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those of the plaintiffs, including the costs of the rule. The private individual costs of the other two defendants, such as are independent of the necessary general costs of the suit, must be paid out of the trust funds. I will not throw them upon the plaintiffs, as the plaintiffs were misled by the circular and the resolutions.

Attorneys for the plaintiffs.—Messrs. *Smith and Frere*.

Attorneys for the defendants.—Messrs. *Tobin and Roughton*.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Bayley.

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May 8.

ARDESIR JEHA'NGIR FRA'MJI (ORIGINAL PLAINTIFF), APPELLANT, v.
HIRA'BA'I AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Parsi will before Indian Succession Act—Probate in 1866—Act XXVII of 1860—Effect of probate—Construction of will—Executrix also trustee—Suit against executrix—Representation of the estate—Civil Procedure Code, Sec. 437.

The will of a Parsi testator in Bombay affecting lands in the Mofussil, made before the 1st January, 1866, when the Indian Succession Act, X of 1865, came into force, and proved subsequently, viz., on the 25th day of January, 1866, but before Act XXIV of 1867 came into operation, is governed by Act XXVII of 1860.

Held that such probate had the same effect as probate in respect of the property of British subjects, but for the purpose only of collecting debts. It did not confer a title on the executrix to represent the testator's estate, except for the above-mentioned limited purpose, or to exercise the usual powers of an executrix, where the testator's intention, to be gathered from the whole of the will, was to vest his property with the entire management of, and control over it, in a series of persons in succession as trustees, the first of whom was the executrix.

Held also that, having regard to section 437 of the Code of Civil Procedure, the persons acting as such trustees in succession under the said will, adequately represented all persons beneficially interested in the estate in all suits relating to it.

APPEAL by plaintiff against the decree of Birdwood, J., made on the 4th day of August, 1883, whereby judgment was passed against the plaintiff with costs.

The suit was brought by the plaintiff against the first defendant Hirábái, widow and executrix of the late Dádábháí Jámásji Pochkhánávála; the second defendant Mithibái, widow and executrix of the plaintiff's father, the late Jehángir Frámji Bánáji, deceased; and one Hormasji Dádábháí Jámásji, a son of the first

* Suit No. 228 of 1882.

defendant Hirábái, to obtain (*inter alia*) a declaration that he, the plaintiff, was entitled, under the last will of his late father the said Jehángir Frámji Bánáji dated the 2nd day of May, 1861, to a life-interest in his property, and for an account of the advances made by the first to the second defendant.

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Jehángir Frámji Bánáji died at Bombay on or about the 6th day of September, 1863, and probate of his will was granted on the 25th day of January, 1866, to the plaintiff, who was "nominated and appointed the executrix therein, reserving the right of the other executors and executrices therein named to come in and apply for probate on the death of the said Mithibái."

The testator by his said will directed (*inter alia*) as follows:—

"My wife Mithibái shall obtain in her name solely probate out of the Supreme Court. And, for carrying on the management my sons Ardesir Jehángirji, Dosábhái Jehángirji, Sorábji Jehángirji and Navroji Jehángirji—these four sons will act according to the instructions of my wife.

2. "God Almighty, being gracious to me, has given me a large tract of land within the boundaries of Ghátkoper village and other properties which are mortgaged to my creditors. * * * From the day on which the Lord God will release all the said above-mentioned properties, the income which all the said properties may yield, I give by this writing, under the head of religion and charity, for religious and charitable purposes; and the religious and charitable acts exactly, according as I have been used to perform them in my house during my life-time, are to be performed always (and) for ever as long as God may preserve. And, after my death has taken place, there is given by me to my wife Mithibái, by this writing, all manner and authority,—that is, full power (in order) that she may perform the religious ceremonies in her life-time as follows, &c., &c.

5. "After the decease of my wife Mithibái has taken place,—that is, after she has departed (this life),—my sons Hormasji Jehángirji and Ardesir Jehángirji and Dosábhái Jehángirji and Sorábji Jehángirji and Navroji Jehángirji, and my daughters Jurbái

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Jehangirji and Sonabai Jehangirji; these six persons are by this writing appointed managers. Having obtained probate from the Court they are to pay the debts there may be (due) by me, and are to recover any claims there may be outstanding, and they are to carry on the management according to what is written in the first and second clauses above, and out of such amount of income as may be realized according to what is written in the second clause (the outlays for religious and charitable purposes (*dharm*) being deducted), the residue which may remain is to be divided and taken in equal portions by the six persons, the managers, (namely) these six persons who are appointed in this clause, and they may use the same during their lives. After the decease of the said six managers,—that is, after they have departed (this life),—the management is to be carried on in conformity with the under-written six clauses.

6. "My sons—five persons, and daughters—two persons; these are appointed managers above in the fifth clause. After their death has taken place (then), as to how the management is to be held, it is to be understood (that it is to be carried on) as follows:— The sons which my sons Hormasji and Ardesir and Dosabhai and Sorabji and Navroji may have, and the sons which they (my sons' sons) may have, these sons, from generation to generation, as long as God may preserve them, are appointed managers, &c., &c."

The Ghatkoper property, mentioned in the will, was situated in the Salsette Taluka of the collectorate of Thana outside the limits of the Ordinary Original Civil Jurisdiction of the High Court of Bombay. By deed dated the 16th day of April, 1859, and duly registered, it was mortgaged by the testator to a nominee of one Dadabhai Jamasji Pochkhanavala (husband of the first defendant Hirabai), to secure repayment of the sum of Rs. 9,999 advanced to the testator by the said Dadabhai Jamasji Pochkhanavala. The said Dadabhai Jamasji (the mortgagee) died in the year 1863; and Hirabai, his widow and executrix of the testator, continued to make advances to the second defendant as widow and executrix of the testator Jehangir Framji Banaji on the old mortgage account. This account was adjusted and signed from time to

time by the second defendant Mithibái, the last adjustment having been made on or about the 31st day of December, 1879, for Rs. 10,370-1-6.

In October, 1880, Hirábái filed a suit, No. 497 of 1880, in the High Court against Mithibái, who was described in the title of the plaint as “widow and executrix of Jehángir Frámji Bánáji”, to recover the said sum of Rs. 10,370-1-6 with interest, and to obtain an order for the sale of the property comprised in the said mortgage.

That suit came on for hearing on the 13th day of November, 1880, before West, J. Mithibái did not appear to defend the suit; but the present plaintiff, Ardesir Jehángir Frámji (the son of the testator), appeared, and applied to be made a party defendant. This application was resisted by Hirábái, who contended that Mithibái was the sole executrix, and that the applicant had no *locus standi*. The application was rejected.

On the 16th day of December, 1880, to which date the further hearing of the suit was postponed, West, J., in giving his judgment observed as follows :—

“As matters stand at present, there seems to be no reason to suppose that there has been a series of merely colourable transactions between Hirábái and Mithibái for the benefit of the latter party at the cost of the estate and those interested in it. If the transactions between the two ladies are impeachable by those whose interests Mithibái was bound to guard, the interests of such persons are not intended to be concluded by the present judgment, though they must make out a case of improper dealing in order to obtain any relief. For this, any steps they may be advised to take, the time allowed (for sale of the property) will give them full opportunity.”

A decree was passed in favour of Hirábái for the amount claimed and for sale of the Ghátkoper property in default of payment of the same within six months from the date of decree.

The plaintiff accordingly instituted the present suit on the 16th day of June, 1882. At the hearing, judgment was given by Birdwood, J., in favour of the first defendant.

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The plaintiff appealed.

At the hearing of the appeal, Sargent, C.J., raised the point whether the testator Jehángir Frámji Bánáji having died prior to the coming into force of the Indian Succession Act X of 1865, his executrix obtained any interest in his immoveable property left by him, and whether in her dealings with that property she sufficiently represented the plaintiff and other legatees under the said will in Suit No. 497 of 1880.

Vicáji (with him *B. Tyáji*) for the appellant.

Farran (with him *Jardine*) for the respondent Hirábái.

8th May, 1884. SARGENT, C. J.—The plaintiff in this case is the son of one Jehángir Frámji Cowásji Bánáji, who in his life-time mortgaged his property at Ghátkoper village to one Dorábji Dhanjibháí for and on behalf of Dádábhái Jámásji. Jehángir and Dádábhái both died in 1863 within a month of one another, the former having left a will by which he appointed his widow Mithibái, the second defendant, his executrix, who has since obtained probate of the will. In 1880 the latter filed a suit No. 497 of 1880, against Mithibái for the amount due on the mortgage, and for sale of the mortgaged lands if the mortgage debt was not paid within a specified time. The plaintiff applied to the Court to be made a defendant in the suit; but his application was refused on the ground that Mithibái represented the estate, and that, if she had committed *devastavit*, that must be the subject of a special suit.

Mithibái allowed judgment to go by default, and a decree was passed on 16th December, 1880, according to the prayer of the plaintiff. Default was made in payment of the mortgage debt, and the property was sold at auction, and purchased by Hirábái on 19th June, 1882, in the name of her son, the third defendant. The plaintiff now files this suit, charging that the purchase by Hirábái is null and void against him, and prays that an account may be taken of the mortgage debt.

At the hearing the following issues were raised :—

1. Whether the decree of 16th Decémbér, 1880, is not binding on the plaintiff.

2. Whether the mortgaged premises at the death of Jehángir were not validly charged in favour of the defendant for payment of a consolidated debt, *viz.*, Rs. 3,848-12-2, or thereabouts.

3. Whether the plaintiff is entitled to have the mortgage account taken.

4. Whether the sale of mortgaged premises is not binding on the plaintiff.

5. Whether the plaintiff is entitled to the relief asked for.

6. Whether the defendant Hirábái lent any moneys to Mithibái after the death of the testator, and whether such moneys are a valid charge on the mortgaged property.

7. Whether the decree in Suit No. 497 of 1880 was null and void as against the estate of the testator or against the plaintiff by reason of the fraud or collusion of the defendants Hirábái and Mithibái.

The first question for decision is whether the appellant was adequately represented by the defendant Mithibái in Suit No. 497 of 1880 so as to be bound by the decree for sale of the property. Jehángir's will was made on 2nd May, 1861, and, therefore, was not governed by the Indian Succession Act (X of 1865), which is only applicable to wills made after 1st January, 1866. The effect of the probate of the will, which was granted in 1866, will, therefore, be dealt by section 18 of Act XXVII of 1860, which was applicable to Hindus, Mahomedans and all persons not usually designated British subjects, and which was not repealed, as regards Pársis, until the Act XXIV of 1867 was passed. The probate, therefore, granted to Mithibái would, in the terms of the above section, "have the effect of a probate in respect of the property of British subjects, but for the purpose only of collecting debts." In *Mahá Ránee v. E. I. Company*⁽¹⁾, where the question arose as to the effect of letters of administration granted, under the Act XX (repealed) of 1841, to a Hindu, section 14 of which is identical with section 18 of the Act XXVII of 1860, it was discussed at great length by Sir L. Peel and Sir J. Colville; it was held that the grant of probate or letters of administration did not constitute the persons to whom they were granted exclusive representatives of the

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(1) Taylor & Bell, 290.

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estate of the deceased. Again in *In re Hájí Ismáíl Hájí Abdulla*⁽¹⁾ Sir M. R. Westropp delivering the judgment of the Court, after discussing the effect of probate in cases to which Act XXVII of 1860 applied, says: "It is only for that purpose (meaning payment of debts) that probate can be granted." The language of the Act is the same with respect to all persons to whom it is made applicable, and the same result must, therefore, follow in the present case, *viz.*, that the probate granted to Mithibái in 1866 did not confer a title to represent the estate of the testator, except for the above limited purpose, or to exercise the usual powers of an executrix.

Passing, however, to the will itself we find the testator directing a series of persons, of whom Mithibái is the first, to take out probate, and further appointing them trustees for the management of his property for the purposes and with the powers therein particularly mentioned; and we think the testator's intention, to be gathered from the whole of his will, was to vest his property with the entire management and control in the same above persons in succession as such trustees.

We agree, therefore, with Mr. Justice Birdwood in thinking that in that character, and more particularly having regard to section 437 of the Civil Procedure Code, they would in succession adequately represent all persons beneficially interested in the estate in all suits relating to it. We have, therefore, come to the conclusion that the plaintiff was adequately represented by Mithibái in Suit No. 497 of 1880.

His Lordship proceeded to discuss the other points in the case, and dismissed the appeal with costs.

Attorneys for appellant.—Messrs. *Tyabji and Dayábhái.*

Attorney for respondent Hirábái.—Mr. *H. Bicknell.*

(1) I. L. R., 6 Bom., at p. 459.