1893 OCT. 3. APPELLATE CIVIL. 18 B. 606.

person who was said to be the agent of the applicant. On the day of hearing, this person appeared in Court and said that he was not the agent. The hearing was then adjourned, and a summons was sent in a registered packet addressed both to Kampti and Nagpur. The registered packet went to Kampti and came back with an endorsement that it was refused. The refusal to accept the packet was held by the Court to be a good service, and a decree was passed in our favour.

[BAYLEY, J.—There is nothing to show that the defendant himself refused to take the packet. The post peon may have presented the packet at the defendant's residence or place of business, and some one may have declined to take it.]

Section 114 of the Evidence Act (I of 1872) shows what presumption should be drawn in such a case.

Mahadeo Chimnaji Apte, for the applicant, in support of the rule, was not called upon.

JUDGMENT.

SARGENT, C. J.—The Small Cause Court has acted with material irregularity in treating the delivery of the summons by the post to a person, who was not shown to have been the defendant, as good service, and, therefore, in exercise of our extraordinary jurisdiction we must make the rule absolute, and reverse **[608]** the decree, and direct the Small Cause Court to proceed according to law.

Applicant to have his costs of and incidental to the rule.

Rule made absolute.

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18 B. 608.

APPELLATE CIVIL.

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

DAVE LILADHAR KASHRIRAM (*Origianl Applicant*), *Applicant* v. BAI PARVATI (*Original Opponent*), *Opponent.* * [4th October, 1893.]

Succession Certificate Act (VII of 1889), ss. 1 (4), 6 (d) and 7 (1)—Will, application for a certificate under—Validity of will—Hindu Wills Act (XXI of 1870).

Clause 4 of s. 1 of the Succession Cerfiticate Act (VII of 1889) does not preclude an applicant from obtaining a certificate under the will of the deceased.

A will having been held to be genuine in a contest between the parties, and there being no suggestion that the will was one to which the Hindu Wills Act (XXI of 1870) applied.

Held, that the Court could not refuse to grant the certificate.

APPLICATION against the order of J. J. Heaton, Acting Joint Judge at Ahmedabad.

Applicant applied to the Court of the Subordinate Judge of Dholka for a certificate under Act VII of 1889 in respect of the estate of deceased Bhavanishankar Kurnashankar under a will alleged to have been passed by the deceased.

The opponent, who was the widow of the deceased, opposed the application on the ground that the will under which the applicant claimed the certificate was a forgery, and prayed that as she had preferred an

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* Application No. 48 of 1893 under extraordinary jurisdiction.

appeal (No. 41 of 1892) against the decision of the Subordinate Judge in the matter of her application (Miscellaneous Application No. 21 of 1891) for a certificate under Act VII of 1889 in respect of the property of her deceased husband, the said Bhavanishankar, the case should be adjourned until the decision of the appeal.

The opponent's application for a certificate had been opposed by the present applicant and refused by the Subordinate Judge on the [609] ground that the two wills produced by the present applicant were proved.

On the present application the Subordinate Judge granted the certificate to the applicant, holding that his decision in Miscellaneous Application No. 21 of 1891 as to the genuineness of the will was binding on the parties.

In appeal No. 41 of 1892 the Acting Joint Judge of Ahmedabad upheld the decision of the Subordinate Judge, but on appeal in the present matter that officer set aside the order of the Subordinate Judge, granting the certificate to the applicant. His reasons are given in the following extract from his judgment:—

"Applicant relies on a will that is found to be legal and valid (see proceedings in appeal No. 41 of 1892 which is decided with this appeal). But certificates under Act VII of 1889 cannot be given with respect to any debt or security to which a right can be established * * * * by letters of administration with a copy of such a will annexed (s. 1 (4) of Act VII of 1889).

"On other grounds also I should refuse a certificate under Act VII of 1889 to any one claiming under a contested will and especially to one who is not the natural heir. The applicant here, Liladhar, is not natural heir of the deceased Bhavanishankar; the natural heir is his widow, the opponent. Liladhar claims under a will to the detriment of the natural heir; ordinary justice requires, therefore, that he should make good his position by legally proving the will and obtaining probate or letters of administration. The law provides a special procedure for this—a procedure that involves a full inquiry into any will that is contested, but which gives the holder of probate or letters of administration full powers in dealing with the property bequeathed.

The result here is that neither party can get a certificate under Act VII of 1889; and Liladhar will be driven to apply under Act V of 1881, as indeed he ought to have done long ago.

"Another objection to granting certificates under Act VII of 1889 to persons claiming under contested wills is that the claimants [610] would so obtain certificates by the payment of smaller stamp duties than would be required for probate or letters of administration."

Against this decision applicant applied to the High Court under s. 622 of the Code of Civil Procedure for the exercise of its extraordinary jurisdiction, and obtained a *rule nisi*.

Govardhhanram M. Tripathi, for the applicant.—In the Mofussil Courts are bound to give certificate to collect debts. It is not necessary to obtain a probate—*Kalidas* v. *Bai Mahali* (1).

There was no appearance for the opponent.

JUDGMENT.

SARGENT, C. J.—The District Court had no ground for supposing that s. 1, cl. 4 of Act VII of 1889 precluded the applicant from obtaining a certificate under the Act. The petition states, as required by

(1) 16 B. 712.

1893 OCT. 4. APPELLATE CIVIL. 18 B. 608.

s. 6 of the Act, that there was no impediment, under the above section, to the grant of the certificate; and there is no suggestion that the will was one to which the Hindu Wills Act applied. As to the validity of the will, *i.e.*, of "the right under which the petitioner claims," that is one of the averments in the petition (see s. 6 (*d*)) as to which the Court is to satisfy itself as provided by s. 7 (1); and the case of *Kalidas* v. *Bai Mahali* (1) shows that the Court cannot decline to do so; indeed, here the Court would appear to have already satisfied itself in appeal No. 41 of 1892.

We must, therefore, make the rule absolute and reverse the order of the Court below and restore that of the Subordinate Judge. Applicant to have his costs in the Court below.

Rule made absolute.

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18 B. 611.

[611] APPELLATE CIVIL.

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

GAVRISHANKAR PARABHURAM AND ANOTHER (*Original Defendants*), *Appellants v.* ATMARAM RAJARAM AND ANOTHER (*Original Plaintiffs*), *Respondents.** [5th October, 1893.]

Hindu law—Partition—Property left undivided at the time of partition—Suit to recover share of the produce—Partition—Amendment of suit—Changing character of the suit.

The circumstance that there has been a partition between the members of a joint Hindu family does not, in the absence of any special agreement between them, alter their rights as to the property still undivided. As to this they continue to stand to one another in the relation of members of an undivided Hindu family.

A claim to a share of the produce of the property left undivided at a partition does not lie, because such a claim is based on the right to a particular share in the property itself which has no existence in the case of an undivided family.

A suit for a share of the produce or the property left undivided at a partition cannot be amended by making it a suit for partition without entirely changing its character.

[R., 23 B. 597 (601); 10 C.L.J. 503 (509)=3 Ind. Cas. 247; 14 C.W.N. 221 (224)=3 Ind. Cas. 9; 10 Ind. Cas. 967=4 S.L.R. 225; 15 M.C.C.R. 308 (309); 1 S.L.R. 133 (136); 2 S.L.R. 43.]

THIS was a second appeal from the decision of J. J. Heaton, Acting Joint Judge of Ahmedabad.

The plaintiffs sued in 1889 the defendants to recover Rs. 122-4-0 as their half-share in the produce, for three years prior to the suit, of a certain filed which they alleged was left undivided at the time of partition which was effected between themselves and the defendants in the year 1876-77.

The defendants admitted that the field was left undivided at the time of partition, but alleged that two days after the partition the plaintiffs had sold their share in it to the defendants. They also pleaded limitation.

In the course of the suit the plaintiffs and their pleader admitted that there was other undivided property besides the field in dispute.

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* Second Appeal No. 329 of 1892.

(1) 16 B. 712.