

## APPELLATE CIVIL.

*Before Mr. Justice Melvill and Mr. Justice Kemball.*

BHAGVA'NSANG BHA'RA'JI, APPLICANT, *v.* BECHARDA'S  
HARJIVANDA'S, OPPONENT.\*

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June 28.

*Civil Procedure Code (Act X of 1877), Section 50—Probate—Wills—Wills in Mofussil.*

There is no law at present in force in the Mofussil which obliges a person, claiming under a will, to obtain probate of the will, or otherwise establish his right as executor, administrator, or legatee, before he can sue in respect to any property which he claims under the will. In any suit or proceeding instituted by him, it is for the Court, in which the suit or proceeding is pending, to determine, for the purposes of such suit or proceeding, whether the will is genuine and valid, and confers upon the plaintiff or applicant the right which he claims.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction.

One Bechardas Harjivandas on the 14th of March, 1879, obtained a decree against Jora Bawa and others for Rs. 522-13-1. In execution thereof he attached some property, which he alleged belonged to his judgment-debtors. The applicant, Bhagvansang Bharaji, applied to the Subordinate Judge of Vagra to raise the attachment. He alleged that, by virtue of a will executed by one Bai Umed on the 10th of January, 1879, he was entitled to the attached property. Bechardas Harjivandas contended, amongst other things, that section 50 of the Civil Procedure Code (Act X of 1877) necessitated the applicant to prove the will set up by him before he could be allowed to assert his claim as an executor; and that his omission to comply with this requisition precluded him from proceeding with his application.

The Subordinate Judge, Rao Saheb Krishnmukhram, allowed this contention, and dismissed the application.

The applicant moved the High Court to exercise its extraordinary jurisdiction.

*Nanabhai Haridas*, Government Pleader for the applicant.—The Code of Civil Procedure in sections 278, 279, 280 and 281 lays down the rules for the investigation of claims to attached property. Section 278 directs that the objector shall be regarded as if he was a party to the suit. There is no law according to which

\* Extraordinary Civil Application, No. 102 of 1880.

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probate could be asked for or granted in regard to wills executed in the Mofussil.

The Court on the 23rd September, 1880, granted a *rule nisi* to show cause why the Subordinate Judge should not be directed to proceed with the application on its merits.

*Dayabhai Jaduram* (with *Cumroodin Tyabji*) showed cause.—The last paragraph of section 50 of Act X of 1877 enacts that “when the plaintiff sues in a representative character, the plaint should show, not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute a suit concerning it.” And the Legislature illustrates this by saying: “*A* sues as *B*'s executor. The plaint must state that *A* has proved *B*'s will.” Moreover, section 187 of the Indian Succession Act, X of 1865, absolutely forbids an executor or legatee to establish his right as such, unless a Court of competent jurisdiction shall have granted probate of the will or letters of administration.

[MELVILL, J.—That section has been made applicable to Hindu wills by section 2 of the Hindu Wills Act, XXI of 1870, as amended by section 154 of Act V of 1881; but the preamble to that Act shows that it does not apply to Hindus in the Mofussil of the Bombay Presidency. What, then, do you consider to be the Court of competent jurisdiction to prove this will?] The District Court of Surat.

[MELVILL, J.—The new Probate Act applies to the whole of British India, and extends to Hindus exempted under section 332 of the Indian Succession Act; but it distinctly provides in section 2 “that, except in cases to which the Hindu Wills Act, 1870, applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay \* \* \* and no High Court in exercise of the concurrent jurisdiction over such local area hereby conferred, shall receive applications for probate or letters of administration until the Local Government, with the previous sanction of the Governor General in Council, by a notification in the official gazette, authorized it so to do.”]

*Nanabhai Haridas* in reply.—The applicant does not appear in any representative capacity. To the will in question neither the Indian Succession Act, nor the Hindu Wills Act, nor the Probate

Act applies. No preliminary proceeding is necessary, or can be taken to prove it. It can, therefore, be proved in any suit or proceeding in which it may be produced as a basis of claim or right.

The judgment of the Court was delivered by

MELVILL, J.—The *rule nisi* must be made absolute. There is no law at present in force in the Mofussil which obliges a person, claiming under a will, to obtain probate of the will, or otherwise establish his right as executor, administrator or legatee, before he can sue in respect to any property which he claims under the will. In any suit or proceeding instituted by him it is for the Court, in which the suit or proceeding is pending, to determine, for the purposes of such suit or proceeding, whether the will is genuine and valid, and confers upon the plaintiff or applicant the right which he claims. The order of the Subordinate Judge refusing to inquire into the applicant's claim until he shall have proved the will of Bai Umed in the District Court, is reversed, and the case is remanded for inquiry and decision according to law. Costs of this application on the respondent Becharadas.

*Rule made absolute.*

## APPELLATE CIVIL.

*Before Mr. Justice Melvill and Mr. Justice Kemball.*

GANESH KRISHN (ORIGINAL PLAINTIFF), APPELLANT, *v.* MADHAVRAV \* November 27.  
RAVJI (ORIGINAL DEFENDANT), RESPONDENT.\*

*Limitation Act (XV of 1877), Schedule II, Articles 66 and 116—Registered bond—  
Compensation for breach of contract.*

A suit to recover a specific sum of money due upon a registered bond or other written contract is a suit for compensation for breach of contract in writing registered, within the meaning of article 116 of Schedule II of Act XV of 1877, and may be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract which is not registered.

THIS was a second appeal from the decision of R. F. Mactier, Judge of Satara, confirming the decree of the Assistant Subordinate Judge of Satara.

\* Second Appeal, No. 477 of 1880.

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