Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Doorga Pershad and others v. *Mussamut Kundun Koowar, from the High Court of Judicature at Fort William in Bengal; delivered Friday 19th December* 1873.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE Appellant in this case is the childless widow of Moneerut Dass, who was the son of one Showkee Lall, and the Respondents are the descendants of the three sons who, with Showkee Lall, constituted the family of the common ancestor.

The family, must be presumed to have been originally joint. The suit was brought by the widow, claiming as heiress of her deceased husband his share of the property in question. The family are Agurwallas by caste, but Jains in religion, and as the suit was originally framed she claimed to be entitled to the property of her late husband whether the family was divided or undivided, under the law regulating successions among the Jains. The third and fifth issues settled in the suit raised this question; and the Principal Sudder Ameen decided those issues, as well as those upon which the determination of this appeal depends, in favour of the widow.

Upon appeal the High Court held, first, that there was no sufficient evidence in the cause to show that the law of succession among the Jains was different from that of the ordinary

Hindoo law, governing the particular province in which the property was situated, which in this case is the law of the Mitacshara; but, secondly, that in the circumstances of the case the Plaintiff was under that law the heiress of her husband, and entitled to recover the property in dispute. Mr. Cutler, who appeared for the Respondents, did not altogether give up the first point; but as their Lordships have formed an opinion that the judgment of the High Court is correct upon the second, they will assume that it was equally correct in respect of the law regulating the succession of this family. The question then is reduced to this: was this family at the time of the death of Moneerut Dass an undivided Hindoo family in such a sense that, according to the law of the Mitacshara, his widow was entitled merely to maintenance, and his share passed by survivorship to the nearest male members of his family; or was it so separate in estate that by the operation of that law the widow was entitled to succeed to her husband?

It is an undisputed point in the case, that the members of this family in October 1851, that is, in the lifetime of Moneerut Dass, executed an ikrarnamah, and that thereafter, if not before, the property was managed and enjoyed in conformity with the provisions of that instrument.

The learned Judges of the High Court have held that, upon the authority of the case of Appoovier v. Ramasubha Aijan and others, 11th Moore's I. A., p. 75, the family must be taken to have been separate in interest and title, and therefore that the widow was entitled to succeed. The learned Chief Justice, it may be inferred from his judgment, would have been, independently of that case, of this opinion upon the construction of the ikrarnamah. The other learned judge, Mr. Justice Jackson, seems to have had serious doubts whether that instrument

did operate as a division of the family, but conceived himself bound, as we read his judgment, by the authority of the case in the Privy Council.

The authority of that case is of course binding upon us here; and the only question is, whether the present case is distinguishable from it. It is not necessary to go through the whole judgment, as Mr. Leith called upon us to do, or to consider with nice criticism whether this or that proposition is or is not stated in words stronger than were necessary. The broad point which their Lordships conceive to be decided by the case, is that there may be division of a joint and separate Hindoo family, and of the joint property without a regular partition by metes and bounds. Lord Westbury, after stating that the term division is capable of a two-fold application, that there may be a division of right, and there may be a division of property, says, "Thus after the "execution of this instrument there was a "division of right in the whole property, al- "though in some portions that division of right "was not intended to be followed up by an "actual partition by metes and bounds, that "being postponed till some future time, when "it would be convenient to make that partition." In another passage he says, "We find, therefore, "a clear intention to subject the whole pro- "perty to a division of interest, although it was "not immediately to be perfected by an actual "partition." And, again speaking of the legal effects of the deed, he says, "It operated in "law as a conversion of the character of the "property and an alteration of the title of the "family, converting it from a joint to separate "ownership, and we think the conclusion of "law is correct, viz., that that is sufficient to "make a divided family, and to make a divided "possession of what was previously undivided,

" without the necessity of its being carried out " into an actual partition of the subject matter." The fair inference from the decision seems to their Lordships to be that inasmuch as there may be a division of the kind there spoken of, viz., a division which though not carried out by a partition by metes and bounds, would, nevertheless, alter the *status* of the family, the question in every particular case must be one of intention, whether the intention of the parties to be inferred from the instruments which they have executed, and the acts they have done was to effect such a division.

The decision of this case must turn upon the application of these principles to the ikrarnamah, and their Lordships are of opinion that the construction which the learned Chief Justice put upon that instrument is substantially correct. The family at the time of the execution of the instrument appears to have been in that state which so often gives rise to very difficult questions in courts of law, and of which we had recently a very remarkable instance, namely, the question, whether the family is joint or separate; and if joint, in what degree, and in what particulars the different members of it possess separate property? It is clear that some members of this family before the date of the ikrarnamah had been carrying on business separately and on their own account. There was also a kotee in which they were jointly interested, and there seems to have been a number of landed estates, some of them standing in the name of one member of the family, and some of them standing in the name of another. That state of things may, however, afford an argument in favour of the contention of either party. On the one hand it may be said that in executing the ikrarnamah the members of the family desired only to make clear what was to

be joint, and what was to be separate. On the other hand it may be argued that the object of the ikrarnamah was to establish beyond all future question the undivided *status* of the family.

The learned Chief Justice appears to have assumed that the instrument was merely declaratory of the antecedent state of the family. Their Lordships do not think it necessary to decide that question, as to which there may be some doubt, because they entirely agree in an observation which he subsequently makes, to the effect that if the instrument did not declare that to have been the state of the family, yet upon the true construction of it it created such a state. However, there are passages which support the view of the Chief Justice as to an antecedent division of interest. The document begins by stating, "We four co-sharers being in possession " of equal shares, viz., of one fourth each without " contention from any one, appropriate and enjoy " the profits thereof in proportion to our re- " spective shares." Those words appear to their Lordships to point to an appropriation and enjoyment of the profits inconsistent with that which is the normal state of enjoyment of a joint and undivided Hindoo family. It then goes on to say, "Now, with a view to avoid future " complications, in consultation and agreement " among ourselves, we have under our signatures " executed four chittas with regard to the said " kotee up to 24th of the month of Kowar of the " year 1259 Fuslee, and four schedules with " regard to houses and shops, both ancestral and " purchased, mangoe and mahawa orchards; and " also four schedules regarding silver articles, " tent, &c., articles for assemblies and con- " veyance, &c., and all the partners have retained " one of each." The deed thus proceeds, "We " have executed this deed to have matters " entirely above board, and to have names

" enrolled in the Government record in respect " of the estates. It is desirable and very " necessary for us declarants, according to this " deed, to have the names of all the parties " enrolled for equal shares." Upon this it may be remarked that there could be no actual necessity, if they continued as a joint family, " to " have the names of all the partners enrolled for " equal shares, viz., one fourth in the name of " me Lalla Mukhun Lall, one fourth in the " names of us Lalla Mahaber Pershad and Mund- " hur Dass," and so on. There is not much, if any, evidence on the record as to what was done in order to procure a mutation of names, or to carry out this stipulation of the deed; but if it were carried out in the way proposed, that appears to their Lordships to be strong *primâ facie* evidence of the intention to hold the undivided shares as the separate property of each co-partner. It may not be conclusive, but at all events it is strong *primâ facie* evidence of such an intention. It is confirmed, in their Lordships opinion, by what appears upon the face of the butwara proceedings, in which the present respondent, the Plaintiff, is named as the heir of her late husband, and representing his interest in the proceedings taken for a formal partition by metes and bounds of certain properties between the whole of this family on the one side, and certain co-sharers in those properties on the other. The deed next proceeds to deal thus with the kotee, " Now also by amicable " settlement the business of the kotee will con- " tinue to be carried on jointly and in partnership " in the same manner as carried on heretofore. " We will amicably transact all matters connected " with the kotee in consultation and agreement " among ourselves, and will keep appropriating " and enjoying the profits thereof in proportion " to the aforesaid shares, viz., equal one fourth

" share each." It then provides for any estates which may be purchased out of the moneys of the kotee.

The Principal Sudder Ameen, upon the inspection of the accounts, has found (and the learned judges of the High Court agree with him) that the accounts were kept in a way from which it is to be inferred that when the accounts of the kotee were balanced each of the four partners was entitled to his separate share of the profits realised; or in other words, that the accounts were kept as they would be kept between four ordinary partners, and not as they would be kept as between members of a joint and undivided Hindoo family.

The deed then provides that certain silver articles, tents, carpets for assemblies, and conveyances, shall continue as before, in possession of all four sharers. Their Lordships do not think that that is a very unusual stipulation as to certain articles of property, even in cases in which partition is carried out formally, and, as to the greater part of the property, by metes and bounds. Therefore they can infer from that stipulation no intention contrary to the intention which the learned Judges of the Court below have imputed to the parties in framing this deed.

Their Lordships, after carefully considering the whole deed and the evidence in the cause, have come to the conclusion that this case is undistinguishable from that in the 11th Moore; that the real intention of the parties to the ikrarnamah was to hold and enjoy the property which was the subject of it in severalty; and that the decree of the Court below is correct.

It is to be regretted, no doubt, that the parties who make such arrangements should not declare on the face of the deed what their intention is, and that, if they are an undivided family, it is their intention thenceforth to cease

to be so. On the other hand, it is to be observed that there is no statement upon the face of the deed in question here that the *status* of indivision had continued up to its date.

On the whole their Lordships must humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this Appeal, with costs.