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APPEL-
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CIVIL.

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[621] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

BAI HARKOR (*Original Defendant*), *Appellant v.* MANEKLAL RASIKDAS AND ANOTHER ADMINISTRATORS OF THE PROPERTY OF THE MINOR MAGANGAURI (*Original Plaintiffs*), *Respondents.**

[30th November, 1887.]

Hindu law—Will—Hindu Wills Act (XXI of 1870)—Indian Succession Act (X of 1865), s. 179—Probate and Administration Act (V of 1881), s. 4—Hindu will made outside Bombay relating to property situate partly within and partly outside Bombay—Probate of such will—Effect of—Representation of the estate—Parties to sue—Practice.

One Lalbhai died at Surat in 1873, possessed of ancestral property situate partly in Bombay and partly in the Surat District. He left a widow Bai Harkor, and a minor son, Maganbhai. At his death he made a will bequeathing his property to his son, and appointing certain executors to manage the property during the son's minority. The son died in 1877 leaving a minor widow, Magangauri. In 1879 one of the executors obtained probate of Lalbhai's will from the High Court.

In 1884 a suit was filed, on behalf of the minor Magangauri, against her mother-in-law, Bai Harkor, to recover possession of the property covered by the will of Lalbhai.

One of the defences to this suit was that the property in dispute had vested in the executor, who had obtained probate of the will, and that as the defendant held the estate under the executor, the suit was not maintainable without impleading the executor.

Held, that the executor was not a necessary party to the suit. Section 179 of the Indian Succession Act (X of 1865) as incorporated into the Hindu Wills Act (XXI of 1870) did not apply so far as it related to property outside Bombay. The property in dispute was situate in the Surat District. It was joint ancestral property. On the father's death it vested in the son by survivorship, and on the son's death it vested in the son's widow, the plaintiff, in the present suit. Under the provisions, therefore, of the Probate and Administration Act (V of 1881), s. 4, (if that Act can be held to operate at all in the Mofussil before a notification is issued under s. 2), the estate could not vest in the executor, as it had passed by survivorship to another person long before the Act came into operation.

[R., 31 B. 418=9 Bom. L.R. 287 (293).]

APPEAL from the decision of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Surat, in suit No. 8 of 1884.

The facts of this case, so far as they are material for the purposes of this report, are as follows:—

[622] One Lalbhai Ramdas died at Surat possessed of considerable moveable and immoveable property. He died on the 21st December, 1873, leaving him surviving a widow, Bai Harkor, and an only son, Maganbhai, aged seven years.

At his death, Lalbhai made a will, bequeathing the greater part of his property, (which was mostly ancestral), to his minor son, and appointing one Ichharam Gangadas and two other persons as executors to manage the property during the minority of his son.

In 1877 the minor Maganbhai died, leaving a childless widow, Bai Judav *alias* Magangauri.

One Maneklal Rasikdas and Bai Umia were appointed, under Act XX of 1864, administrators of the estate of the minor widow, Bai Magangauri.

* Appeal No. 91 of 1885.

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In 1879, Ichharam Gangadas, one of the executors of Lalbhai's will, obtained probate of the will from the High Court, as part of the property covered by the will was situate in Bombay.

In 1884, Maneklal and Bai Umia, the administrators of the estate of the minor Magangauri, filed a suit against Bai Harkor, the widow of Lalbhai, to recover possession of the moveable and immoveable property forming part of the minor's estate.

The defendant pleaded (*inter alia*) that the property in dispute was vested, under the will of Lalbhai, in his executor Ichharam, who had obtained probate of the will; that she held the property under the executor; and that, therefore, the executor was a necessary party to the suit.

The Subordinate Judge held that the executor was not a necessary party to the suit, and on the merits awarded the plaintiffs' claim with costs.

Against this decision the defendant appealed to the High Court.

Jardine (with him *Pandurang Balibhadra* and *Ganpat Sadashiv Rav*), for the appellant.—The High Court granted probate in 1879 to one of the executors of Lalbhai's will. The estate has, therefore, vested in the executor. Under the Probate Act (V of 1881), [623] s. 4, the executor alone represents the estate of the deceased. And he is the only person, under s. 179 of Act X of 1865, who can sue or be sued in respect of the estate so vested in him. He is, therefore, a necessary party to the suit. The proviso to s. 4 of Act V of 1881 does not affect the case at all, as the plaintiff does not take by right of survivorship.

Shantaram Narayan, for the respondents.—The testator and his son were joint. The property covered by the will is presumably joint family property. If so, on the father's death it vested in the son by survivorship, and on the son's death it passed to his widow, the plaintiff in this suit. The case, therefore, falls within the proviso to s. 4 of the Probate Act (V of 1881), assuming that that Act applies. But there is nothing to show that it has been extended to the district of Surat by any notification under s. 2 of the Act. The executor is, therefore, not a necessary party to the suit.

JUDGMENT

BIRDWOOD, J.—We are of opinion that the Subordinate Judge rightly decided that Ichharam, the executor of the deceased Lalbhai's will, was not a necessary party to the suit. The will was made when Act XXI of 1870 was in force, and under that Act, s. 179 of Act X of 1865 had no application to it so far as it related to any property out of Bombay. The property of Lalbhai did not, therefore, vest in the executor at any time before Act V of 1881 came into force. It is contended, however, that the effect of s. 4 of Act V of 1881 was to vest the property in Ichharam, and that he alone, therefore, could sue. We cannot yield to this contention, for Lalbhai and his son Magan were presumably joint in estate, and on Lalbhai's death the estate vested in Magan by survivorship. On Magan's death in 1877 it vested in his widow, the minor Magangauri on whose behalf the present suit is brought by the administrators of her property appointed under Act XX of 1864. Under the provisions, therefore, of s. 4 of Act V of 1881, if that Act can be held to operate at all in the Mofussil before a notification is issued under s. 2, the estate could not vest in

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Ichharam, as it had passed by survivorship to another person long before the Act came into operation.

[624] As regards the ornaments included in list E, the evidence relied on by the defendant is vague, and we think that the Subordinate Judge rightly allowed the plaintiffs' claim to recover them.

As regards, however, the property included in list H, worth Rs. 6,329, we cannot uphold the Subordinate Judge's decision. Bai Harkor has adduced evidence (her own and that of witnesses Nos. 101, 111, 112, 176), which is not met by any evidence on the other side. She has all along consistently claimed these ornaments as having been given to her by her husband on their betrothal. The evidence relied on by her sufficiently supports her claim, which is consistent with Hindu custom on such an occasion. We, therefore, disallow the plaintiffs' claim to recover those ornaments.

The effect of this decision will be to vary the decree of the lower Court by striking out of it the paragraph relating to the ornaments in list H.

Before, however, we can make a final decree in this appeal, it will be necessary to ascertain the amount of money to be paid as an alternative if delivery of the moveable property decreed to the plaintiffs cannot be had, Section 208 of the Code of Civil Procedure, the provisions of which have been overlooked by the Subordinate Judge, requires that the decree should state this amount. The Subordinate Judge should certify a finding on this point within two months, after taking such evidence as the parties may offer.

Decree varied.

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[625] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

KRISHNAJI LAKSHMAN AND OTHERS (*Original Defendants*), *Appellants v.* VITHAL RAVJI RENGE (*Original Plaintiff*), *Respondent.**
[6th December, 1887.]

Hindu law—Ancestral property—Joint family—Alienations by father—Son's liability for father's debts—Execution—Purchaser—Notice—Limitation Act (XV of 1877), s. 14—Exclusion of time taken up in prosecuting a former suit which was eventually withdrawn.

Where a Hindu governed by the Mitakshara law seeks to set aside his father's alienations of ancestral property, if the alienees are purchasers at court-sales held in execution of decrees against the father, it is not enough for him to show that the debts, for which the decrees were passed, were contracted by the father for immoral purposes; it must also be shown that the auction-purchasers had notice that the debts were so contracted. The points to be determined in such cases are:—

(1) What was the interest that was bargained for and paid for by the purchaser? Was it the father's interest only, or was it the interest of the entire family?

(2) Were the debts, for which the decrees were obtained under which the property was sold, contracted for immoral purposes? and

(3) Had the purchaser notice that the debts were so contracted?

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* First Appeals, No. 98 and 107 of 1884 and Nos. 9 and 20 of 1885.