1888
SEP. 1.

ORIGINAL CIVIL.

13 B. 57.

association agrees to become a shareholder, and so long as there are shares that can be allotted to him he must fulfil that obligation "—*per* Jessel, M.R.; *Drummond's Case* (1).

But Mr. Russell argued (*a*) that the special circumstances took this case out of the general rule, and (*b*) that the company had no shares available for allotment. As regards the first point, I do not think the transactions between Mr. Elmore and Mr. Premchand Roychand in any way bind or affect the Company. The present of a paid-up share by a third party does not satisfy the obligation of a subscriber of the memorandum. The issue of the certificate does not estop the company as long as the certificate has not passed to a *bona fide* transferee for value. If Mr. Elmore has not, in fact, paid money or money's worth for the one share subscribed for, the company is still able to prove the non-payment, and claim the Rs. 1,000.

As regards the second point, I think the case is governed by *Evan's Case* (2). There though all the shares were, in the first instance, allotted to other persons, the allotment was not confirmed, and it was consequently held that there were, in fact, shares which might have been allotted to Mr. Evans. So here there were shares proposed to be allotted to Premchand if certain things were done which were not done. Thus the allotment was never final, and there were left at all times shares sufficient to supply the claim of Mr. Elmore. It makes no difference that no share was allotted to him. The liquidator on behalf of creditors is entitled, in law, to hold him now to his contract which he made with the company when he signed the memorandum. **[61]** He must be placed on the list for one share, and he must pay the costs for this application.

Attorneys for the Official Liquidator:—Messrs. *Tobin and Roughton.*

Attorneys for J.C.S. Elmore:—Messrs. *Winter, Burder and Bayley.*

---

13 B. 61 = 13 Ind. Jur. 185.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

TOOLSEYDAS LUDHA (*Plaintiff*) *v.* PREMJI TRICUMDAS (*Defendant*).*

[6th September, 1888.]

Hindu law—Joint family—Evidence—A person claiming a share must prove property to be joint—No presumption that property of member of joint family is joint property—Release obtained from person just come of age—Guardian and minor—Will—Disherison of heir—Undisposed of residue.

The plaintiff as a joint member of the defendant's family sued to set aside a release obtained from him by the defendant and for partition, &c. The plaintiff was the son of one Ludha Callianji and the defendant was the plaintiff's nephew and grandson of Ludha Callianji, being the son of Tricumdas Ludha, an elder brother of the plaintiff. The plaintiff alleged that Ludha and his brother Jivan were joint and had carried on a family business; that Jivan died childless and that on Ludha Callianji's death in 1868 the whole family property passed into the hands of Tricumdas Ludha his eldest son, on whose death it came into the possession of the defendant as eldest male member of the family although belonging to a younger generation than the plaintiff. The plaintiff alleged that in 1882, shortly after he came of age, the defendant induced him to sign a

---

* Suit No. 421 of 1888.

(1) 7 Ch. App. 780. (2) L. R. 2 Ch. 427.

1888
SEP. 6.

ORIGINAL CIVIL.

13 B. 61 = 13 Ind. Jur. 185.

release of all his claims upon the estate in consideration of a sum of Rs. 25,000. He prayed that this release might be set aside. He also alleged that a will set up by the defendant as the will of his father Ludha Callianji was a forgery. The defendant denied that any part of the property in his hands was ancestral property. He alleged that the property of Ludha Callianji was self-acquired and that Ludha had, by his will, devised the whole of his property, except Rs 25,000, to his son Tricumdas (the defendant's father), on whose death it had come to the defendant. He denied the plaintiff's allegations as to the release.

Held, that the release must be set aside. The defendant stood in the relation of a guardian to the plaintiff. Releases executed immediately after a ward comes of age are looked upon with suspicion. The circumstances must show the fullest deliberation on the part of the ward and perfect good faith on part of the guardian. The circumstances of this release did not fulfil these requirements. There was not that absolute fairness and good [62] faith required by the relations of the parties, and the signing of the release was an improvident act which a prudent person would not have done with full knowledge of the circumstances.

Held, also, that there was no evidence to prove that the property left by Ludha Callianji at his death was joint property. Although presumably every Hindu family is joint in food, worship and estate, there is no presumption that every family possesses property. Unless there is an admitted nucleus of family property, the *onus* of proof of the existence of joint property lies on the claimant. The presumption in favour of the joint family does not obtain in the case of property, and it is for the claimant to prove the property joint. The plaintiff alleging that there was joint property was bound to make out his case, which he had failed to do.

Held, also, on the evidence that the will of Ludha Callianji was genuine.

By the said will, Ludha Callianji had directed Rs. 25,000 to be paid to the plaintiff's mother and her family. He appointed the defendant's father, (Tricumdas Ludha), his executor and gave him control and authority over the business. He did not, however, in express terms dispose of the residue of his property, and there was, after providing for the above legacy of Rs 25,000, a considerable balance to the credit of the business at the time of the testator's death.

Held, that such balance was a residue undisposed of by the will, and that the plaintiff was entitled to a half share of such residue which was to be divided as if there was no will. But the business itself from the date of the testator's death was to go to Tricumdas.

Mere bequests of special portions of the testator's estate to the heir without language of disherison do not exclude him from the undisposed of residue.

[R., 33 A. 677=8 A.L.J. 723=10 Ind. Cas. 543.]

SUIT to set aside a release and for partition, &c., The plaintiff was the uncle of the defendant who was the son of Tricumdas Ludha, an elder brother of the plaintiff.

The plaint alleged that one Ludha Callianji and his brother Jivan Callianji were two brothers who were joint in food, worship, and estate, and carried on a family business at Bombay and Goa. Jivan died childless, and thenceforward Ludha carried on the business and amassed a fortune. Ludha Callianji was the plaintiff's father. He died in 1868, leaving three sons, *viz.*, Tricumdas Ludha, (the defendant's father), Toolseydas Ludha (the plaintiff), and Thakersey Ludha. Tricumdas, (the defendant's father), was his son by his first wife and the other two were his sons by his third wife. At the time of Ludha Callianji's death they were five and three years old respectively and all Ludha's property passed at his death into the hands of the eldest son, Tricumdas Ludha, who had already had the management of it for some [63] years previously. Thakersey Ludha, the plaintiff's younger brother, subsequently died without issue.

The plaintiff alleged that all the property which had come into the hands of Tricumdas Ludha on the death of his father Ludha Callianji was

1888
SEP. 6.
ORIGINAL
CIVIL.
13 B. 61 =
13 Ind. Jur.
183.

family property; and that on the death of Thakersey, the youngest male member of the family as above stated, the plaintiff became entitled to a half share of the said property, the other half belonging to Tricumdas and his son (the defendant).

Tricumdas Ludha (the defendant's father) died about the year 1873, and thereupon his son the defendant took possession of all the property, and as the eldest male member of the family assumed the care and guardianship of the plaintiff and his property.

In 1882 the plaintiff attained the age of majority, *viz.*, eighteen years, whereupon (as he alleged) the defendant desiring to exclude him from his proper share in his inheritance began to use all his influence with him for the purpose of inducing the plaintiff to give him a release and to accept a sum of money in full satisfaction of his claim upon the said property. Ultimately by means of false representations as to the amount of property, &c., &c., he induced the plaintiff to accept a sum of Rs. 25,000 and to execute a release. The said release stated that Ludha Callianji had left a will dated 19th November, 1868, whereby all his property, except Rs. 25,000, had been left to the defendant's father Tricumdas. The plaintiff alleged in the plaint that at the time he executed the release he knew nothing about the said will except what the defendant told him, and that he had since learned that the alleged will was not the will of Ludha Callianji at all, but that it had been fabricated by the defendant's father, Tricumdas. He denied that the will was signed by the said Ludha Callianji, and alleged that, at the time the document was prepared and executed, the said Ludha Callianji was and had been for some time wholly unconscious. The plaintiff prayed that the said release might be declared not binding on him, and for partition of the property, &c.

In his written statement the defendant denied that any part of the property in his hands was ancestral property. He alleged [64] that the whole of the property left by Ludha Callianji was self-acquired by him and that, with the exception of Rs. 25,000, he left it by will all to his son Tircumdas, (the defendant's father), and that on the death of Tricumdas he, (the defendant), became entitled to the said property. He denied the plaintiff's allegation with respect to the release.

The following are the material portions of the will of Ludha Callianji on which the defendant relied :—

"As to the immoveable and moveable property belonging to me, I am the owner thereof . . . My eldest son Tricumdas shall duly keep up the disposition of all my abovenamed property . . . There are now living near relations and heirs of mine: their names are as follows:—My above-named eldest son Tricumdas and my present third wife by name Lalvahu and her sons and daughters and my eldest son Tricumdas's son Premji and my niece . . . .

"As the executor of my will I have appointed my eldest son Tricumdas. After my decease he shall duly take out a power . . . and shall duly make the outlays in respect of my funeral ceremonies . . . .

"My wife Lalvahu and her sons are to live with my eldest son Tricumdas . . . My eldest son Tricumdas shall duly manage their expenses in accordance with custom . . .

"Out of my property Rs. 25,000 are duly to be set apart in the name of my wife . . . As to whatever dealings and transactions there are connected with my trade at this place and at Goa and those connected with *fatamaris*, I have entrusted all the authority in respect thereof to

1888
SEP. 6.

ORIGINAL CIVIL.

13 B. 61 = 13 Ind. Jur. 185.

my eldest son Tricumdas: he may duly conduct the same as he may think proper . . .

"My young sons are to be got married out of the sum deposited in the name of my wife . . .

"Here and at Goa there are houses and *fatamaris* standing in my name and in my brother's name. The owner of all these is my eldest son Tricumdas: to the same no other person whatever has any claim of inheritance.

"The above sum of Rs. 25,000 has been set apart in the name of my wife. When my younger son attains the age of 21 years . . . then my eldest son Tricumdas of his own accord shall divide and distribute the same, and my young sons are duly to accept the same accordingly. If any risk or loss in business should take place, still no risk shall attach to these rupees and no claim shall prevail."

Tyabji and *Telang*, for the plaintiff.

Latham (Advocate General) and *Jardine*, for the defendant.

The following authorities were cited:—*Nanabhai Ganpatrav Dhairyavan* v. *Achrathbai*(1); Jarman on Wills, Vol. I, 529, 590; [65] Kerr on Fraud, pp, 330, 332; *Moxon* v. *Payne* (2); *Turner* v. *Turner*; *Hall* v. *Turner* (3); *Turner* v. *Collins* (4).

JUDGMENT.

SCOTT, J.—This is a suit to set aside the release which the plaintiff gave to the defendant in March, 1882, of all right to any share in the property left by Ludha Callianji in 1868, in consideration of the immediate payment of Rs. 25,000.

The plaintiff is the son of Ludha Callianji, by his third wife, and the defendant is the grandson through Ludha's first wife. The plaintiff came of age a month before he signed the release having been brought up by the first defendant's father, Tricumdas Ludha, and since 1873 by the defendant himself, who though of a second generation is much the plaintiff's senior in age. The plaintiff contends that the release should be declared void, because he signed it without full knowledge of his rights while he was under the defendant's influence, and without having taken independent advice. He now claims to be entitled to one-half of the property left by Ludha Callianji in 1868. He says that the will, ostensibly made by Ludha just before death on the 19th November, 1868, was not signed by Ludha at all. He further says that even if the will were genuine it was inoperative, as the property was ancestral. He next says that even if the will were genuine and the property self-acquired, it does not dispose of all the testator's property, and that he is entitled to a share of what was undisposed of. He next says that even if the will disposed of all the testator's property, a proper account of what was given to the plaintiff through his mother would show the sum stated to him as due at the time of the release, *viz.* Rs. 14,977, is much below what was really due. Finally, he says that as he was not in a position to know all these facts when he signed the release, the release ought to be set aside.

In the first place, as regards the release, I think Premji Tricumdas, the defendant, stood in the relation of a guardian to the plaintiff. The defendant himself says, "I considered him as a son or a younger

(1) 12 B. 122.
(2) L. R. 8 Ch. 881.
(3) L. R. 14 Ch. Div. 829.
(4) L. R. 7 Ch. 339.

1888
SEP. 6.
ORIGINAL
CIVIL.
13 B. 61 =
13 Ind. Jur.
185.

brother." Premji was the head of the house, and the plaintiff was under his management and control—fed, clothed, [66] and maintained by him. It is not necessary to cite cases in support of the proposition that releases, executed immediately a ward comes of age, are looked upon with suspicion. The circumstances must show the fullest deliberation on the part of the ward and perfect good faith on the part of the guardian. Now the circumstances of this release do not fulfil those requirements. The terms are unusual. The releaser undertakes, for instance, to raise no charge of fraud, nor to try to set the release aside on any grounds whatsoever. The plaintiff was not given an opportunity of testing the validity or the real meaning of the will by an independent opinion, nor was he able to fully test the accuracy of the account. The man who wrote out a draft for him did not advise him, or tell him to get advice. He only saw the accounts in Premji's house. He had the will shown to him, but he took no advice upon it, and Premji distinctly told him that he, (Premji), was entitled under it to all the property save the Rs. 25,000. In short, I do not think the transaction was of that absolute fairness and good faith required by the relations of the parties, and the signing of the release was an improvident act which a prudent person could not be expected to have done with full knowledge of the circumstances.

This release does not, therefore, preclude the Court from going behind it with a view to ascertain whether the plaintiff has forfeited any of his rights. In the first place, as regards the sum alleged to be due to him under the will, I think the evidence of the *mehta* shows that considerable sums, such as thread-ceremony expenses, were charged improperly to that account during the plaintiff's minority, and the plaintiff is entitled to an investigation before the Commissioner to ascertain what was really due with the interest calculated, according to the will from the date of its execution.

Then passing on to the plaintiff's rights I do not think there is any evidence that the property devised was joint property. Although "presumably every Hindu family is joint in food, worship or estate" (1), there is no presumption that every family possesses property. Unless there is an admitted nucleus of family property the *onus* of proof of the existence of joint property lies [67] on the claimant (Mayne's Hindu law, paras. 261, 262, 263). In the present case there was no such nucleus, and the brothers embarked in separate trades. It may be that Ludha was joint with his brother Jivan, but it does not follow from that fact that they possessed joint property. If the plaintiff alleges there was joint property, the plaintiff must make out his case. He offered no proof of the existence of joint property, save certain unsupported allegations that they (Ludha and Jivan) were partners. On the other hand, there is the evidence of those who knew Ludha and his brother to the effect that they came as poor men from Cutch; that Jivan remained poor—a mere dealer in gunny bags, but that Ludha made a large fortune in general trade both in Goa and in Bombay with the aid of Tricumji, his eldest son. The precise part Tricumji took in this business is not very clear. But I think Ludha, in declaring in the will all his property to be his own, described it according to the weight of evidence. He had, therefore, full testamentary rights over it, and the will if duly executed, was valid.

Next comes the question of the due execution of the will itself. The plaintiff in denying it took upon himself the affirmative proof of fraudulent

(1) 12 M. I. A. 541.

1888
SEP. 6.
ORIGINAL CIVIL.
13 B. 61 = 13 Ind. Jur. 185.

execution. His own personal knowledge of matter was *nil*, as he was an infant at the time. But he called several witnesses—two being examined *de bene esse* and one at the hearing. Of the two, whose evidence had been taken beforehand, Bhagvan Jairam, Ludha Callianji's cook, says he was in the room when Ludha was dying and saw the signing of Ludha's name by Purshotam Ramlal while Ludha lay unconscious. He puts the time of this fraudulent execution at midnight. The other witness, Ludha's son-in-law, says he was called to the house at 7 P. M., and that he attested the will which had been already signed. Thus these two witnesses did not agree. The third was one employe of Ludha's who worked and slept at the warehouse in another street. Although he was of an inferior caste he says he was called to attend on the dying man, and that he saw the will brought at 10 at night, signed by Purshotam and attested by witnesses while Ludha lay unconscious and dying. Ludha died at 4 o'clock next morning. This witness admitted he had never told this story before. Such is all the plaintiff's evidence in support of this grave charge of fraud. Of course, it is difficult for the [68] plaintiff to bring first-rate evidence at this distance of time. But I hesitated about the sufficiency of what he did produce even before the defendant called his counter testimony which completely convinced me that I could not accept the plaintiff's story. The man who wrote the will, the man who is said to have written the dying man's signature, both appeared, with two other witnesses, and swore the will was duly signed by the testator when he was fully conscious, and they said the execution was in the morning, not at night at all. They gave their evidence fairly and consistently, and I see no reason to believe they were not speaking the truth. The plaintiff, on the other hand, in his evidence did not impress me favourably. He certainly lied on the first day as regards the circumstances of the release. He denied, for instance, having seen the will before the release was signed, and this and other falsehood he was forced to withdraw on the second day. Experts were also called who gave strong evidence in chief, and, as usual, were somewhat shaken in cross-examination. I do not attach much weight to that kind of testimony, but it leaned towards the defendant's story. On the whole I am of opinion the case of fraud was not made out, and that the will is genuine.

Next comes a more difficult question. Although the plaintiff has tried to support his case by unfounded charges of fraud, and also, as I am inclined to believe from Ex. 11, by bribery, still he may have a good case of which his trickery cannot deprive him. What claim has he on his father's estate? Did the father dispose of all his property by his will? *Lallubhai's Case* (1) has decided that the present English testamentary law applies in India as regards the undisposed residue of a testator's estate, and that it passes, not to the executor, but to the heirs; (see also Jarman on Wills, Vol. I, p. 1; Vol. III, p. 800). It becomes, therefore, of the greatest importance to settle whether the whole property was disposed of by will. As the Court said in *Lallubhai's Case* (1), the intention to disinherit must be clear and unambiguous, or otherwise the executor is only trustee of the undisposed residue for the heirs of the testator.

The fifth rule of construction laid down by Jarman says: "The heir is not to be disinherited without an express devise or [69] necessary implication, such implication importing not natural necessity, but so strong a probability that an intention to the contrary connot be supported.

(1) 2 B. 388.

This is a point over which I have felt much difficulty. It is a case where the most probable hypothesis of the testator's intention appears to be in opposition to the plain sense of the language used. But the fact that the testator did not foresee the consequences of his disposition, is not a reason for varying it. My only duty is to declare what is in the instrument; and the material parts of the will, when read together, seem to me to allow of only one conclusion. These parts are as follows. (His Lordship read the portion of the will above set out and continued) :—

It seems to me this will provides expressly (1) for Rs. 25,000 being given to the third wife and her family; (9) for the houses and *fatamaris*; and (3) for the management and control of the business, full authority in respect whereof is entrusted to the eldest son. It also says that the living wife and her children are to live with the eldest son, who is to provide for their expenses, save their marriage expenses, which are to come out of the Rs. 25,000. But the will does not, in terms, provide for the distribution of the residue of the property. Mr. Sayani's balance sheet (Ex. 35) for the year of the testator's death proves that there was a profit balance of Rs. 98,000 in good outstandings that year, and that there was cash in hand of Rs. 24,464 and liabilities only of Rs. 43,639. That left, after providing for the legacy of Rs. 25,000, some Rs. 50,000 in outstandings undisposed of. The bequest of the house and boats (*fatamaris*) did not touch residue. It is not dealt with in terms. But in order to exclude this the title of heir or next of kin there must be an actual gift to some other definite object. What did the testator intend to do with it? Does it pass to the executor and eldest son under the clause which gives him the control and authority over the business? It was argued that the younger sons were provided for by a specific bequest. But so is the eldest son by the bequest of the houses and boats. *Lallubhai's Case* (1) confirms the English rule, that mere bequests of special portions of the testator's estate to the heir without language of disherison do not exclude him from the **[70]** undisposed residue. Do the final words of the bequest to the younger children "which they will accept" amount to such language? I do not think so. Even if they did, the fact of an undisposed residue and the outstandings remains. It may be that the testator did really intend to dispose of everything and to make his eldest son residuary legatee. But I cannot find that intention expressed in the will itself.

There is another view of the case, *viz.* that Ludha intended the business to belong to all the family under the management of the eldest member. The outstandings of a going business, if he intended the business to belong to all, would not enter into his mind on making his will. But I do not think the provisions of the will favour this view. Not only does the will give the eldest son the entire control of the business generally, but it includes all the business arising out of the vessels which are given, in terms, to him. Again, the burden of his own funeral expenses and of the expenses of the maintenance of his family are to be defrayed by the eldest son. Unless the business was to be his exclusively, his share would be really less than the others. The words at the close of the will, where the testator says that no loss in the business shall affect the younger children's rupees, seem to support the view that the business was given exclusively to the eldest son.

Placing myself, as far as possible, in the position of the testator, my construction of this somewhat obscure will is that there is nothing in the

(1) 2 B. 388.

1888
SEP. 6.
ORIGINAL CIVIL.
13 B. 61=
13 Ind. Jur. 185.

will which excludes the plaintiff's right to a share in the balance to the credit of the business at the time of the testator's death, which is a residue unprovided for by the will and must be divided as if there were no will. But the business itself from that date was, I think, intended to be given to Tricumdas. That, in my opinion, is the true construction of the will read as a whole. There are no words which show that the testator intended the business to be managed for the family, and there are words which seem to show that it was to pass to Tricumdas.

There must be an account taken of the business at that time in order to ascertain the plaintiff's share. The amount due to him depends on whether there was a partnership between his [71] father and Tricumdas. The evidence is not very conclusive on that point. I presume the books do not show any evidence of partnership, as none has been produced from them, and the *mehta* said there was none. All the affirmative evidence I have is the statements of persons who were not in a position to know beyond doubt, such as the relations who said that Tricumji had a share. Against that there is the evidence of Dattu, Ludha's servant, the terms of the will, where the testator distinctly deals with the business as his own, the silence of the books, and the language of the release must preponderate. I do not think the partnership has been established. The plaintiff being the only surviving son and the other brother having died without issue, is, therefore, entitled to a half share.

There is only one more point to consider—the alleged bribery by the plaintiff—which can only affect the costs. That turns on Ex. 11. The circumstances of its production are singular, but the evidence of the experts, in my opinion, coupled with the difficulty of forging so long a letter, shows, the document to be genuine. It was suggested that it might have been traced from another writing. But that does not disprove the admission of bribery. It only removes the evidence of it one step further back.

The conclusion I come to on the whole matter is, that the plaintiff is entitled to set aside the release of the 2nd March, 1882; that the property of Ludha Callianji is not ancestral property; that the will is not a fabricated document; that the plaintiff is entitled under it to more than Rs. 25,000; that the business passed to Tricumji after the death of the testator; that the plaintiff is entitled to one-half share in the balance to the credit of the business at the death of the testator, with interest at 6 *per cent.* since the date of the testator's death.

The plaintiff is, therefore, entitled to a decree and to the two accounts as above; but as he set up a case of fraud, and as he was, in my opinion, proved to have written the letter No. 11, I shall make no order as to the costs up to this date of the suit, including all interlocutory proceedings.

Attorneys for the plaintiff:—Messrs. *Crawford and Buckland.*

Attorneys for the defendant:—Messrs. *Payne, Gilbert, and Sayani.*