1891
MARCH 19.

APPELLATE CIVIL.

15 B. 694.

At this stage of the proceedings the Subordinate Judge submitted the following questions for the decision of the High Court :—

"(1) Whether the Collector had authority to cancel the decree-holder's sale of the 11th August 1888, and to order a re-sale of the property?

"(2) Whether the decree-holder's sale should be confirmed or not?"

The opinion of the Subordinate Judge on the first question was in the negative and on the second in the affirmative.

Gokuldas Kahandas Parekh, for the decree-holder.—I rely upon the ruling in *Ganpatram Motiram* v. *Isakji Adamji* (1).

Chimanlal Hiralal Setalvad (*amicus curiæ*), for the auction-purchaser.

ORDER.

[697] SARGENT, C.J.—Following the decision in *Ganpatram Motiram* v. *Isakji Adamji* (1), we answer the first question referred by the Subordinate Judge in the negative. The re-sale by the Collector being a nullity, the Subordinate Judge will deal with the second question as if the Collector had issued no orders on the subject.

Order accordingly.

---

15 B. 697.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

MAGANLAL PURUSHOTTAM AND OTHERS (*Original Defendants*), *Appellants v.* GOVINDLAL NAGINDAS (*Original Plaintiff*), *Respondent.** [21st March, 1891.]

Declaratory decree—Section 42 of the Specific Relief Act (I of 1877)—Defence not raised in the lower Court—Objection taken for the first time in appeal.

Bai Javer, a Hindu widow, made a will disposing of property of which under an award she had only the use during her life and to which the plaintiff, her son, was entitled after her death. While she was still living the plaintiff filed this suit praying that the will might be declared invalid. The defendants were the testatrix and those who took under the will. While the suit was pending, the testatrix died. The Subordinate Judge passed a decree in plaintiff's favour and declared the will invalid.

The defendants appealed, and contended for the first time, in appeal, that the allegations in the plaint, *viz.*, that the will was in their favour and that they (the defendants) were interested in denying the plaintiff's title as reversioner, did not constitute a case in which, in the exercise of a sound judicial discretion, a declaratory decree ought to be made.

Held, that as the objection was taken for the first time in appeal, it would be unjust to allow the defendants to benefit after they had failed to resist G.'s claim on the merits.

Held, further, that the will of J. should be declared to be invalid so far as it operated to defeat the award.

[R., 26 A. 238=6 Bom L.R. 495=8 C.W.N. 465=31 I.A. 67=14 M.L.J. 149=7 O. C. 239=8 Sar. P.C.J. 625.]

---

* Appeal No. 96 of 1890.

(1) 15 B. 322.

1891
MARCH 21.

APPELLATE CIVIL.

15 B. 697.

THIS was an appeal from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad.

[698] The plaintiff, Govindlal Nagindas, having brought a suit against his mother, Bai Javer, it was referred to arbitration, and the arbitrators passed an award, which declared that the plaintiff was entitled to all money, ornaments, &c., in the hands of his mother, Bai Javer, after her death. It provided that until then she should remain in possession. The award also directed that a sum of Rs. 4,000 should be given to the plaintiff by his mother, and provided that, in case of default of payment by his mother, one Maganlal Purushottam and others should pay that sum to the plaintiff.

After the passing of the award, Bai Javer made a will, stating therein that she had entrusted ornaments, worth Rs. 5,000, to the plaintiff for safe custody, but that he denied receipt thereof; that according to the terms of the award she had paid Rs. 4,000 to the plaintiff, but that he denied having received that sum also and had received it from Maganlal Purushottam and others; that, thereupon Maganlal Purushottam and others obtained a decree against her for the amount, ordering that the judgment-debt should be satisfied from her estate. By the will she gave her property to the defendants. The plaintiff thereupon brought a suit against her and the other defendants, praying that the will might be declared null and void. He alleged that by the award he was entitled to the property after her death, and that she had otherwise disposed of it.

His mother, Bai Javer (defendant No. 1), died while the suit was pending in the Subordinate Judge's Court.

The Subordinate Judge found that Bai Javer was not competent to make the will, and declared that the plaintiff was entitled to all the property, moveable and immoveable, of Bai Javer after her death.

The Subordinate Judge in his judgment remarked:—"This will is evidently in favour of, and for the benefit of the other defendants, and attempts to prejudice the rights of the plaintiff. There is, however, not an atom of evidence to show that Bai Javer had paid Rs. 4,000 to the plaintiff or had entrusted ornaments of Rs. 5,000 for safe custody to the plaintiff. Her evidence taken on commission contradicts the statement of the will, because [699] there she has deposed on oath that the plaintiff committed a theft and took away the ornaments. The will having thus been made for the benefit of the other defendants, those defendants have been properly made parties to the suit, and though Bai Javer had died pending this suit the cause of action survives against the surviving defendants. The will is clearly invalid and beyond the authority of Bai Javer to make. The statements made therein against the interests of the plaintiff are evidently false and not supported by any evidence."

Against the decree passed by the Subordinate Judge, the defendants appealed to the High Court.

Govardhanram Madhavram Tripathi, for the appellants.—In this suit the plaintiff Govindlal prayed that the will made by his mother, Bai Javer, should be declared to be invalid, and the lower Court made the declaration sought for. We submit that under the circumstances of the present case, suit for a declaration cannot lie, because a widow has absolute power over the moveable property inherited from her husband—*Damodar Madhowji* v. *Purmanandas Jeewandas* (1).

(1) 7 B. 155.

1891
MARCH 21.

APPELLATE CIVIL.

15 B. 697.

[SARGENT, C.J.—A will can operate only after the death of the testator. The present suit for a declaration to set aside the will was brought during the lifetime of the testatrix.]

As regards us there was no cause of action at all—*Colvin Cowie & Co.* v. *Barbara Elias* (1). Even supposing that the plaintiff had a cause of action, still it had not accrued to him when the suit was filed, as the testatrix was living at the time. The point as to the want of cause of action was taken by us in our written statement. By inadvertence an issue was not raised on that point in the lower Court. The point goes to the root of the case, and it should be allowed to be taken for the first time, even in a second appeal, like the points of jurisdiction and limitation. The cause of action having arisen after the presentation of the plaint, that is, when the testatrix died, the plaintiff cannot proceed with the suit—*Prannath Shaha* v. *Madhu Khulu* (2).

[700] *Ganpat Sadashiv Rao*, for the respondent.— The award only gave a life-interest to Bai Javer and after her death it gave the property to us. The will of Bai Javer contradicted our title to the property to which we were entitled under the award, and this state of affairs we could not allow to continue—*Kalian Singh* v. *Sanwal Singh* (3). The will of Bai Javer created an interest in favour of the appellants; we had, therefore, a cause of action against them, and we were entitled to join them in the suit under s. 42 of the Specific Relief Act. The discretion given to a Court of first instance in entertaining a suit, cannot be interfered with by a Court of appeal—*Sant Kumar* v. *Deo Saran* (4). If the present suit be dismissed for absence of cause of action when it was filed, another suit will have to be filed, and the same question will have to be decided over again. We had a cause of action when the suit was filed, because our rights under the award were threatened under the will.

[SARGENT, C.J., referred to *Rani Pirthi Pal Kunwar* v. *Rani Guman Kunwar* (5).]

The point as to the want of cause of action was not specifically taken in the lower Court, nor was any issue framed with respect to it. The objection ought to have been taken in the first Court—*Sheo Singh Rai* v. *Dakho* (6). It is now too late to raise the objection in appeal. The appellants ought to have shown that the discretion vested by s. 42 of the Specific Relief Act was improperly exercised by the lower Court. The deposition of Bai Javer clearly shows that she in collusion with the appellant wanted to prejudice our interest as much as possible.

Govardhanram Madhavram Tripathi, in reply:—In our written statement we clearly say that there was no cause of action, and a plaintiff cannot come to Court without having any cause of action. The point as to the absence of the cause of action is allowed even in second appeal—*Lachman Prasad* v. *Bahadur Singh* (7); *Anandram Jivram* v. *Kashiram Anandram* (8). The circumstances of the present case are not such as would justify the Court in passing a **[701]** declaratory decree. There is no evidence in the case to show that Bai Javer was colluding with us to defeat the interests of the plaintiff. A man cannot be sued simply on the ground that a legacy has been given to him under an invalid will.

(1) 11 W.R. C. R. 40. (2) 13 C. 96. (3) 7 A. 163.
(4) 8 A. 365. (5) 17 I.A. 107=17 C. 933. (6) 1 A. 688
(7) 2 A. 884. (8) P. J. for 1882, p. 307.

1891
MARCH 21.

APPELLATE CIVIL.

15 B. 697.

JUDGMENT.

SARGENT, C. J.—The plaint alleges that Bai Javer has made a will of the property, which was the subject of the award and to which by the award the plaintiff was to be entitled after Bai Javer's death. The will is said to be in favour of the defendants, who thus, it was contended, became, in the language of s. 42 of Specific Relief Act, "interested to deny" the plaintiff's title as reversioner.

It has been contended before us that these allegations do not constitute a case in which in the exercise of a sound judicial discretion a declaratory decree ought to be made. Had this objection been taken in the first Court, we should hesitate much before holding that a declaratory decree ought to be made in such a suit as against either the widow or the other defendants. The judgment of the Privy Council in *Rani Pirthi Pal Kunwar* v. *Rani Guman Kunwar* (1) has an important bearing on that point, and also shows that a declaratory decree may be reversed, on appeal, on that ground. But here the objection has been taken for the first time on appeal, and we agree with the remarks of Mitter, J., in *Ram Kanaye Chuckerbutty* v. *Prosunno Coomar Sein* (2) that it would be "unjust to allow the defendants to benefit by it after they had failed to resist the plaintiff's claim on the merits." After Bai Javer's death there was still the same cause of action against the defendants as existed at the time the plaint was filed, *viz.*, that they were "interested in denying the plaintiff's title." The decree of the Court, however, should, we think, to avoid doubts which might arise in future litigation, be amended by declaring that the will of Bai Javer is invalid so far as it operates to defeat the award, having regard to what subsequently took place during Bai Javer's lifetime. Parties to pay their costs.

Decree amended.

---

15 B. 702.

[702] APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* SHIVRAM AND TWO OTHERS.* [24th March, 1891.]

Indian Penal Code (Act XLV of 1860), ss. 378 and 22—Theft—Earth—Moveable property.

Earth, that is soil, and all the component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached, is moveable property capable of being the subject of theft. Whoever dishonestly severs such earth commits theft.

Where a person dishonestly carried away 100 cart-loads of earth from the complainant's land, *held* that he was guilty of theft.

Queen-Empress v. *Kotayya* (3), dissented from.

[Appl., 27 M. 531=14 M.L.J. 155 (159)=1 Weir 417.]

THIS was an appeal by the Local Government from an order of acquittal passed by Rao Saheb P. W. Sathe, Magistrate (Second Class) at Khed, in the case of *Queen-Empress* v. *Shivram and two others.*

---

* Criminal Appeal, No. 133 of 1889.

(1) 17 I.A. 107=17 C. 933. (2) 13 W.R. C.R. 176. (3) 10 M. 255.