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Supreme Court Charter, Secs. 53, 54. The practice in Chancery is to stay the proceedings in a suit, until an answer in the cross-suit is filed.

The following authorities were cited:—*The Seringapatam* (*a*); *The Cameo* (*b*); Coote's Admiralty Practice, 28; *Murray* v. *Vibart* (*c*); *Ex parte Mahomed Firoz Shah* (*d*); 1 Morley's Digest, Jurisdiction, 147.

PER CURIAM:—We set aside the order rejecting the plaint, and order it to be received and filed: and we order the costs of this appeal to be costs in the suit.

(*a*) 3 W. Robinson 41. (*b*) 5 Law Times, N. S. 773.
(*c*) 1 Phillips 521. (*d*) Tayl. & Bell, 74.

Aug. 19.

Original Suit No. 1507 *of* 1866.

LAKSHMI'BA'I, widow of Krishnanáth Morobá.....*Plaintiff.*

GANPAT MOROBA', NA'RA'YAN MOROBA', and SATYABHA'MA'BA'I, widow of Vináyak Morobá.....*Defendants.*

Hindú Law—Family Property—Partition—Will—Testamentary Power—Coparcenary—Tenancy-in-Common—The words "share and share alike"—Construction—Life Estate of Widow in Immoveables—Doctrine of Mitákshará—Reunion—Joint Enjoyment.

V. and M., Hindús residing in Bombay, made a deed of partition, in 1823, of the whole of the family property, moveable and immoveable, which had come into their exclusive joint enjoyment on the death of their father. V. died in 1850, having made a Will, prepared by an English solicitor, in the English language and form, by which, after various bequests to members of the family, he disposed of the residue of his estate: one third share to his son V. absolutely; another third to his son L. absolutely; "and the remaining clear third share to my grandsons K., V., G., and N., the sons of my late son Morobá deceased, their and each of their respective heirs, executors, administrators, and assigns, share and share alike." These residuary bequests, it was provided, were not to take effect until after the death of the testator's widow, who was appointed executrix and manager of the whole estate during her life; but the estate was divided by the award of arbitrators, in 1855, after making a provision for the widow, in substantial accordance with the directions of the will. V. and L. immediately thereafter took possession of their respective third shares of the moveable and immoveable estate; but

the third share allotted to the four sons of M., who were all still infants, remained unapportioned until 1856, when, on a suit being filed, the greater part of the *moveable* property was apportioned. The *immoveable* property allotted to them remained unapportioned; and was managed first by the widow of M., till her death in 1855; then by his eldest son, K., till his death, without male issue, in 1859; then by the next eldest son, V., till his death, without issue, in 1864; and afterwards by the elder of the two surviving sons; and the proceeds were treated throughout, as though the property was held in coparcenary by the four sons as a joint and undivided Hindú family.

In a suit brought by L., the widow of K., against K.'s surviving brothers and S., the widow of his brother V., in which L. claimed to be absolutely entitled as heir of her husband [and also as heir of her daughter, who died after her husband's death, childless and unmarried], to a fourth part of the third share of the estate allotted by the award of 1855:—

Held (1) That the words "share and share alike" occurring in the Will of V., ought not to be construed as necessarily constituting a tenancy-in-common, with all the incidents attached thereto, in English law; but that each of the four sons of M. took a separate share in the third of the testator's residuary estate; the share of each son going, on his decease, to those who would, according to Hindú (and not according to English) law, be his heirs as a separated Hindú. (2) That, with regard to the immoveable property devised by the Will and allotted by the Award to the sons of M., there never was a *union* of estate—a coparcenary—from the Commencement; and, consequently, there was no *Reunion* in the sense of the Hindú law, notwithstanding joint enjoyment and common residence; but only postponement for a time, and for purposes of convenience, of an apportionment of the estate, which was, accordingly (among other things) decreed.

THIS suit, the facts of which are fully stated in the judgment, was heard before ARNOULD, J., in a Division Court on the 20th of July, and the 5th, 8th, and 9th of August, 1867.

Pigot and *Marriott* for the plaintiff.

Howard for the 1st and 2nd defendants.

The Advocate General (*Hon'ble L. H. Bayley*) for the 3rd defendant.

Cur. adv. vult.

ARNOULD, J.:—In this case, which involves several points of Hindú law, the following appear to be the material facts:—

In the year 1823 two brothers, Vásudev Vishvanáth and Mádhavji Vishvanáth, made a deed of partition (the legal validity of which has never been, and is not now, disputed) of all the family property, moveable and immoveable, which

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had come into their exclusive joint enjoyment on the death of their father, of whom they were either the only, or the only surviving, male issue, and with whom in his lifetime they must be presumed, nothing appearing to the contrary, to have formed a joint and undivided Hindú family. Upon, or shortly after, the execution of the partition deed of 1823, the whole of the family property was in fact apportioned into two separate shares—known respectively as Vásudev's share and Mádhavji's share.

At the time of the execution of the partition deed of 1823, Mádhavji was (as until his death he continued to be) without male issue; but Vásudev had five sons, all then born, but all then infants, viz., (1) Viṭhobá, (2) Vishvanáth, (3) Rámchandra, (4) Morobá, (5) Lakshuman.

Vishvanáth, the second son of Vásudev, about the time of the execution of the partition deed of 1823, was adopted by his uncle Mádhavji, and on Mádhavji's death inherited, and has ever since enjoyed, Mádhavji's separated share. He has never made claim to, nor does he now make claim to, any interest in the separated share of his natural father, Vásudev; nor did Vásudev, in his lifetime, claim, nor have any of the sons or grandsons of Vásudev since claimed, nor do they now claim, any interest in the separated share of Mádhavji. The family house being large and commodious, all the members of the family, of both branches (Vásudev's branch and Mádhavji's branch), have continued to reside under its roof down to the present time. Vishvanáth, the adopted son of Mádhavji, though he seems frequently to have messed and worshipped in common with his natural father, Vasudev, and his natural brothers, yet has always had a separate set of rooms appropriated to him in the upper part of the family house, and the expenses of his establishment have always been defrayed out of the proceeds of his separate estate.

Rámchandra, the third son of Vásudev, died intestate and without issue, but leaving a widow, in his father's lifetime. Morobá, the fourth son, also died in the lifetime of his father, intestate, but leaving a widow, Anpúrṇábái, and four sons,

Krishṇanáth, Vináyak, Gaṇpat, and Náráyaṇ. Gaṇpat and Náráyaṇ, now the sole survivors of these four sons of Morobá, are respectively the first and second defendants in this suit: Lakshmíbái, the plaintiff, is the widow of the deceased son Krishṇanáth: Satyabhámábái, the third defendant, is the widow of the deceased son Vináyak.

On the 23rd of December 1850 Vâsudev Vishvanáth died, having, on the 14th of November 1850, made a will, in the English language and form, and prepared by an English solicitor, by which, after making various bequests to different members (principally female members) of his family, and constituting his widow, Lakshmíbái the elder (who is still living), executrix and manager of all his estate for her life, he thus disposes of the residue :—" One clear third part or share thereof" to his son Viṭhobá absolutely: "another clear third part thereof" to his son Lakshuman absolutely; *" and the remaining clear third part or share thereof, to my grandsons, the sons of my late son Morobá deceased;—Krishṇanáth, Vináyak, Ganpat and Náráyáṇ, their and each of their respective heirs, executors, administrators, and assigns, share and share alike."*

By one of the provisions of the will, the residuary devise was not to take effect until after the death of the testator's widow, the elder Lakshmíbái; but this having led to some ill-feeling in the family, in the year 1854, the elder Lakshmíbái, Viṭhobá, Lakshuman, and Anpúrṇábái, the widow of Morobá, and guardian, under the will, during their minority, of Morobá's four sons, Krishṇanáth, Vináyak, Gaṇpat, and Náráyaṇ (all then still infants), agreed that the whole of the testator's property should be at once apportioned among the several objects of his bounty, in substantial accordance with the disposition of his will, by the award of Mr. Rimington, the solicitor of this Court, and of three native gentlemen named as his co-arbitrators.

On the 17th of May 1855 Mr. Rimington and his co-arbitrators made a very fair and equitable award, by which, after securing a suitable provision for the testator's widow, Lakshmíbái the elder, and carrying out the bequests of the

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will as to the other members of the testator's family, they divided the residuary estate into three portions (as specified in the 1st, 2nd, and 3rd schedules to their Award) between (1) Vithobá, (2) Lakshmaṇ; (3) the four sons of Morobá, Krishṇanáth, Vináyak, Gaṇpat, and Náráyaṇ.

Vithobá and Lakshumaṇ immediately took possession of the respective shares thus allotted to them under the Award, both of the moveable and immoveable property. Lakshumaṇ (who has since been found a lunatic by this court) has sold all his share of the immoveable property, and apparently squandered the proceeds: Vithobá has sold only a portion of his share of the immoveable property, and that very advantageously.

The third share of the testator's residuary estate allotted, under the 3rd schedule of Mr. Rimington's Award, to the four sons of Morobá, remained under the management of their mother, Anpúrṇábái, until her death, in July 1855; nor had any actual division or apportionment even of the moveable property allotted in this 3rd schedule of the Award taken place, when, on the 10th of July 1856, a friendly suit was filed on the Equity side of the late Supreme Court, for a partition of the greater portion of the *moveable* property included in the 3rd schedule of Mr. Rimington's Award. In this suit Vináyak, Gaṇpat, and Náráyaṇ (the two latter being represented by their uncle Vishvanáth Mádhavji as their next friend) were plaintiffs: and Krishṇanáth Morobá (together with a sister, Sonábái, since deceased) was defendant.

It is admitted that, under the decree and the Master's report in this suit, an actual partition and apportionment of the great bulk of the moveable property allotted to the share of the four sons of Morobá by the 3rd schedule of Mr. Rimington's Award, has, in fact, taken place. It is also admitted that Gaṇpat and Náráyaṇ, the first and second defendants in this suit, have enjoyed and are now enjoying their fair and equal share in the moveable property so apportioned. A certain portion of the moveable property allotted under the 3rd schedule of the Award, consisting principally of dresses

and jewellery, is still unpartitioned, and that such portion of the moveable property may now be partitioned, is part of the prayer of the plaintiff in this suit.

Of the *immoveable* property allotted under the 3rd schedule of Mr. Rimington's Award to the four sons of Morobá, no partition or apportionment was decreed, or indeed prayed for, in the Equity suit of 1856; it being expressly stated, in the last paragraph but one of the bill in that suit, that it was "*not for the benefit of the said infant plaintiffs* (Ganpat and Náráyaṇ), *nor the wish of the plaintiff Vináyak Morobá, that any immediate partition should be made of the said immoveable property.*"

Accordingly, the portion of the *immoveable* property of the testator devised to the four sons of Morobá by the residuary clause of the Will of 1850, and allotted to them by the 3rd schedule of the Award of 1855, has hitherto remained, and still is, unpartitioned. The evidence in this case, moreover, clearly shows that, at all events from the date of the Award of 1855, this portion of the immoveable property has been managed and enjoyed first by the widow, and, after her death, by the sons of Morobá, precisely in the same way as it would have been managed and enjoyed, had it vested in the four sons of Morobá in coparcenary, as constituting among themselves a joint and undivided Hindú family.

The widow Anpúrṇábái managed till her death, in July 1855; then Krishṇanáth, the eldest son of Morobá, till his death, intestate and without male issue, in 1859; then Viṅáyak, the next eldest, till his death, intestate and without issue, in 1864; and from that time to the present the property has been, and now is, managed by Ganpat, the elder of the two surviving sons of Morobá, who are respectively the first and second defendants in this suit. Dwelling in the same portion of the family house, messing together and worshipping in common, the sons of Morobá are proved, ever since the Award of 1855, if not, indeed, from an earlier date, to have paid their joint family expenses out of the rents and proceeds of this unpartitioned share of the immoveable property, devised to them by the Will, and

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allotted to them under the Award. Those rents and proceeds are shown to have formed a common stock or fund, out of which, after the joint family expenses were defrayed, the surplus was laid by, on the joint family account, by the managing elder brother for the time being. In short, the evidence clearly shows a joint undivided enjoyment as a matter of fact, by these four sons of Morobá, of their unpartitioned one-third share of the immoveable property devised to them by the Will and allotted to them by the Award—an enjoyment extending from the date of the Award, if not from an earlier period, down to the present time. Whether this joint enjoyment is evidence of *reunion*, according to Hindú law, among the sons of Morobá, or whether it was a mere matter of convenient arrangement, and, therefore, not of force to alter or disturb legally vested rights, is one of the questions in this case; but of the fact of such joint enjoyment there can, on the evidence, be no doubt.

In February 1866, Lakshmíbái, the plaintiff in the suit, the widow of Krishṇanáth (the elder of the four sons of Morobá), caused her solicitors to send a notice to Gaṇpat and Náráyaṇ, the two surviving sons of Morobá, to insist on an immediate partition of the yet unpartitioned portion of the moveable property, ornaments, clothing, &c., and the appropriation to her of her late husband's share therein. To this the solicitors of Gaṇpat and Náráyaṇ replied, that the four brothers, both before and after the date of Mr. Rimington's award, constituted a joint and undivided family according to Hindú law, and that, therefore, she (Lakshmíbái) as the sonless widow of one of the brothers, was entitled to no share at all in the family property, but to a mere maintenance.

Ever since her marriage with Krishṇanáth down to the time, or about the time, of her sending the notice of February 1866, Lakshmíbái had continued to reside in the family house. She then left it, and in October 1866 filed her plaint in the present suit. In this plaint she makes the case that her late husband Krishṇanáth, under his grandfather's will, was entitled to a separate fourth share in that portion of the testator's property which was devised to the four sons

of Morobá, and that Krishṇanáth never brought such his separate one-fourth share into the family again, although, for convenience sake, the parties to the Equity suit of 1856 agreed not to press for an actual division of the immoveable, and of certain portions of the moveable, property. She, accordingly, prays that she may be declared absolutely entitled, as heir of her late husband, to a fourth part of the property set forth in the 3rd schedule of the Award of 1855; that a partition into four equal shares be forthwith made of the said property for the benefit of the parties entitled thereto; that the Commissioner of this court be directed to take accounts of the management of the property since the death of Krishṇanáth, &c., to frame a scheme for the partition of the said premises, and to report whether it would be necessary or advisable to sell the whole, or any and what partition thereof.

On the 30th of January 1867, Gaṇpat and Náráyaṇ, and on the 22nd of February 1867, Satyabhámábái, respectively filed their written statements.

Gaṇpat and Náráyaṇ set up the case that the plaintiff's late husband, Krishṇanáth, died a member of an undivided Hindú family; that on his death, without male issue, his share merged in the family estate; that the plaintiff, as his widow, is only entitled to maintenance, and not to the partition or other relief for which she prays.

Satyabhámábái, as the childless widow of Vináyak, claims to be entitled to an equal fourth part of the immoveable, and of the undivided portion of the moveable, property devised to the four sons of Morobá by the Will of 1850, and allotted by the Award of 1855; she prays that a partition may be made, and as to the accounts, submits that they should be taken, if at all, not from the death of Krishṇanáth only, but from that of Anpúrṇábái.

Such being the material facts of the case, many legal points were raised.

It was first contended by Mr. Howard, for the first and second defendants, that, though he admitted that the partition

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of 1823 was valid in law, and had always been acquiesced in and acted on, in fact—yet, as the property, the subject of that partition, was ancestral, it could not be alienated by gift or disposed of by will, in the same manner as self-acquired property.

On this point it seems sufficient to refer to the decision of the Privy Council in the *Rajah of Shivagunga's Case* (*a*), in which, after an elaborate review of all the authorities, the position was established, that "when property belonging in common to a united Hindú family has been divided, the divided shares go in the general course of descent of separate property."

It certainly would seem fairly to follow from this decision that the same power of alienation by gift, or disposal by will, must exist in the case of divided ancestral property, as in the case of other separate property; and this position has accordingly, been affirmed in a recent well-considered judgment of the High Court of Bombay in the exercise of its appellate jurisdiction, delivered by Mr. Justice *Westropp*, on the 13th of October 1866: *Narottam Jagjivan* v. *Narsandás Harikisandás*. (*b*)

Whether, in the case even of separate property, the right of disposition by will is strictly co-extensive among Hindús with the right of alienation *inter vivos*, is a point that may still, perhaps, be regarded as open to some question. That it is thus co-extensive, was apparently affirmed in the elaborate and well-considered judgment delivered in the High Court of Madras by Chief Justice *Scotland* in April 1863: *Vaḷḷináyagam Piḷḷái* v. *Pachche and others*. (*c*) Mr. Justice *Holloway*, however, in January 1866, *expressed himself to the effect that the doctrine that a man may devise whatever he may give* has never yet been established by judicial decision. (*d*)

On this point, however, it is not necessary in the present case to express any opinion; for here the testator, by the will

(*a*) 9 Moo. Ind. App., 609.
(*b*) 3 Bom. H. C. Rep., A. C. J., 6.
(*c*) 1 Mad. H. C. Rep., 326; and see especially pp. 337 and 339.
(*d*) 3 Mad. H. C. Rep., 55.

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of 1850, though undoubtedly dealing with his share of the property partitioned in 1823, as separate and not as joint family property, has not, as it appears to me, at all exceeded the powers which, according to a long current of uncontested decisions, are by law vested in a Hindú, when disposing by will of his separate property. He has excluded none who, by the ordinary course of descent, would have had any right to inherit, and he has divided his residuary estate into three equal shares—giving one of such shares to each of his two then surviving sons, and the remaining third in equal portions to the four sons of the only one amongst his own deceased sons who left male issue. His other deceased son, Rámchandra, left no issue, only a widow, who is equitably provided for in the Will; and his other surviving son, Vishvanáth, had been taken out of his, the testator's, branch of the family, by virtue of his adoption by the testator's brother, about the time of the partition of 1823.

There has been a recent decision of the High Court of Madras, that in the absence of all proof of fraud, or undue advantage or gross inequality (all of which are absent in the present case), infants are bound by an agreement for division in which they were represented by their mother as guardian: *Nallappa Reddi* v. *Balammál and others.* (*e*) On the authority of this case it might be fairly contended that the first and second defendants in the present suit were bound by the award of 1855. But even apart from the award and the Equity suit of 1856, under the decree and report in which the first and second defendants (as the evidence clearly shows) have actually taken an apportionment of the larger part of the moveable property allotted under the 3rd schedule of the Award of 1855—apart, I say, from all consideration of these matters, I have been unable, after giving the best attention in my power to the arguments adduced by Mr. Howard on this part of the case, to understand how it can be seriously contended that this testator had not the legal right so to dispose of his share of the property, divided between him and his brother Mádhavji by the admittedly

(*e*) 2 Mad. H. C. Rep., 182; 16th July 1864.

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valid partition deed of 1823, as he did, in fact, dispose of it by the will of 1850. It appears to me, upon the best consideration I have been able to give to the case, that he clearly had such testamentary disposing power.

The next question is assuming him to have had such disposing power, what estate was vested in the four sons of Morobá by the clause in the will devising the residuary third-share to them. For the plaintiff it was contended that the will (though made by a Hindú), being in the English language and form, the words "*share and share alike*" must have the same technical sense given to them, as they undoubtedly have acquired in English wills; and that the clause must, accordingly, be held to have vested in the four sons of Morobá a tenancy-in-common in fee, according to, and with all the incidents annexed to it by, English law: Jarman on Wills, Vol. II., p. 211.

In support of this proposition reference was made to the case of *Morton* v. *Lee* (*f*), and to the case of *Gangabai* v. *Thavur Moolla*, decided by the late Chief Justice, on the Equity Side of the late Supreme Court. (*g*) With regard to the case in the Privy Council, it may be sufficient to observe, that though the marginal note of the Reporter affirms the proposition contended for positively, the judgment of the Privy Council by no means goes to the same extent, and does not warrant a reference to their Lordship's decision, as clearly or categorically establishing the principle of construction in support of which it has been, more than once, cited in this court. The decision in *Gangabai* v. *Thavur Moolla* has, in my opinion, been a good deal misunderstood. In that case a lady belonging to the Khojá community had made a will in the English language and form, disposing of a part of her property in *charity*. Those who opposed the will contended that the word "*charity*" should be read "*dharm*," and that parol evidence should be admitted to show that "*dharm*" was the word used by the testatrix in giving instructions for her Will; and they urged this view,

(*f*) 14 Moo. P. C. Ca. 211. (*g*) 1 Bom. H. C. Rep. 71.

in order to set aside the disposition to "*charity*" as a void bequest, on the authority of certain cases in which the late Supreme Court and this Court had refused to carry out bequests to *dharm* (*h*). The late Chief Justice, *ut res magis valeat quam pereat*, rejected the application to let in parol evidence, and upheld the Will, on the ground expressed in the following passage of his judgment:—"The testatrix was not obliged to make her Will in English, but having selected that language to convey her intentions under the safeguard of an English solicitor, the Will must, after thirteen years, and in the absence of any allegation of deception or fraud, be now *taken to have intended what is clearly expressed in it.*" (*i*)

Of the equity and justice of this decision there can be no doubt; and it is based on the plain and intelligible ground, that a testator must be taken to have intended by his Will what is clearly expressed in it.

It does not appear to me that either of these cases supports the proposition that a Native making a will in the English language and form, through the medium of an English solicitor, is necessarily to be taken as intending to convey by the expressions used in the Will all the technical meanings which in a long course of judicial construction have been attached to them in the English courts, but of which a Native testator may, most reasonably and fairly, be presumed to have been wholly ignorant.

The very reasons, for instance, assigned by Mr. Jarman for the technical construction put by English Judges on such expressions as "*share and share alike*" in English wills, show that the rule of construction contended for is one that should not be adopted by Indian tribunals, in suits between Hindús. "The preceding cases," says Mr. Jarman," evince the anxiety of later [English] Judges to give effect to the slightest expressions affording an argument in favour of a tenancy in common—*an anxiety which has been dictated by*

(*h*) As to these cases see note of the Reporter in 1 Bom. H. C. Rep., 274.

(*i*) *Ibid.*, p. 75.

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the conviction that this species of interest is better adapted to answer the exigencies of families than joint tenancy:" Jarman on Wills, Vol. II., p. 211.

This ground of decision is not applicable to suits between Hindús in India, where, as is well known, the unit of proprietorship is, and for ages has been, not the individual, but the family; and where it is incumbent on the courts, by a long-settled rule, always to presume, where Hindús are the litigating parties, in favour of a family being undivided, till the contrary is proved.

For these reasons it appears to me that in a suit like the present, in which all the parties are Hindús, I ought not to construe the words "*share and share alike,*" occurring in this Will, as necessarily constituting a tenancy in common, *with all the incidents attached thereto in English law.* It seems to me that the true rule of construction is to take all the words as they stand in this clause of the Will in their plain and natural sense; and so taking them, I am clearly of opinion that they give to each of the four sons of Morobá a separate share in the third of the testator's residuary estate, the share of each son going on his decease to those who would, *according to Hindú (and not according to English) law,* be his heirs as a separated Hindú.

Now the plaintiff, Lakshmíbái, and the third defendant, Satybhámábái, being respectively (according to the above construction) the widows of Krishnanáth and Vináyak, separated Hindús who died without male issue, are respectively entitled by Hindú law, as their heirs, to the fourth-share of their respective husbands in the moveable and immoveable property devised to the four sons of Morobá by the Will of the testator, and allotted to them under the 3rd schedule of the Award of 1855. Each of these two widows, as to their respective late husbands' undivided fourth-share of the *moveables,* is entitled *absolutely:* as to the undivided fourth-share of the *immoveables,* each is entitled to an *estate for life only,* without power of alienation, except for certain very special and stringent purposes of religion or necessity.

That the widow of a separated and sonless Hindú, in all parts of India where the *Mitákshará* law prevails (and this includes the Bombay Presidency), takes only a life estate in immoveable property, *which goes on her decease to those who at her decease are the heirs of her husband,* is a position too firmly established to admit of doubt.

An ingenious attempt, indeed, has recently been made by Messrs. West and Bühler, in their very learned work on the Hindú Law of Inheritance (pp. lxiv. to lxvii. of the Introduction), to show that immoveable property thus inherited by a Hindú widow is *stridhan,* and goes on the widow's death to her heirs, not to her husband's. But the current of opposing authority is far too strong to be resisted; and the true doctrine must be taken to be, that, wherever in India the *Mitákshará* law prevails, the widow of a sonless and separated Hindú takes, as his heir, his immoveable estate for her life only, and that on her death those succeed her who would have been her husband's heirs in her default; in other words, her estate is an estate interposed for life between the last absolute proprietor and his next heirs. See the doctrine very clearly laid down in Colebrooke's Digest, Book V., Ch. VIII., Sec. 1 (*j*), *Doe d. Kullammál* v. *Kuppu Pillai* (*k*), *P. Bachiraju* v. *V. Venkatappadu* (*l*), *Devkúvarbái's Case* (*m*), *Jamiyatrám et al.* v. *Bái Jamná.* (*n*) The decisions of the High Court of Calcutta are numerous o the same effect as to those parts of Bengal where the *Mitákshará* law prevails. In fact, the doctrine must now be regarded as finally and conclusively established.

Such then being, in my opinion, the rights of the plaintiff and the third defendant, under the devise in this Will to the four sons of Morobá, it remains to consider whether their rights are affected by the circumstances: (1) that as to the immoveable property devised to these four sons by the Will, there has been no *partition of lands by metes and bounds;*

(*j*) Madras Edn. of 1865, pp. 531-532.
(*k*) 1 Mad. H. C. Rep., 85. (*l*) 2 Mad. H. C. Rep., 402.
(*m*) 1 Bom. H. C. Rep., 130. (*n*) 2 Bom. H. C. Rep., 11.

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(2) That, on the contrary thereof, the sons of Morobá have throughout, in fact, dealt with the immoveable property as though they were, in respect of it, an undivided Hindú family; and whether, therefore, even if their estate in this immoveable property was, in its creation, divided, yet their subsequent mode of enjoying it is not evidence of what in Hindú law is called Reunion.

Now that there may be, in Hindú law, a partition of *estate* without a partition of *lands*, a division in *title* without a division in *enjoyment*, is a clear and elementary principle. See *Vyavahár Mayúkha*, Chap. IV., Sec. 3, "Partition of Heritage;" a very instructive case in the High Court of Calcutta, *Mussamut Josoda Koonwur* v. *Gourie Byjonath Sohae Sing* (*o*); and a recent case in the Privy Council, *Appoovier* v. *Ramasubba Aiyan and others*, decided on the 17th of November 1866 (*p*), and cited by Sir B. *Peacock*, C.J., as the basis of his decision in *Lalla Mohabeer Pershad and others* v. *Mussamut Kundun Koowar*. (*q*)

It appears, indeed, to have been recently ruled by the High Court of the North-Western Provinces, that in order to entitle the widow of a deceased brother to succeed in her claim for his separate share, there must have been a regular partition and apportionment of lands, and not simply a division of estate, but the High Court of Calcutta, before which this ruling was cited, has in terms dissented from it: *Lalla Sreepershad* v. *Mussamut Akoonjoo Koonwar and others* (*r*); and in my opinion rightly, for I cannot, as at present advised, see on what ground of principle or precedent the ruling referred to rests. I also find that the widow's right to enforce a partition, where there has been no apportionment of lands in fact, has been upheld by the High Court of Bombay in the exercise of its appellate jurisdiction: *Ram Joshi* v. *Laxmibai koh M. S. Joshi*. (*s*)

(*o*) 6 Calc. W. Rep., Civ. R. 139, decided on the 4th of August 1866.
(*p*) 8 Calc. W. Rep., P. C., 1.
(*q*) 8 Calc. W. Rep., Civ. R. 116; 29th June 1867.
(*r*) 7 Calc. W. Rep., Civ. R., 488.
(*s*) 1 Bom. H. C. Rep. 189.

Then comes the question whether there is in the present case evidence of anything that amounts, in Hindú law, to a reunion, among the four sons of Morobá as to their residuary third-share in the immoveable property devised to them by the Will of 1850 and allotted by the Award of 1855.

The evidence, indeed, shows that they have throughout dealt with this their share in the said immoveable property, just as though it were held by them in coparcenary, as a joint and undivided Hindú family: its proceeds have been appropriated to the common family use; the common family expenses have been paid out of such proceeds; and the surplus has been set apart as a common family fund.

The question is whether this is evidence of anything more than an arrangement among themselves, by which a partition *in fact, an apportionment of lands in severalty*, has been postponed from motives of convenience; or whether it is really to be taken as evidence of a *Reunion*.

The doctrine of reunion in Hindú law will be found treated of in 1 Strange, H. L., pp. 234, 235; *Mitákshará*, Chap. II., Sec. IX., Cl. 2 *et seq.*; *Vyavahár Mayúkha*, Chap. IV., Sec. IX., Cl. 1 *et seq.* The decisions on the point have not been numerous; I have only been able to meet with three: *Tara Chand Ghose* v. *Pudum Lochun Ghose and others* (*t*), *Kuta Bully Viraya* v. *Kuta Chudappavuthamulu* (*u*), and *Vishvanáth Gangádhar* v. *Krishnáji Ganesh and others* (*v*).

In the Calcutta case, there had been first a state of union as a joint and undivided Hindú family; then a state of partition in fact—that is, apportionment of lands, as well as division in estate; thirdly, residence in common and enjoyment in common, after such partition, by a certain branch of the family. The Court, sitting as it was in special appeal, came to no decision on the facts, but remanded the case to the lower court, for a finding whether the facts proved amounted to a reunion upon the principles laid down in the

(*t*) 5 Cale. W. Rep., Civ. R., 249.
(*u*) 2 Mad. H.C. Rep., 235.
(*v*) 3 Bom. H. C. Rep. A.C.J., 69.

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judgment of the High Court. What the finding of the lower court was on the facts is not mentioned in the Report, and, indeed, from the nature of the remand, it is not probable that the case ever came again before the High Court.

In the Madras case, there had been, 1st, union; 2nd, division of estate and no partition of lands; 3rd, clear proof of subsequent mixture of property (a joint enjoyment), and residence in common. The lower court having found that the facts proved did not show reunion, the High Court of Madras, in regular appeal, (one of the members of the court being Mr. Justice Holloway), refused to disturb the finding of the lower court.

In the Bombay case, the principle is laid down that reunion must be made by the parties, or some of them, who made the separation.

The conclusions I draw from these authorities are: (1) That in order to constitute Re-union, there must, as indeed the very word implies, have been a previous state of *union*; (2) That, in the absence of partition in fact, *i.e.*, apportionment of lands, as well as division of estate, it would be very difficult, to say the least of it, to establish a conclusive case of reunion as a matter of evidence; (3) That the reunion must be effected by the parties, or some of them, who have made the partition.

Now in the view I take of the present case all these elements are wanting: that there has been no partition in fact—no several apportionment of lands—is clear; and, in my opinion, it is no less clear, that as regards the immoveable property devised by the will of the testator, and allotted by the Award of 1855 to the four sons of Morobá—a union of estate—a coparcenary—the status of joint and undivided Hindú family—never did exist *from the commencement*. Their interest in this third-share of the testator's immoveable property was derived from the Will and created by the Will, and under the Will their estate in that immoveable property, from its inception, was not joint and undivided, but separate. Under the Will all the four sons of Morobá did not take in coparce-

nary, but each one of the four took separately a separate fourth.

It appears to me, therefore, that the present is a case in which the evidence that has been adduced of joint enjoyment and common residence, subsequent to the creation of the estate, does not amount to evidence of reunion in Hindú law; but simply to evidence of postponement for a time, and for purposes of convenience, of a partition and apportionment of the immoveable property, in which, under the Will, they had a divided estate. As such it cannot affect legally vested rights, or alter the division of estate created among the four sons of Morobá by the residuary clause of the Will of 1850.

These being the conclusions at which I have arrived, I pass a Decree: 1. Declaring the plaintiff, Lakshmíbái, as heir, according to Hindú law, of her deceased husband, Krishṇanáth Morobá, entitled *absolutely* to his one-fourth share in the yet unpartitioned portion of the *moveable* property allotted under the third schedule of the Award of 1855, and to an estate for her life, according to Hindú law, with remainder to those who at her decease may be the heirs of her said deceased husband, in his unapportioned one-fourth share of the *immoveable* property allotted under the said third schedule of the said Award.

2. A similar declaration (*mutatis mutandis*) as to the rights of Satyabhámábái, the third defendant, as heir, according to Hindú law, of her deceased husband, Vináyak Morobá.

3. Direction that it be referred to the Commissioner, under Sec. 181 of the Code of Civil Procedure, to take accounts as prayed; such accounts to be taken from the death of Anpúrṇábái, the widow of Morobá Vásudevji.

4. Direction to the Commissioner, if necessary, to frame a scheme for a partition, and to report whether the whole, or what, if any, portion, of the said immoveable property should be sold, &c.

5. Direction that, with a view to the better taking of the said account, &c., as above, Satyabhámábái, the third de-

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fendant, do further take out administration to the estate and effects of her deceased husband, Vináyak Morobá.

6. Each of the parties to the suit to bear his or her own costs respectively.

Of course, if the parties to the suit, acquiescing in the principles of this decision, can agree to some equitable arrangement, by which the expense and delay of going before the Commissioner may be avoided, it will be much to their advantage to do so; if not, the above directions must be carried out.

10 Oct. After the delivery of the above judgment, *Mr. Pigot* raised an objection that no notice had been taken by the Court of the point that Lakshmíbái claimed as heir, not only to her husband, but also to her daughter Devkúvarbái, who died after her husband's death childless and unmarried. The point came on for argument to-day, when, having heard *Mr. Pigot* and *Mr. Marriott*, counsel for Lakshmíbái, I came to the conclusion, without calling on the other side, that, even assuming that Lakshmíbái could be said to inherit at all from her predeceased daughter, which, in my opinion, she could not, yet any estate she so took could not alter the quantity or quality of the estate that had devolved upon her from her deceased husband; and, therefore, no ground was shown for altering the Minutes of the Decree as originally framed.