1880

In re HAJI ISMAIL HAJI ABDULA.

of opinion that such probate cannot be granted. We do not think that Cutchi Memons can be regarded as Hindus within the meaning of the Hindu Wills Act, by which section 242 of the Indian Succession Act with the clause subsequently added by Act XIII of 1875 is made applicable to Hindus. We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law. That is not enough to bring them within the term 'Hindu' as used in the Hindu Wills Act. It is admitted that, among such Memons, marriages are celebrated by the Kazi, they attend the masjid, they belong to the Suni division of Mahomedans, and make pilgrimages to Mecca. Under these circumstances we must hold them to be Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established.

Probate, therefore, in this case cannot be granted to take effect throughout India. It must be limited to this Presidency, and will be in such form as to confine its operation within the limits prescribed by Act XXVII of 1860.

Attorney for the applicants.—Mr. *H. W. Payne.*

Attorney for Government.—Mr. *R. V. Hearn.*

TESTAMENTARY.

September 27.

Before Sir M. R. Westropp, Kt., Chief Justice, and Sir C. Sargent, Justice.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF THAKER MADHAVJI DHARAMSI.

GOKALDAS MADHAVJI, APPLICANT.

Indian Succession Act (X *of* 1865), *Sections* 179, 226—*Probate—Limited probate.*

Probate limited to part of the estate cannot be granted in cases where under section 179 of the Indian Succession Act (X of 1865) the whole estate is vested in the executor.

THE applicant in this case was the only son and universal legatee and devisee of the testator (a Hindu) who died on the 18th January, 1880, leaving a large amount of property, both

moveable and immoveable, all of which, with the exception of a house of trifling value, was self-acquired. The testator left a widow and a married daughter him surviving. His will was dated the 18th March, 1879. The applicant now sought probate limited to certain specified outstanding debts and shares in joint stock companies.

Inverarity for the applicant.—The will in this case was made in 1879, and, therefore, by the Hindu Wills Act, sec. 2, the Indian Succession Act (X of 1865) applies. We only need probate for the purpose of collecting a few outstanding debts, and effecting the transfer of some shares. As the only son of the testator the applicant takes all the property without the assistance of the Court, and it is unjust to make him pay duty upon the whole estate when he only needs probate to deal with a small part of it. The issue of limited probate is contemplated by the Indian Succession Act. Sections 212 and 220 enable the attorney of an absent person to obtain such probate, so that hereafter, when the applicant leaves Bombay, he will be able to obtain indirectly what he now asks for directly.

[WESTROPP, C.J.—No. 488 of the Supreme Court Rules, which is continued in force by Rule I, Chapter II of the High Court Rules, requires us to follow the English practice in the absence of special legislation inconsistent with it.]

But the rule in England, that limited probate should not be given, is not inflexible: see Brown's Probate Practice (ed.) 214. The rule, if it exists in India, should be relaxed in the case of Hindus who are not bound to take out probate. In England probate duty is a kind of succession duty, and it is paid by every one, but that is not the case in India among Hindus. A son may succeed to property of any amount, and may deal with it without taking probate. Section 226 of the Indian Succession Act enables the Court to grant limited probate under special circumstances.

Hon. *F. L. Latham* (Acting Advocate General) for the Government.—In England limited probate cannot be granted except where the will itself limits the interest of the executor, and the law applicable in this case is the same as English law: *Sutton* v. *Smith*(1). The rule in that case is the rule laid down in sec-

(1) 1 Lee. Eccls. Cases 275.

1880

In re THAKER MADHAVJI DHARAMSI.

tion 219 of the Indian Succession Act : Williams on Executors (8th ed.), 387. We say a general probate must be granted, or none at all.

WESTROPP, C. J.—We think that this application for the grant of limited probate to the son and executor of the testator must be refused. In this case the will was made subsequently to the passing of the Hindu Wills Act (XXI of 1870). By that Act certain sections, and amongst them section 179 of the Indian Succession Act (X of 1865), were declared applicable to all wills of Hindus made on or after the 1st September, 1870. Section 179 provides that the executor of a deceased person is his legal representative for all purposes, and that all the property of the deceased vests in him as such. It is clear that under this section the interest of the executor in the property of the deceased is not limited as it is in cases falling under section 18 of Act XXVII of 1860. This latter Act only affects the powers of executors of wills which do not come within the provisions of the Succession Act, so that we have not now to consider it. There appears to be no provision in the Succession Act which authorizes the Court to grant probate limited to part of the estate in cases where under section 179 the whole estate is vested in the executor. It has been contended that this can be done in the present case under section 226, but we do not think this section in any way applicable. By the will the testator's property is given, without reservation, to his son who is the applicant, and no circumstance has been brought to our notice which would justify us in holding (in the words of the section) that "the nature of the case requires" any limitation to the probate. It has been suggested that there is no obligation upon the applicant to take out probate at all ; that, as sole heir of his father, the whole property devolves upon him, even though the will should never be authenticated by the Court ; and that it is a hardship under these circumstances to require him to take out a general probate and to pay duty upon the whole estate when he needs probate only in order to enable him to deal with a small fraction of the testator's property. It may be a hard case, but we do not think that that circumstance brings it within the provisions of section 226.

As the applicant is in Bombay it is not necessary for us to con-

1880

In re THAKER MADHAVJI DHARAMSI.

sider whether it would be possible for him, under sections 212 and 220 of the Succession Act, to obtain, in the circuitous method suggested in argument, the limited probate which he desires.

Application refused.

Attorneys for the applicant.—Messrs. *Hore, Conroy, and Brown.*

Attorney for Government.—Mr. *R. V. Hearn.*

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

1882
April 10.

SHIDDHESHVAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMCHANDRARAV (ORIGINAL DEFENDANT), RESPONDENT.*

Bombay Hereditary Offices Act III of 1874, *Section* 10—*Certificate by Collector—Jurisdiction—Hindu law—Age of majority—Mortgage by a person not owner—Agent—Ratification—Estoppel.*

A certificate under section 10 of Bombay Act III of 1874, stating that a *vatan* has been assigned to an officiator as his remuneration, and granted by the Collector to save a *vatan* from attachment before judgment, does not exclude the jurisdiction of the Civil Court to make a decree, notwithstanding that the decree may be rendered inoperative by the Collector issuing a fresh certificate.

A Hindu to whom Act XX of 1864 (Minors Act) is not applied, and who is not governed by the Indian Majority Act, 1875, attains his majority when he attains the age of sixteen years.

The plaintiff sued the defendant on mortgages executed to the plaintiff by the adoptive mothers of the defendant (who were also defendants) subsequently to his adoption. The plaintiff contended that the mortgages had become effectual as against the defendant by reason of his subsequent conduct. Evidence was given that he had promised his adoptive mothers to redeem the mortgages, and that he had stood by and allowed the plaintiff to carry out the provisions of the mortgage deeds to his own detriment by paying maintenance to the defendant's adoptive mothers, and by paying off certain mortgages which had been created by them previously to the adoption of the defendant.

Held that the defendant was not liable upon the mortgages. His promise to redeem the Mortgages was not made to the plaintiff, but to his adoptive mothers, and there was no consideration for such promise as he made. Nor could the promise have the effect of ratification, for the ratification of the unauthorized contract of an agent can only be effectual when the contract has been made by the agent avowedly for or on account of the principal, and not when it has been made on account of the agent himself.

*Regular Appeal, No. 14 of 1881.