

(1938) 03 BOM CK 0017
In the Bombay High Court
Case No : O.C.J. Appeal No. 8 of 1935

Menahem Mesha Menahem Messa

APPELLANT

Vs

Moses Bunin Menahem Messa

RESPONDENT

Date of Decision : 07-03-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13
Evidence Act, 1872 — Section 41

Citation : AIR 1938 Bom 394 : (1938) 40 BOMLR 571

Hon'ble Judges : John Beaumont, J;B.J. Wadia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is an appeal from a decision of Mr. Justice Rangnekar. The suit was originally transferred from Aden, where the deceased testator was domiciled. So that the suit is heard by this Court as the Court which at the date of the suit had jurisdiction in the Protectorate of Aden.

2. The plaintiff is the only son and heir of one Bunin Menahem Mesha, who died on October 12, 1922, domiciled in Aden. The deceased left a will dated July 10, 1919, which is exhibit C, and the plaintiff sues in this suit for a declaration that that will is not the last will of Bunin, that the plaintiff is entitled to the whole estate as heir, that he is also entitled to a grant of letters of administration, and he further asks for administration. The Judge held that exhibit C was not the last will of Bunin, and decreed the plaintiff's suit, and from that decree this appeal is brought.

3. Appellant No. 1 has died, and his name has been ordered to be struck out; appellants Nos. 4 and 5 at their own request have been transposed and made respondents, and they support the other respondents ; so that the only effective appellants are those originally numbered 2, 3 and 6, of whom Nos. 2 and 3 were executors under the alleged will, and No. 6 was a legatee.

4. At the date of the death of the deceased he was a partner with his brother, original appellant No. 1, and other relatives, in the firm of Menahem Mesha, which carried on business at Aden, and owned a considerable amount of property. In addition to property at Aden the deceased left property in Egypt. Whether that property was his own or partnership property is not clear. At any rate he had property in his name in Egypt, and in 1923 the plaintiff started a suit in the Court of Port Said, which was subsequently transferred to the Supreme Court at Alexandria, and in that suit the plaintiff challenged the will, and asked for the grant of letters of administration to himself. The defendants to the suit were the executors named in the will. On June 30, 1925, the Supreme Court at Alexandria gave judgment, holding that the will of the deceased was null and void, and they granted letters of administration to the plaintiff limited to the personal estate situate within the jurisdiction of the Court.

5. Mr. Justice Rangnekar in the Court below held that that judgment of the Alexandria Court, being a judgment which affected status by taking away from the defendants the status of executors and conferring on the plaintiff the status of an administrator, was a judgment in rem, and binding, so far as related to the status which it established or took away, on the whole world. I am unable to agree with that view. In my judgment no Court can pronounce a judgment in rem binding outside the State in which the Court exercises jurisdiction unless such judgment affects either a thing situate, or a person domiciled, within such State, see Halsbury's Laws of England, 2nd Edition, Vol. XIII, p. 420. We have been referred to a considerable number of cases on the subject including *Dogliani v. Crispin* (1866) L.R. 1 H.L. 301, *Shaw v. Gould* (1868) L.R. 3 H.L. 55, *Castrique v. Imrie* (1869) L.R. 4 H.L. 414. In *re Trufort* : *Trafford v. Blanc* (1887) 36 Ch. D 600, *Ewing v. On Ewing* (1885) 10 App. Cas. 453 and *Concha v. Concha* (1886) 11 App. Cas. 541. In my opinion those cases establish the following propositions which are relevant for the purposes of this case, though they also establish a good many other propositions :-

1. That where the Court of a State gives a judgment affecting the status of a person domiciled within its territory, such judgment is treated by the comity of nations as analogous to a judgment in rem, and as binding all the world over.

2. That the succession to the estate of a deceased person is governed by the law of his domicile.

3. That where a person domiciled in one country dies leaving assets situate in another country, the Courts of the latter country have jurisdiction to appoint a representative of the deceased in that country and to distribute the assets in that country according to the law of succession of the country of domicile, such law being ascertained in accordance with the ordinary laws of evidence, which usually involve calling expert witnesses on the subject. I know, however, of no case which establishes that by the comity of nations the Courts of one country are bound to accept as conclusive, on a question as to its own law and in a matter upon which it is called upon to adjudicate, the judgment of a foreign

Court, and I am not prepared to accede to the proposition. Mr. Coltman for the respondents has not seriously argued that there is any rule of international law which requires this Court to accept the judgment of the Alexandria Court as to the law of the deceased's domicile, which is our own domestic law, as binding outside the limits of that Court's jurisdiction, but he argues that in British India Section 41 of the Indian Evidence Act goes further than the rule of international law applicable elsewhere. In my opinion that is not so. Section 41 provides that "a final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled: to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant; when the existence of any such legal character, or the title of any such person to any such thing, is relevant," and then the section enacts the effects of any such judgment. It is argued by the learned Advocate General for the appellant that a "Court" in that section means a Court of British India, but that, in my opinion, is plainly not so. Although the expression is not used, the section is clearly dealing with what are known as judgments in rem, and, in my opinion, "competent Court" means the Court of any country which is competent to pass such judgment as is referred to in the section, that is to say, putting it shortly, a judgment in rem. As, in my opinion, the Alexandrian Court in this case was not competent to pass a judgment in rem in relation to a deceased person who had died domiciled in Aden, Section 41 of the Indian Evidence Act does not help the respondents. It is not disputed by the appellants that the judgment of the Alexandrian Court is binding upon them, whether or not they were parties to the decision, in respect of the assets situate in Egypt. So that it is not necessary for us to consider whether in respect of those assets the judgment of the Court binds any one but the parties before it. In my opinion, however, the argument of the appellants is right that in respect of assets outside Egypt the judgment of the Alexandrian Court has no effect as a judgment in rem.

6. The next question is whether it has effect as a judgment inter partes, and is binding on the parties to the suit u/s 13 of the Code of Civil Procedure, which provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title, with certain exceptions, which in my opinion do not apply to this case. I think therefore that the judgment is binding on the persons who were parties to the suit, that is to say, the original appellants Nos. 2 and 3, but the original appellant No. 6 was not a party. It is suggested that he is bound because he was a legatee claiming under the will, and the executors appointed by the will were parties to the litigation in Egypt. One may assume, I think, that by the rules of procedure of the Alexandrian Court the executors sufficiently represented the legatees under the will for the purposes of the suit, but it is going rather further to say that legatees claim through the executors, seeing that the title of a legatee may

clearly be good, although the title of the executors is bad. In the present case it is to be noticed that in his plaint in the Alexandrian suit the plaintiff challenged the appointment of the executors, apart altogether from the alleged invalidity of the will, his contention being that as the deceased left a major¹ heir, it was not competent for him by Jewish law to appoint an executor. The Court upheld that contention. It seems to me, therefore, impossible to say that in that particular suit the executors, whose title as such was successfully challenged, can be held to have properly represented the legatees so as to bind them. In my opinion, therefore, the judgment of the Alexandrian Court is not binding upon appellant No. 6, who was not a party to it.

7. It is therefore necessary to consider whether the will of the deceased is binding according to the law in force in Aden. The parties are Jews, and expert evidence was given as to the law affecting Jews domiciled in Aden, and the learned Judge went at great length through the texts which had been cited, and the expert evidence, and arrived at the conclusion that the will was invalid according to the law of the testator's domicile. As I agree with the conclusion of the learned Judge on that point it is not necessary for me to go at any great length through the texts and the expert evidence. The defendants had examined on commission some people called Sherias, people who had been appointed Sherias in Aden, and they seem to be persons having some knowledge of Jewish law in Aden. The learned Judge came to the conclusion that they were not experts, and in any case they were plainly not impartial, because they had been appointed Sherias by the firm in which the defendants and the deceased had been partners, and I agree with the learned Judge that their evidence is not of any value. The only real expert who was called was Dr. Eliash, on whose evidence and demeanour in the box the learned Judge commented very favourably. Dr. Eliash in his evidence states the classes of wills which can be made under Jewish law, and his evidence in the main is that Jewish law is the same all the world over. He says :

The main forms in which a will can be made under the Jewish law are three. A direct will in the sense of the Roman *testamenti-factio* is not possible under the Jewish law. The widest formula for disposing of any property is by way of a conditional bond or charge, whereby the deviser undertakes towards the recipient an obligation in a sum of money which may be discharged by delivery to the recipient of either a certain chattel or a certain share in the estate. In that way he leaves the heirs an option either to discharge the obligation in the terms stated or by delivering the object intended or the share in the estate. He would obviously increase the obligation to such an extent as to leave the heirs no option but to give the part of the estate or the object intended. The second way is by way of gift *inter vivos* which is to operate after his death. This again falls into two main divisions, namely irrevocable and revocable. The third way which can only be made use of by a person on sick bed is *donatio mortis causa*.

8. There is no doubt that the will in the present case is made in the second form,

and as to that the witness goes on to give the following evidence.

The second way is always a gift in form but in essence it is testamentary disposition. The object which may be given away is limited to the following : It must be definitely known, and definable. It must be in the possession of the donor and it must exist at the time when the gift is created. If the thing donated ceases to exist between the time the gift is created and the death of the donor the result would vary according as the gift is revocable or irrevocable. If it is irrevocable, then the donee has a claim against the estate for its equivalent. If it is revocable, then he has no claim and the very fact that the object has ceased to exist is the best evidence of revocation.

9. Then he was asked as to the conditions affecting a gift of the second) class, and he says :

As regards the execution of the deed there must be a Kinyan. Kinyan is like symbolical transfer of property.

10. The witness then referred to many texts, and I would only mention exhibits D9, 10, 16 and 18 as corroborating the evidence of the witness. D18 gives an illustration, which is, I think, apposite. The author of the text points out that a gift of a half share of a field would be good, because the Court would assume that the donor meant the worst half share of the field, and that the donee accepted the gift on that basis, a rule which might not appeal to the sentiments of all nationalities. But then the learned author goes on to say that a gift of a share in land which the donor had in partnership with others would be bad as being too indefinite, because it could not be assumed that the donor as a partner was entitled either to the best or the worst half of the land-Now the present will is, as I have said, in form a will of the second class described by Dr. Eliash, and purports to have been effected by Kinyan, that is, symbolical delivery of possession. The testator was, I think, aware of the difficulty of giving a share in a partnership which might exist at his death, because that would not be a share of definite property in his possession. For some reason or other he did not adopt the form of making his will by means of a conditional bond. As I read his will, what he does do is this. He gives all his property, lands and houses, and chattels and coins and promissory notes which he had got in partnership with his brother and with the other relatives he mentions, and he gives that property in different shares amongst the legatees. In all the testator endeavoured to dispose specifically of nine-twelfths of his total share, leaving the other three-twelfths undisposed of. What exactly would be included in the word "property, whether that would embrace things like merchandise, or other property not specifically mentioned, may be doubtful, but at any rate, what the testator has purported to do, as I read his will, is to give specific property which he then holds in partnership with others, and to give that specific property in certain shares. It seems to me quite impossible to say that that is a gift of specific definite property which is in the possession of the donor. The interest which the testator had in this property was in his capacity as a partner in a subsisting partnership.

It seems to have been a partnership at will on the terms of a deed which had come to an end in 1916, but, at any rate, it was a subsisting partnership, and continued to subsist until the death of the testator. The testator could not say that any particular asset belonging to the partnership belonged to him. His only right was to share in the profits of the partnership and to share in the assets on a winding up. But it was plainly quite impossible for him to take possession of any particular asset of the partnership and still more impossible for him, after taking possession of such asset, to hand over shares of that asset to his legatees. The will, in my opinion, was clearly one which a Jew domiciled in Aden was incompetent to make, and that really disposes of the case.

11. A good many other objections were taken to the will, and those objections have been argued, and the respondents do not desire to abandon them. I can however dispose of them shortly. It is said that it is not proved that effective Kinyan was ever performed. As to that my impression is that as the testator alleges in his will that Kinyan was performed, Kinyan being a purely symbolical act of delivery, we should have to accept the testator's admission as conclusive.

12. A much more serious difficulty in the way of the appellants is that according to the evidence of Dr. Eliash and the texts on which he relies, a will of this character, to be effective, must be delivered to the intended donees or to some one on their behalf. Two witnesses gave evidence as to the custody of the deceased's will after it was made, namely Mr. Howard, and Tob, a nephew of the deceased, and the learned Judge accepted the evidence of Howard. His evidence is that directly the will was executed it was placed by the testator in a sealed envelope, and locked up in his safe. The evidence of Tob is that it was not in the safe, but was in an almirah or cupboard, which was in the partnership office and of which the deceased as senior partner generally had the key, but that when he went away he left the key with his brother Judah, and sometimes told the witness to keep the key. But even if one accepted the evidence that the will was in a sealed envelope in the almirah, although I should think it much more probable that it was in the safe, in my opinion it is impossible to say that the mere fact that partners were given possession of the key of the cupboard would amount to delivery of this will, which was in a sealed envelope. Clearly they would have been guilty of a gross breach of confidence if they had taken the will out of the envelope or made any use of it. I am disposed to think, therefore, that the will is not proved to have been delivered to the legatees or any one on their behalf, and under Jewish law that alone would invalidate it.

13. The appellants also sought to rely on the doctrine of precept, by which a son may be bound to carry out the wishes of his deceased father, but the text relied on, exhibit E, says :

There is a precept to fulfil the words of the deceased, even in case of a healthy person who made testamentary provisions and died, but only provided he at the same time delivered the property to a third person for that purpose.

14. As in my opinion the property was incapable of delivery in this case, the doctrine of "precept" can have no application.

15. Reference has also been made to the doctrine of Kimli, which is discussed in the judgment of the learned Judge. That seems to be a rule under which a party in possession of property, if he can cite two texts in his favour, is entitled to call Kimli, and thereupon his title, as I understand it, is indefeasible. Mr. Coltman's client is in possession, but though Mr. Coltman cited more than two texts in his favour, he did not call "Kimli", and, if he had, we could not, in my opinion, have paid any attention. The doctrine seems to be in the nature of a rule of procedure and to be inconsistent with the Indian Evidence Act. We have to make up our minds as best we can from the texts and the expert evidence as to what the Jewish law is. We cannot, in my judgment, accept a rule which compels us to stop the inquiry at a certain point and to shut out evidence admissible under the Indian Evidence Act. I mention the doctrine, because the appellants, although they did not say Kimli in this Court, nevertheless desire to reserve the right to rely on the doctrine in the event of an appeal.

16. In my opinion the appeal fails because the will of the testator was not made in accordance with the system of law by which he was bound, and must be dismissed. Appellants Nos. 2, 3 and 6 to pay the plaintiff's costs of the appeal. No order as to costs of Mr. Desai's clients, who are newly added as respondents. Cross-objections dismissed with costs. Administration order stayed.

B.J. Wadia, J.—There are several questions of law and fact arising on this appeal. The first important question relates to the effect which this Court would give to the judgment and order of the Supreme Court of Alexandria dated June 30, 1925. As the learned Judge in the Court below has observed, the question is not an easy one. The principles, however, on which it can be decided have been considered in the several cases that were cited and discussed before us. The Alexandria Court declared the will of Bunin dated July 10, 1919, to be null and (void and of no effect, and ordered letters of administration to issue to the plaintiff, the 1st respondent in this appeal, who is the only son and heir of the deceased, to the estate of the deceased lying within the jurisdiction of that Court on the footing of the deceased having died intestate. It was urged that even if it was not necessary for the Judge in that Court to decide against the validity of the will for the purpose of the proceedings before it, yet that in fact he had decided it, and his decision was recorded in the order of the Court, and that therefore his decision on the point was conclusive against the world. Section 41 of the Indian Evidence Act deals with what are known as judgments in rem. The term judgment in rem is not used in the Indian Evidence Act, but it is clear that the section incorporates the law on the subject. It is not easy to give any satisfactory and comprehensive definition of a judgment in rem, but it is defined in the *Duchess of Kingston's Case*, *Smith's Leading Cases*, 13th edn., Vol. II, p. 666, as "an adjudication pronounced (as indeed its name denotes) upon the status of some particular subject-matter, by a tribunal having competent authority for that

purpose," and Cozens Hardy M. R. cited this definition with approval in *Hall v. Clifford* : *Clifford v. Timms* : *Clifford v. Phillips* [1907] 2 Ch. 236, 243. It is further stated that such an adjudication, " being a most solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication." It is thus conclusive for or against all persons, whether parties, privies, or strangers, to the matter actually decided.

2. The judgment of the Court at Alexandria was pronounced in its Probate Jurisdiction. It purported to take away the status of the executors mentioned in the will, and to confer upon the plaintiff the status of an administrator, the Court confining its grant of letters of administration to the estate of the deceased within its jurisdiction. It further declared that the plaintiff was solely entitled to all the real and personal estate of the deceased within that jurisdiction. A judgment of a Court of Probate which creates the status of an administrator is on the face of it a judgment in rem, and the question is whether the judgment of the Alexandria Court is of a character which bars the defendants from setting up the will in this suit with regard to properties other than those which were the subject of the proceedings in that Court. In other words, the question is whether that judgment has created for the plaintiff the status of an administrator " absolutely", to use the word mentioned in Section 41. If so, was the Alexandria Court competent to create it ? I do not think that the word " Court" in Section 41 is restricted to a Court in British India, and I agree with the observation of Chandavar-kar J. in *Chanmalapa Chenbasapa v. Abdul Vahab* (1910) ILR 35 Bom. 139, 145 : 12 Bom. L. R. 977, though it was only obiter, that it is not so restricted, I do not see any reason why the judgment of a foreign Court should be excluded from the operation of Section 41, provided it is competent to pronounce a judgment such as is contemplated by the section. If the Court is competent to pronounce a judgment in rem, its effect would be to bind not only the persons who were parties to the suit, but all persons and all Courts, until it was set aside. It would be a judgment conclusive against the world as to the status or title which it established. It is not in dispute that the deceased Bunin was domiciled in and was a resident of Aden up to the time of his death. It is also not in dispute that the Alexandria Court was not the Court of domicile. As stated in *Halsbury's Laws of England*, 2nd edn., Vol. XIII, p. 420, para. 473, a judgment in rem can have no effect as such beyond the limits of the State within which the Court delivering the judgment exercises jurisdiction, unless the thing affected is situate, or the person affected is domiciled, within those limits. The two cases relating to the exercise of the Court's jurisdiction when a person is domiciled within its limits, which are cited in the foot-note, are matrimonial cases. But a decree for divorce which alters the status of parties to a marriage and which might, as it often does, affect the legitimacy of after-bom children, is certainly much more like a judgment in rem than a judgment in personam, and the principle underlying such a judgment is the same as the judgment of a

competent Court in the Probate Division. That is clear from Section 41 itself. The person affected by the judgment of the Alexandria Court, namely Bunin, was not domiciled within the limits of its jurisdiction, and as to the thing affected, only a small portion of his estate was actually lying within those limits. It is a well-known rule that the moveable property of a deceased, in whatever country it is locally situate, is regarded as to succession, whether testate or intestate, by the law of the country to which he belongs, that is by the law of the domicile. The material point, however, is to determine the effect of a grant of letters of administration in a country other than that of the domicile. The grant no doubt follows upon the judgment. The judgment of the Alexandria Court has purported to create a status of administrator in the plaintiff by declaring against the will. A question of status, however, is a question which has to be determined according to the law of the domicile. Can a foreign Court decide a question of status which is to be absolute as against the world ? It is argued that it is open to the foreign Court to ascertain as best as it can the law of the domicile by taking expert evidence on the subject when necessary, and it can then pronounce judgment upon the question of status. The argument seems to be based on certain dicta in cases where it is said that a judgment in rem in order to have a binding effect upon all the world in respect of moveable property need not be a judgment of a Court of exclusive jurisdiction, and that such judgment need not necessarily be a judgment of the Court of domicile, provided the Court which pronounced it follows the law of the domicile. But so far as I am able to gather from the cases which have been cited and discussed, such expert evidence is taken in a foreign Court whenever it is necessary for that Court to ascertain the law of the domicile for the purpose of determining the succession to moveables within its jurisdiction in order to enable that Court to make its grant, just as in this case the Alexandria Court made a grant limited to the moveables belonging to the "estate of the deceased within its jurisdiction. Such a grant operates merely for the purpose of getting in or collecting the property within the jurisdiction of the foreign Court. In Dicey's Conflict of Laws, 5th edn., p. 484, Rule 118 is stated in this way :-

A valid judgment in rem in respect of the title to a movable gives a valid title to the moveable in England to the extent to which such title is given by or under the judgment in the country where the judgment is (pronounced).

In his commentary Dicey observes that a valid foreign judgment or judicial proceeding in rem which either directly or indirectly determines, the title to a moveable is conclusive against all the world ; and he adds that "this applies to all proceedings in rem against moveable property within the jurisdiction of the Court pronouncing the judgment." In my opinion, therefore, the judgment of the Alexandria Court has not the absolute effect of creating the status contemplated by Section 41, but has effect only qua the property situate within the jurisdiction of that Court. A judgment in rem as to status " absolutely" must be decided by the law of the domicile and in the Court of domicile which is the best judge of that law. Otherwise there might be an anomalous position, if there were two judgments in rem, one of a Court of competent jurisdiction having decided in

rem, and another of a foreign Court which may also proceed in rem and pronounce a contrary decree with regard to the same res or subject-matter. There cannot be two judgments in rem on the question of status having effect absolutely, that is, against all the world. The only judgment in rem as to status absolutely is the judgment pronounced not only according to the law of the domicile, but by the Court of domicile. The judgment of any other Court as to such status would have no extra-territorial force or validity. The very foundation of the jurisdiction in all cases of proceedings in rem against moveable property is the power to deal with it or to dispose of it, if it is within the jurisdiction of the Court pronouncing the judgment in rem. See Dicey's Conflict of Laws, 5th edn., pages 418-419 Over such property the foreign Court would have a rightful jurisdiction, " founded on the actual or constructive possession of the subject-matter (res)."

3. There is also a further limitation to the effect of a judgment: in rem. It is not conclusive if it relates to a matter which need not have been controverted or which was not material or which only came collaterally into question or which was only incidentally cognizable. It was not necessary for the Alexandria Court to decide on the validity of the will and the bequests contained in it for the purpose of the grant of letters of administration to the plaintiff limited to the estate of the deceased within its jurisdiction. No question can be said to be conclusively determined if the Court has expressed an opinion upon it which was not necessary for its decision. Even if therefore the Alexandria Court had not pronounced against the validity of the will one way or the other, the grant would still have been limited as it was, and the decree would have been the same, and the plaintiff would have been declared entitled to the real and personal estate of the deceased within its jurisdiction. The principle is that in order to be a judgment in rem binding on the world there must be a finding on status which is not only the foundation of the judgment but is necessary for it. Under all these circumstances I am of opinion that the judgment of the Alexandria Court is not a judgment in rem declaring the status of the administrator absolutely.

4. The next question is whether that judgment is valid inter partes under the provisions of Section 13 of the Civil Procedure Code. Under that section also the judgment must be of a Court of competent jurisdiction. But the jurisdiction which alone is important in such matters is the competence of the Court in an international sense, that is its territorial competence relating to the subject-matter and the defendant. As pointed out by Lindley M. R. in *Pemberton v. Hughes* [1899] 1 Ch. 781, if a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Such a judgment cannot be impeached on its merits. Further, the previous judgment which is to operate as res judicata must be a judgment between the same parties or parties claiming under them, litigating under the same title. Two of the defendants in the suit in the Alexandria Court are also defendants in this suit. In

paragraph 13 of the statement of claim the plaintiff in that suit said that the alleged will did not contain the appointment of the defendants as executors, and that the appointment of the defendants as "Apothropos" or executors in the will over an heir who is not a minor was null and void by the law of the domicile of the said deceased. That allegation is denied by the executors. In my opinion there is considerable force in the contention that the plaintiff cannot say that the will does not appoint executors or that their appointment is not valid, and at the same time say that such executors represent the legatees in a probate action. Ordinarily, the executors would represent the legatees including the residuary legatee regarding all matters which have necessarily to be decided in a suit to which the executors are parties. That is pointed out by the House of Lords in *Concha v. Concha* (1886) 11 App. Cas. 541. It cannot, however, be said here that the executors whose title was challenged represented the legatees, nor that under the circumstances the legatees claimed through those executors. There is also nothing to show that all the legatees were cognizant of the proceedings in the Alexandria Court at the time and could have intervened if they chose to do so : see *Young v. Holloway* [1895] P. 87, If they were not represented and were unaware of the proceedings, it would be contrary to natural justice to hold that they could be injured by any determination which they had not the opportunity to controvert. In my opinion, the proceedings in the Alexandria Court do not constitute a bar to this suit as far as any one who was not a party to that suit is concerned.

5. The next important question is whether the will of Bunin and the bequests and provisions contained in it are valid according to the Jewish law. The will is in the Hebrew language, and was written by the testator himself. It is in one of the archaic forms known to the ancient Jewish law, namely, by way of a gift *inter vivos* which is to operate after the death of the testator and is revocable by him during his lifetime. It has been attested by two witnesses according to the requirements of the law. The will has been translated into English by an expert in Jewish law, Dr. Eliash, and the translation has been accepted by all parties as substantially correct. He also gave evidence as an expert in Jewish law in the Court below. The defendants had two experts examined on commission, but none was examined before the learned Judge. Various texts from the old Hebrew writers and commentators, not always easy to explain or to reconcile, have been also translated and put in, and have been relied on by both sides in support of their contentions. The learned Judge has discussed and considered these texts exhaustively, and taking them in connection with the evidence recorded I agree with his conclusion that the will is invalid and not in accordance with the Jewish law. It has not been seriously suggested that the opinion of the "Sheriah" at Aden, a body of persons who deal with matters of marriage, inheritance and divorce, and which pronounced in favour of the will, is binding upon this Court, It goes without saying that it could not be binding if it was pronounced in the absence of the plaintiff, that is, without hearing him.

6. It is not in dispute that Bunin had a half share in a partnership business which

he carried on with his deceased brother Judah and his three nephews, being the sons of another brother Mesha. He divided his half share in the partnership assets, excluding the dwelling houses, into twelve parts, and by his will devised two in favour of his son the plaintiff, two in favour of his grandson since deceased, two to his nephew Zion son of Judah, and one to each of three grandnephews. This makes a total of nine, leaving three out of the twelve shares undisposed of. It is one of the requirements of the old Hebrew law, as appears from the texts, that the object of a revocable gift inter vivos must be a thing which is definitely known ; (that it must exist at the date of the gift, and must be in the possession of the donor. A gift of future property is not valid according to that law, nor can a man assign something which is not in his possession either by sale or by way of gift. A share in a partnership which is a going concern or rather a share out of a share, the twelve shares being carved out of Bunin's half share, is in my opinion something which is not definite. It does not exist and is not in possession, and therefore could not pass by a gift inter vivos. It can only be given, as Dr. Eliash stated, by that form of will called " a conditional bond" or a " charge-will," and it is not disputed that that is not the form used by Bunin. A present share in a going partnership is something indefinite according to English law, and it cannot be said to be definite merely because it is capable of being in some way rendered definite. No partner under the English as well as under the Indian law can point to any specific item of either moveable or Immovable property belonging to the partnership as his own and appropriate it to his own share. In order to ascertain that share the assets would have to be realised for payment of debts and liabilities. As pointed out by the learned commentators of Pollock & Mulla's Law of Contract, 6th edn., p. 704, the only conclusive measure of a partner's share is what he is entitled to claim on the determination of the partnership or could at any given time claim, if the partnership had at that time to be wound up and its assets realised and distributed. It is nobody's case that there was a dissolution at the time or that any dissolution was even contemplated at the time. In fact, the shares bequeathed were to remain in the partnership, either for thirteen or for fifteen years from the date of the will, though the original partnership period had long expired", and the partnership at the time was only one at will. The appellants, however, rely on certain texts of the Hebrew law on the subject. One of them is from the Tur Hoshen Mishpat, chapter 278, paras. 12 and 13. That was a code of the civil law which was prepared somewhere about the 14th century. It provides that a first born son can effectively sell his share as first born before division because he has got a right therein before division. It was argued on behalf of the appellants by way of analogy that a partner can also sell his undivided share or make a gift of the same before dissolution, a gift and a sale being put by the Hebrew texts on the same footing. In my opinion, however, the analogy does not help the appellants at all. The share of the first born becomes defined on the death of the father, even though its value may not be immediately ascertained, whereas the share of a partner does not become defined until on the termination of the partnership or on dissolution. As I have said before, the partnership was still continuing, though

at will, and no dissolution was contemplated at the time. The other text which the appellants rely on is from Tur Beth Joseph, chapter 278. That is also a commentary on the Jewish law. It provides that a partner is at liberty to sell his share as stated in chapter Hammokher et Habbait (62). That refers, however, only to a field held by two persons in partnership, A field is a specific thing with a specific area, and is not a thing which is indefinite as a share in a going concern. I do not therefore think that these two; texts help the appellants at all. On the other hand there are texts from the Hoshen Mishpat, chapters 176-179, which say that with regard to a thing which belongs to a partnership there is no exercise of possession by one of the partners against the other ; if he wants to take his share, he must effect a partition, which is something corresponding to the dissolution of a partnership business. In other texts it is also pointed out that in the case of a share of a house or land owned in partnership there is what is called " the indefiniteness of the object." The only way to dispose of such a share is to do so " by way of undertaking," that is to say, by way of a " charge-will," which we have not got here. That is pointed out clearly in an extract from the Tur Beth Joseph, chapter 250, Section 15, which says that if a man has got a "going concern " or merchandise or chattels which cannot be defined, and he wants to divide the same and to give more to one and less to another, there is " no way for him in which he can make them acquire by way of a gift of a healthy person from to-day to operate after death, lest what he has to-day will not be his at the time of his death." Therefore he cannot achieve it in any way " but by way, of obligation, that is to say, that he will bind himself and his property from to-day and after death to each one of them for as much as he likes whether more or less."" That is a clear statement as to how a share in a going concern can be left by a testator to a legatee, and the shares left by Bunin out of his half share have not been left in the manner indicated by the Hebrew texts. Both therefore on a construction of the gift according to the Hebrew texts and according to the principles of English law the gift is not valid and not binding upon the plaintiff who is the only heir of the testator. ? There are also various objections to the valid execution of the will. The two principal objections are (i) the want of performance of the proper " Kinyan," that is the omission of the formal act of acquiring the thing gifted by or on behalf of the donee, and (ii) the absence of delivery of the will to the donee or his agent. The Jewish law requires strict proof of " Kinyan" as part of the execution of a Jewish will. There are three forms of "Kinyan." Two of them are referred to in the will, namely, " Kinyan Sudar" and " Kinyan Agav". " Kinyan Agav" is the form used for acquiring moveables along or in coherence with Immovable property, but it is essential that the Immovable property must pass first, and then the moveables pass after it. The donee must acquire firstly the immovables, and through them the moveables. The question is whether these methods of transfer have been observed in the proper order in the will. The order is not clear. The whole will has not been very happily or clearly worded. The learned Judge in the Court below is of opinion that as " Kinyan Sudar" comes after " Kinyan Agav", the gifts have not been made in the proper manner and with the necessary formalities, and I agree

with his conclusion. It was further pointed out that several categories of objects were comprised in the gifts, e.g. coins, promissory notes, and even outstandings would be covered, if the words "all my property" have a wider meaning, and that the proper "Kinyan" had not been performed in respect of these objects. Under the circumstances another doctrine of the Hebrew law would apply, namely, that the "Kinyan" being bad in part must be considered bad as a whole, though it may be pointed out that according to the texts there is a conflict of opinion on the subject. It has been urged before us that any defect that there may be is cured by reason of the acknowledgment of the performance of "Kinyan" in the note at the end of the will. But that strictly speaking is not an acknowledgment by the testator himself; it is a statement of the attesting witnesses, made very probably in the testator's presence, so that it may be binding upon him. It was further urged that it was not necessary to perform "Kinyan" by reason of the technical words used in the will, namely "Wenatati" and "Na-tati", meaning either "I gave" or "I have given." It is said that these are words of admission on the part of Bunin that he had done something in the past, which may have been even just before the will was written out, and that he was only confirming or admitting what he had already effectively done. There is a conflict as to what exactly the meaning of those words is. If they are capable of two meanings, namely, "I gave" which refer to the past, or "I have given" which refer to what he was giving by the will itself, the more natural and proper construction would be that the testator was making his gifts by the will, and not merely admitting what he had done in the past. In fact, one of the respondents' own witnesses, Tob, has stated that it was after the will had been completed and attested that Bunin expressed his satisfaction that he had made the will for the benefit of those whom he intended to benefit. That would ordinarily refer to what was done by the will itself. The Jewish expert Dr. Eliash, whose evidence and interpretation of the texts the learned Judge has accepted, was of opinion that the proper "Kinyan" should have been performed in spite of the use of the words. The learned Judge agreed with that opinion, and I see no reason to differ from it myself.

7. It is another essential requirement for the validity of a will under the old Hebrew law that it should have been delivered to the donee or his agent, that is to say, the will should have been published in the lifetime of the testator himself to the different donees or their agents. There is no text which says that delivery can be dispensed with when there is a gift inter vivos which is revocable. Some texts have been relied on by counsel for the appellants, but they refer to an irrevocable gift. In an extract quoted from Tur Hosken Mishpat it is said that a deed of gift found in the safe of the deceased is worthless in case it was either the gift of a sick person the effect of which only began after his death, or the gift of a healthy person who wrote therein "if I do not change my mind till after death," meaning that he did not change his mind in his lifetime. Such a gift is invalid for want of delivery of the deed or writing. Another text from the Tur Hoshen Mishpat also lays down that the donee acquires no right to a gift so long

as the will has not been handed over to him in the donor's lifetime. There is some conflict of evidence as to whether the will was in fact delivered by the testator to Judah, one of the executors, as stated by the witness Tob, or whether the testator put it in a sealed envelope in his safe and kept it there as stated by the witness Menahem Howard. They were both examined in Court, and the learned Judge has accepted the evidence of Howard in preference to that of Tob. Even if there was a delivery to Judah, it would be delivery to an executor, and according to the old Hebrew law delivery to the executor is not delivery to an agent of the donee, because until the death of the donor or the testator the executor or "Apothropoe" is only the agent of the donor. Further, there cannot be a valid appointment of an "Apothropos" when the only heir of the deceased, as in this case, is a major. The will was kept in safe custody by the deceased himself, and was produced on his death from his safe, the keys of which were with one of his widows. This essential requirement for the validity of a will under the Hebrew law therefore has not been complied with. It was argued on behalf of the appellants that the defect, if any, was cured by recourse to the maxim, namely "the precept to fulfil the words of the testator." But on a consideration of the texts I find that the precept is not enjoined on the son as a legal duty; it is a matter of persuasion. A legal duty would be a binding obligation, but one text distinctly says that the son must apply the precept "leniently", which obviously he could not do, if in law he was bound to apply it strictly. Lastly, there is the doctrine that the heir is what is called "Muchzak", that is the man who is entitled to legal possession, and the plaintiff as the only son and heir was entitled to legal possession of the estate of his father. The respondents' own witness Solomon Aron, who was examined as an expert on commission at Aden, said as follows:-

I agree that if a will is disputed and is doubtful¹, the heir is the "Muchzak" and the legatees must prove their right to the legacy. If there is a difference of opinion between the authorities, the heir can say "Kimli".

8. I do not think it is necessary to go into the doctrine of "Kimli" at length. It means that where there is a conflict of authorities, the person in legal possession of the property can plead "Kimli" by showing that two reliable authorities are in his favour, even though other authorities are not. In my opinion the will was not delivered or published to the donees in the lifetime of the testator, and that defect is fatal to its validity.

9. I may mention here that counsel for the plaintiff, namely, the 1st respondent, said at the close of his address that he was not prepared to give up a single point taken by him in the Court below, even though he did not deal with all of them at length before us. All the points arising in connection with the will have been dealt with by the learned Judge. He has pronounced definitely and distinctly against the will, and I agree with his conclusions regarding the same.

10. Under these circumstances I agree that the appeal must be dismissed with costs.