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TESTAMENTARY JURISDICTION.

Before Mr. Justice Starling.

YESHWANT BHAGWANT PHATARPAKAR (*Plaintiff*) v. SHANKAR RAMCHANDRA PHATARPAKAR (*Defendant*).* [19th December, 1892.]

Practice—Receiver—Receiver in testamentary suit—Succession Act (*X of* 1865), s. 239.

The High Court has power to appoint a receiver in a testamentary suit.

[R. 18 B. 237 (240).]

TESTAMENTARY suit. In this suit a consent order was made on the 26th November, 1892, whereby it was ordered that the plaintiff should produce all the ornaments in his possession, [389] belonging to the estate of Bhagu Naikin Phatarpakar, deceased, before the attorneys of both parties, and that an inventory thereof and of all furniture and other moveables belonging to the estate should be made by the attorneys, and that the ornaments should be deposited in the Bank of Bombay in the name of the attorneys, &c. By the same order Mr. L. A. Watkins was appointed receiver to receive the rents of the immoveable property belonging to the estate.

Disputes immediately arose as to the amount of the property, and on the 3rd December, 1892, a *rule nisi* was obtained by the defendant calling on the plaintiff to show cause why Mr. L. A. Watkins, the receiver appointed in the suit, should not be ordered to take possession of all the estate of Bhagu Naikin not produced before the attorneys in accordance with the order made on the 26th November, 1892.

Jardine, for the plaintiff, showed cause.

Inverarity, *contra*, in support of the rule.

JUDGMENT.

STARLING, J.—In this matter Mr. Inverarity on the 26th November applied for an order that the Administrator-General should take possession of the estate and effects of Bhagu Naikin under s. 18 of the Administrator-General's Act (II of 1874). This was opposed by the Advocate-General on behalf of one Yeshwant, who alleges that he is the executor of the will of the said Bhagu and has applied for probate thereof, to which Mr. Inverarity's client, Raghunath Narayan, has entered a caveat. Eventually, by consent of both counsel, it was ordered that all the ornaments of Bhagu should be produced to the solicitors of both parties, a list made of them, and that they should then be deposited in the Bank of Bombay, that all the other moveable property of Bhagu should be produced, and a list made of it, after which it was to remain in the possession of Yeshwant, he undertaking not to dispose of it, and Mr. Watkins was appointed receiver to collect the amount of the immoveable property.

On the 3rd December it was alleged that Yeshwant had not obeyed that order, in that he had not produced all the ornaments or household property of Bhagu, and that he had not produced the cash belonging to her estate, which was in his hands, and the [390] Court was asked to make an order that the receiver should take possession of all the moveable property of Bhagu not heretofore produced by Yeshwant. A rule was granted by me calling upon Yeshwant to show cause why this order

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should not be made. On the 19th December Mr. Jardine appeared to show cause against the rule. As this motion is opposed, I must consider whether this Court in a testamentary suit can appoint a receiver.

In England, the Court of Chancery, in cases of disputed representation in the Ecclesiastical Court, was in the habit, on a proper case being made, of appointing, *pendente lite*, a receiver of property the representation of the former owner of which was in dispute: see *Watkins* v. *Brent* (1); *Rendall* v. *Rendall* (2); and since the Court of Probate Act, 1857, came into force, the Court of Chancery has exercised the same power—*Parkin* v. *Seddons* (3). But these were orders of a Civil Court made in suits filed for the specific purpose of obtaining a receiver. The Court of Probate Act, 1857, however, gave authority to the Testamentary Court to appoint an administrator provisionally to take charge of the personal estate of a deceased person pending any suit touching the validity of his will, and to appoint such administrator or any other person receiver to collect the rent of and to manage his real estate. These provisions have been consolidated and transferred into the Indian Succession Act (X of 1865), s. 239, which empowers the Court to appoint an officer to take and keep possession of the property of a deceased person until probate or letters of administration are granted. This section, however, is not repeated in the Probate and Administration Act, V of 1881. I should have no hesitation in acting under this section if the will was one to which the Indian Succession Act applied, but as the will in the present case would apparently be governed by the Probate and Administration Act, 1881, it is necessary to look more closely into the question.

The section by which this will would be excluded from the Indian Succession Act is s. 331, but that only excludes [391] from the operation of that Act intestate or testamentary succession of Hindus, and does not forbid the procedure provided thereby (in the course of granting probates, &c.) to be applied to Hindu or other excepted wills. See the case of *Kokya Dine* (4), which was with reference to a Buddhist will. Why, then, was this useful provision not inserted in the Probate and Administration Act, 1881? My own impression is that the framers of that Act having provided in s. 55 that proceedings in relation to the granting of probate and letters of administration should be regulated by the Civil Procedure Code, and knowing the provisions of that Code as to receivers, and seeking to avoid the repetition, in the Probate Act, of any provision which was in the Civil Procedure Code, have left the appointment of a receiver to be regulated by the provisions of that Code. For these reasons I should, without difficulty, have come to the conclusion that this Court in its testamentary jurisdiction had power to appoint a receiver.

Mr. Jardine has, however, referred me to a motion in Testamentary Suit No. 11 of 1891, in which Farran, J., on the 13th August, 1891, refused to appoint a receiver. There is no written judgment, and consequently I cannot ascertain whether the refusal was on the merits or on a point of law. It was, however, argued that the property of the deceased was not the subject of a suit. Possibly not directly, but the present suit is to determine who is to have the possession and management of the property of the deceased,—in fact, who is to be the person in whom all the rights of the deceased are to vest, and thus become the legal owner. If a suit were brought on the civil side to determine who had the right to

(1) Myl. and Cr. 102.
(2) 1 Hare 152.
(3) L.R. 16 Eq. 34.
(4) 2 B.L.R.A.C. J. 79.

the possession and management of property, the provisions of the Specific Relief Act, I of 1877, would ordinarily require a prayer to be inserted for possession of the property, but I cannot see the substantial difference, as regards *interim* remedies, between a suit in this form and a suit on the testamentary side, the result of which will be to declare that, by virtue of the provisions of a will, a certain person has the right to stand in the shoes of a deceased owner, and thus be entitled to have the possession and management of all his property.

[392] It seems to me that the property is the subject of the suit, in the one case, directly, because possession is sought, and in the other, because the decree will determine who is to have authority over, and to be entitled to get possession of, certain property which is set out in a schedule to the petition for probate or letters of administration. Consequently I see nothing in the law relating to procedure which would prevent me appointing a receiver in this case without regard to any consent on the part of the plaintiff.

It is true that the Administrator-General's Act empowers the Court to authorize and require the Administrator-General to take charge of property of deceased persons which is in danger, yet I doubt whether this provision deprives the Court of any other powers it may possess; and although in many cases the Administrator-General might most conveniently be appointed, a receiver might be better in others. In the present case, a receiver has by consent been appointed for certain purposes, and I, therefore, consider that, if the Court is to take any action, it will be better to enlarge the present receiver's powers than to enjoin the Administrator-General to take possession of the assets of the estate.

Has any ground, then, been made on the facts of the case for such an appointment? In the first place, when the consent order was made, it was certainly a distinct understanding that every portion of the moveable property of the deceased was to be produced and entered in an inventory, and by what passed in Court must the parties have alone been guided, as the order was not drawn up till some days after it was carried out, so far as it has been obeyed. The plaintiff did not, however, produce the cash in his hands, and it was not until after enquiries from the defendant's solicitors that the plaintiff mentioned the amount thereof. As to the ornaments admitted by the defendant to belong to the estate, those produced and inventoried appear in two lists, one in the handwriting of the plaintiff, which he says has always been with him, and the other partly in the handwriting of the plaintiff and partly in that of the defendant, which has been in the possession of the defendant, and as far as these ornaments are concerned these two agree. In the same lists [393] and mixed up with the foregoing ornaments, are others which, the plaintiff asserts, belong to his wife, but there is nothing in these lists to indicate that fact, or to distinguish them from those which he admits belonged to Bhagu, and it is difficult to understand why, if they did belong to plaintiff's wife, they should have been inserted in a list which was given to the defendant at the time the safe was locked up and sealed.

It is also a suspicious fact that, in the absence of the defendants, the plaintiff broke the defendants' seal which had been put on the safe, and took out the ornaments now in dispute. It looks very much as if some portion at least of these ornaments belonged to the deceased Bhagu. I, however, do not decide that question at the present time, but I think under all the circumstances of this cases I am justified in

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extending the power of Mr. Watkins, by appointing him receiver without security to recover and take possession of all the cash and moveable property belonging to the deceased which has not been produced by the plaintiff to the solicitors of the two parties and entered into the inventory made by them. Costs must be costs in the cause.

Attorneys for the plaintiff: Messrs. *Mansukhlal, Damodar,* and *Jamsetji.*

Attorneys for the defendants: Messrs. *Chitnis, Motilal,* and *Malvi.*

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17 B. 394=Chitty's S. C. C. R. 363.

[394] ORIGINAL CIVIL.

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

GOVARDHANDAS GOCULDAS TEJPAL (*Plaintiff*) *v.* THE MUNICIPAL COMMISSIONER (*Defendant*).* [27th January, 1893.]

Municipal Act (Bombay) III of 1888, s. 158—Tax—Drawback—General conditions prescribed by Standing Committee limiting right to drawback under s. 158—Ultra vires.

Under s. 158 of the City of Bombay Municipal Act (Bombay Act III of 1888), the following general conditions were prescribed by the Standing Committee with reference to claims for drawback of the general property tax leviable in Bombay:—

"(1) Except with the special sanction of the Commissioner, no claim for drawback shall be entertained unless submitted to the Commissioner not less than 30 days before the commencement of the half-year to which such claim relates.

(2) Drawback of the one-fifth part of the general tax shall be sanctioned by the Commissioner in cases failing within either of the following classes and in no others:

(*a*) Chawls or buildings let out for hire in single rooms either as lodging or godowns for the storage of goods.

(*b*) Properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially.

(3) No sanction for drawback shall extend or apply to any floor on which trade or manufacture is carried on, or any goods are sold."

The Commissioner having refused to sanction a drawback of the tax liable on certain properties of the plaintiff on the ground that they did not fall within the terms of the above conditions, the plaintiff filed this suit. It was contended in this behalf that the second and third of the above conditions were bad, and that the Standing Committee could not by so-called general conditions limit or curtail the right given to tax-payers by s. 158.

Held, that the conditions prescribed by the Standing Committee were not *ultra vires* and that the Commissioner was justified in refusing the drawback.

CASE stated for the decision of the High Court under s. 2 of Act XII of 1888 by C. W. Chitty, Chief Judge of the Court of Small Causes:—

"1. This is an appeal against the decision of the Municipal Commissioner refusing to sanction a drawback of one-fifth part of the general tax leviable in respect of certain immoveable properties belonging to the appellant.

[395] "2. There is no dispute as to the facts of the case. It is admitted that all the properties named in the petition of appeal consists of buildings which are let out in flats; in two cases the ground floor is occupied by shops. With this exception all the premises are used as lodging for tenants, but are not let out entirely in single rooms. The said

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* Appeal No. $\frac{M}{45}$ of 1892.