and who seems never to have had any child except Magan, was to occupy the groundfloor in the Kháki-pádá-kidki house, and, in consideration of his giving up the whole of the upper storey of that house to Jethibái, he was to have a room in the upper storey of Bechar's house, and the enjoyment of half the terrace and half the awning (or covered gallery) of Bechar's house, and he was to have exclusive use of the tank in the open court of the Kháki-pádá-kidki house. After Jethibái's death Chhagan was to give up the accommodation thus provided for him in Bechar's house, and “each was to have what belonged to each.” During Jethibái's life the brothers “were *jointly* to serve her,” (that is, I presume, jointly to maintain and provide for her) and then follows this obscure clause:— “On the death of Jethibái, whatever property there is, the

two brothers are jointly to spend : whatever surplus there may be, they may divide and take." After several endeavours I have been obliged to give up as hopeless the attempt at putting a clear construction on this sequence of words. If it means anything, it must, as it seems to me, mean this : the two brothers on Jethibái's death are jointly to enjoy the immoveable and to divide the moveable property. But I am by no means sure that this is the meaning. The document closes with the words, "None shall treat Báí Jethá with disrespect." Now, I confess I am unable to look on this document as in itself a writing of release between the brothers ; from beginning to end its primary object seems to have been to provide accommodation for Jethibái, on terms which, as between the two brothers, were fair and equitable. I cannot either regard it as conclusive, or even as strong as evidence, that the two brothers had, before its execution, become separate in estate ; the expressions it contains as to either brother having respectively nothing to do with the house of the other, having no claim or title thereto, &c., pointing in my mind rather to division of enjoyment than to division of ownership or estate. I think it does show, and that clearly, that so far back as 1830 Bechar and Chhagan were separate in food and worship, and that they separately occupied the respective houses, which have ever since been separately occupied by their respective families and descendants ; but I think it would be giving an undue weight to the expressions used in this obscure and ill-framed document to rely on them as proving that the two brothers *were separate in estate*. It is to be observed that, from the evidence, the arrangement effected or sanctioned by this document did not last long : whether it was that Chhagan found the accommodation afforded him in Bechar's upper storey unsatisfactory, or that both brothers found the near vicinity of the stepmother, though lodged on a separate floor, unendurable—does not appear ; but it does appear that, not a very long time after exhibit No. 3 was executed, the two brothers placed Jethibái in another house, which they bought jointly, as it seems on the

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evidence, for her accommodation, in another quarter of the town of Pirán-Pattan, in a street called Andaya Savadiá's-kidki, where she still resides, or is still maintained, as it would appear, out of the estate.

The next document in point of date is the deed of 30th of April 1842 (exhibit No. 4). Apart from the vague oral caste evidence of hearsay and reputation, which, for the reasons already stated, I regard in this case as valueless, there is nothing to show separation of the brothers in estate between 1830 and 1842. According to my view of the evidence, it is not shown that the two brothers were divided in estate when the English deed of 30th of April 1842 was executed. This deed is a conveyance to the two brothers jointly in fee "to and to the use of Bechar Govind, Chhagan Govind, their heirs, and assigns for ever," of two houses in Mumbádevi, one of which is the subject of the present suit. There is nothing on the face of the deed to show that the consideration money was paid by the brothers *in equal shares*, nor is there anything in the evidence directly leading to that inference; though, from the equal division of rents and property that is subsequently shown to have taken place between the two branches of the family, it may reasonably be assumed that they were to take an equal, though not therefore necessarily a divided, interest in the purchased property. Then from what sources was the purchase money derived? Was it exclusively from the profits of the partnership, which the two brothers had been carrying on for some time before this deed was executed, or was it also in part from the ancestral fund which they had derived from their father, Govind As'árám? The fair result, in my opinion, of the evidence is, that a part at least of this purchase money was derived mediately, if not immediately, from their father, Govind As'árám. One of the few reliable witnesses in this case was the old witness No. 12, who was called for the plaintiffs; he resisted for six months the payment of the caste contribution of Rs. 10—he was turned out of caste in consequence, and only paid it as a means of getting re-admitted to the caste. This old man knew Bechar and Chhagan when they first came down to

Bombay, and he says expressly that "they carried on business together on their father's money." He was in Pirán-Pattan when Govind As'árám died there, and he represents Govind as having left a considerable sum, adding, "It was said each brother received for his share Rs. 15,000," by which it is plain he must have meant that the share of each brother amounted to that sum; not that any formal division of estate then took place between the brothers: for a moment after he added in answer to a question by the Advocate General, "How can I tell whether in estate they (the two brothers) were separate or joint." On the whole I think the fair conclusion from the evidence is, that the purchase money for the houses conveyed by the English deed of 1842 came in part, either mediately or immediately, to these two brothers as joint and undivided in estate, from their father, Govind As'árám.

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An attempt was made, but scarcely a serious one, to argue that this deed of 1842, being an English conveyance, should be construed, according to its strict legal effect, as clothing the purchasers with all the incidents of joint tenancy according to the English Common Law; and, therefore, as giving the whole estate on Bechar's death to Chhagan, the survivor of the two brothers. It is sufficient to say (1) that, under the new Charter, this court is a Court of Equity as well as of law, and that to give such an effect to a document between natives—merely because it is in English, and prepared according to the forms in use with English conveyancers—would be, in the highest degree, inequitable; (2) that under the old Charter, which in this respect is in force, this court is bound in questions of inheritance between Hindús to determine their rights with reference to their own laws and usages, and not according to the technicalities of English law. No one can for a moment suppose that these two brothers, when they took a conveyance in this form, ever meant or intended that the survivor of the two was to have the whole estate; the subsequent course of dealing between the parties shows this most plainly. The utmost claim ever put forward by those who represent

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Chhagan is, that they are entitled to a separate half of the estate, and even in their written statement filed in this suit the defendants admit the plaintiffs' claim to Bechar's share, and only deny that they are entitled to Chhagan's also. It appears to me that as, according to the view I take of the evidence, the two brothers are not shown to have been divided in estate prior to the execution of the conveyance of 1842; so there is nothing in that conveyance itself, nor in the circumstances under which, on the evidence, it would appear to have been made, either to operate a division of estate between the two brothers, or to afford any proof, presumptive or otherwise, of such a division. If anything, it leads to the inference that the brothers who, in my view of the evidence, are not shown to have been divided in estate when this deed was executed, intended that the property they acquired under the deed should be owned and enjoyed by them jointly and undividedly. But, at all events, the execution of such a deed as this can in no view, according to my judgment, lead to the contrary inference, or tend to show that the brothers, if undivided in estate before it was made, became divided in estate upon its being made.

The next documents of importance are exhibits Nos. 1 and 2, dated respectively the 9th of April 1855 and the 25th of October 1856. The defendants wished to put these forward respectively as a will and codicil of Chhagan Govind, but, as I intimated in the course of the hearing, the first is, in my view, a mere marriage settlement, and the second a confirmation thereof. The first document is addressed by Chhagan to Zummakrám Náná, the father of Putlibái, the bride: after reciting that the customary marriage presents are to be given and received, that Gúlabbái, his present wife, is forty-five years of age, that there is no child (*i.e.*, as the translator says it may mean "no surviving child by the marriage"), and that he has therefore married Zummakrám's daughter (for the marriage is spoken of in the writing as though it was prior, though the evidence shows it was subsequent, thereto); Chhagan proceeds to give "all his property to his two wives in the event of his decease," and provides that "should a

son be born to him, such son is to be the heir of his two wives." Exhibit No. 2 simply confirms exhibit No. 1.

It is clear that, unless Chhagan was divided in estate from Bechar when he executed these two writings, they could not operate (as if then separated in estate from Bechar they, in my opinion, would operate) to give his whole property to his two wives in absolute ownership. If he was then joint in estate with Bechar, no interest in his undivided moiety would pass by these writings. This is admitted, but then it is contended that the very execution of such writings by Chhagan, and the act of his caste-fellow Zummakrám in giving him his daughter to wife on the faith of the representations they involve of Chhagan's being then separate, and having an absolute disposing power over his share of the family property, is itself strong evidence that Chhagan was, and was known in the caste to be, separate from Bechar. The force of this inference depends entirely upon the circumstances under which the writings were executed. Let us see what these were. In 1854, the year before the first of these writings existed, Chhagan was at Pirán-Pattan. His only son, Magan, had then been some time dead; his wife Gúlabbái was past the average age of child-bearing with Híndú women. His brother Bechar had died in 1850; his nephews Mánchand and Ranchhod in 1852-53. The plaintiffs, his grandnephews, then mere children, were the sole surviving males (except himself) of the family of Govind As'árám. Under these circumstances it was natural that Chhagan should think of marrying a second wife, and it was natural that he should look for her at Pirán-Pattan, his native place, for that, according to the evidence in this case (according to what we should expect among Híndús), is the general course: these Pirán-Pattan men come down to Bombay to make money, but if not married when they come, or if they wish to be remarried, they go back to Pirán-Pattan to find a first or second wife as the case may be. Well, we find that Chhagan did attempt to find a second wife in Pattan. What other offers he made does not appear, but he certainly proposed for the daughter of that

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wily and astute old witness No. 8, Bechar Hirá, the same who spoke most confidently to its being a notorious fact in Pattan that Chhagan was separate in estate from his brother Bechar. Now, if Chhagan was really separate when he made this offer, he was, in point of worldly position, a very eligible son-in-law ; if he was not, then, in the event (which from his time of life was probable) of his dying before his young wife, he would leave her in the very unsatisfactory position of a widow kept on maintenance in an undivided family. Witness No. 8 was obliged to admit that he had refused his daughter to Chhagan, and as he had just before most positively asserted that he, in common with the whole caste at Pattan, knew Chhagan to be then separate in estate from Bechar, he saw at once that he must assign a plausible reason for this refusal. He therefore volunteered the following explanation :—“ Shall I tell you the real reason why I would not give him (Chhagan) my daughter ? I would not give him my daughter, because he killed a serpent that turned up in the gutter of a house he was going to build ; I thought him a butcher.” It was impossible not to be struck with the air of gratified ingenuity and complaisant virtue with which the crafty old witness delivered this answer. And, indeed, it was a very clever answer. In the north of Gúzerát the influence of the Jains and their doctrines is still strong—the greatest regard is shown to animal life. The serpent, besides, especially in its more venomous varieties, is not very common in Gúzerát, and it is held in a certain superstitious veneration. So that the answer was a very plausible one, and, although it might possibly be a pure invention, might also possibly be true. It might also quite as possibly, and far more probably, be the case, that this old Soni refused Chhagan his daughter because he was not satisfied of his having been really separated in estate from his brother Bechar. I must say that from the witness' manner I was led to regard his volunteered story of the serpent as a clever fiction invented on the spur of the moment, and so regarding it, I am further led to consider his refusal of his daughter to Chhagan as having really proceeded either from a knowledge that he

was not separate in estate from Bechar, or at least from a grave doubt whether he was so. Chhagan, thus disappointed in finding a second wife at Pattan, comes down to Bombay and there proposes for Putlibái, the daughter of the Bombay Soni Zummakráam Náná. He is accepted, and executes to Zummakráam Náná, in April 1855, the document, which he confirms in 1856, the very confirmation, as it appears to me, tending to show that some suspicion had probably been excited in Zummakráam's mind as to Chhagan's really possessing the absolute disposing power which he had assumed to possess by the writing of April 1855.

Still if these documents, or either of them, had been attested by members of the Soni caste (even in Bombay), so that it might have become generally known in the caste that Chhagan Govind was dealing with his property as though separated in estate from his brother, I should have considered that the execution of these writings *did* afford some satisfactory kind of inferential proof that Chhagan was really, as he assumed to be, separated in estate. But was this so? No; except the one member of the caste, who was necessarily a party, for Chhagan could not, of course, marry out of his caste—except his new father-in-law, Zummakráam, no other member of the Soni caste is shown to have been made aware of the contents or of the execution of these writings. Not one of the attesting witnesses to either of these documents was a Soni; and, be it remembered, attesting witnesses to Hindú documents are something more (and less) than witnesses to the signature. They are supposed to know and give a sort of sanction to the contents of the documents, and it not unfrequently happens that they are not present when the signature is actually made. Neither of these documents was attested by a Soni. They were attested respectively by a Brahman whom Chhagan had met with at Wái and by two Banyás; one of these latter witnesses, witness No. 3, protested when asked to attest, on the ground that he was not of the caste. “Chhagan,” he says, “came to me and said, I have got estates which I am going to make over to my wife, and he requested me to make my

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attestation." I said, "I don't belong to your caste; ask some of your caste people." Such being the circumstances attending the execution of these documents (exhibits Nos. 1 and 2), it seems to me that the inference endeavoured to be founded on their execution does not fairly arise therefrom; on the contrary, it would appear to me that the fairest inference would be, that Chhagan rather desired to keep as secret as he could from his caste the fact that he was dealing with his property as one who had been separated in estate from his brother.

The rest of the documentary evidence adduced has no important, if any, bearing on the point of the brothers being separated in estate. The exhibits Nos. 5 and 6, each bearing the same date of 29th April 1861, only show that a division of the rents and profits took place after Chhagan's death, between the widow, as representing Chhagan, and the plaintiffs, as representing Bechar, on the footing that each should share equally in the proceeds. But a division in equal shares of the proceeds may have been a mere matter of convenient or equitable arrangement, and is of little, if any, value as proving a separation in or division of estate.

Upon the document exhibit No. 8, I will only remark that, considering the circumstances under which it was obtained from the elder of the two plaintiffs, it ought never to have been put in or relied on by the defendants. I have no hesitation in saying that, in my opinion, it is clearly shown to be evidence of nothing except of a low and discreditable trick attempted to be practised on the young Chhabilá Mánchand—a trick sought to be carried out, I hope not also concocted and contrived, in the office of an attorney who, though not now practising in Bombay, is still on the rolls of the High Court.

On the whole, looking at all the evidence adduced before me in this lengthened inquiry, both oral and documentary, it fails to lead me to the conclusion, that any separation in estate ever took place between the two brothers Bechar Govind and Chhagan Govind. Upon the whole matter,

therefore, I record a finding on all the issues raised in favour of the plaintiffs, in the negative of the first and fourth issues, and in the affirmative of the second and third issues.

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The decree will be for the plaintiffs, declaring them entitled to the entirety of the dwelling-house and premises in the 4th paragraph of the plaint mentioned—subject to the respective rights of the three widows, Jethibái (defendant No. 6), Jadávbái (defendant No. 7), and Devkúvarbái (defendant No. 8). The decree will also direct that possession be forthwith given to the plaintiffs by the first defendant (the widow of Zummakráam Náná) for herself and the second and third defendants (the infant sons of the said Zummakráam Náná) of the premises, or such portion thereof as may now be in their possession or occupation.

This decree is for the plaintiffs, with costs as against the first defendant (for herself and as guardian of the second and third defendants), without costs as against the other defendants on the record, viz., the fourth, fifth, sixth, seventh, and eighth defendants.

Attorney for plaintiffs : *H. S. Carter.*

Attorney for defendants 1, 2, and 3 : *C. Tyabji.*