ORIGINAL CIVIL.

Before Mr. Justice Starling.

HA'FIZA'BA'I, PLAINTIFF, *v.* KA'ZI ABDUL KARIM AND OTHERS, DEFENDANTS.*

1893. *April* 18.

Receiver—Administration suit—Receiver appointed where executor is in possession—Suit against executor where will not proved—Will of Mahomedan testator—Parties—Civil Procedure Code (XIV of 1882), *Sec.* 438.

The rule of the Court of Chancery, that a receiver will not be appointed against an executor unless gross misconduct was shown, is not applicable to the case of an executor of the will of a Mahomedan.

Where a Mahomedan testator had by his will appointed three executors, only one of whom had acted and got possession of the estate, a suit by the testator's widow for administration of the estate was *held* sufficiently well constituted for the purpose of a motion for a receiver, although only the executor who had acted was made defendant, the other two executors not being parties to the suit.

Quære whether it would not be necessary or advisable to add the said two executors before the suit came on for hearing.

MOTION by the plaintiff for a receiver. The plaintiff was the widow of one Kázi Rahimtula, who died on the 28th February, 1892, leaving him surviving herself (his widow), a son Kázi Ismáil, and two daughters Fátmábái and Nonbái.

The plaintiff's husband Kázi Rahimtula was the son of one Kázi Futtay Mahomed, who died in 1886. He left a considerable amount of property, including a share in a printing and book-selling business, in which his son (Kázi Rahimtula) and his brother Abdul Karim (the first defendant) were his partners. He left a widow (Khátubái) and two children, *viz.* the plaintiff's husband and a daughter Khatijábái, who died in 1891. At the time this suit was filed, the estate of Kázi Futtay Mahomed was the subject of litigation (Suit No. 282 of 1888), and an inquiry was proceeding to ascertain of what his estate consisted, and who were entitled to share therein.

After the death of Kázi Futtay Mahomed, the partnership business above mentioned was carried on by his brother Abdul Karim (defendant No. 1) and his son (the plaintiff's husband).

In March, 1893, the plaintiff filed this suit praying for administration, and that her husband's estate might be partitioned

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between herself and her children. She stated that the first defendant Abdul Karim alleged that her husband had left a will, but she did not admit that it was genuine, and in any event she denied that it was binding on her unless she elected to take under it. She alleged that the first defendant had taken possession of all her husband's property, and continued to carry on the business, and had opened another press which he was carrying on with monies belonging to her husband's estate.

She prayed *(inter alia)* for the appointment of a receiver to collect and hold possession of the estate of her husband Kázi Rahimtula.

She obtained a rule calling on the first defendant to show cause why a receiver should not be appointed. The rule was argued on the 18th April.

Lang (Advocate General) for the defendant showed cause.

Inverarity and *Jardine* in support of the rule.

The Civil Procedure Code (XIV of 1882), section 438 ; Tágore Law Lectures, pp. 564, 567 ; and Macnaghten's Mahomedan Law, p. 54, were cited.

STARLING, J.:—This is a suit brought by the plaintiff, who is the widow of one Kázi Rahimtula, against the first defendant, as his executor, for administration of the estate in his hands, and for the delivery to her and the infant defendants (the sons of the deceased) of the property coming to them.

On the 16th March, 1893, the plaintiff obtained a rule calling upon the first defendant to show cause why a receiver should not be appointed to take charge of the estate of the deceased, which came on for argument on the 18th April.

The first objection taken on behalf of the first defendant was that this suit was not properly constituted. The deceased had appointed three persons as his executors, and only one was made a defendant hereto. In answer to this objection, section 438 of the Civil Procedure Code (XIV of 1882) was quoted, which provides that executors who have not proved a will need not be made parties to a suit brought by or against the executors. This, however, is a Mahomedan will, and, therefore, need not be proved. But I think the principle of that section is applicable. Not joining in probate

is evidence that those not joining do not intend to intermeddle with the estate, and there is no reason why those who do not intermeddle should be worried with suits concerning a matter in which they have no interest. In this case, the property seems to be wholly in the hands of the first defendant, for in paragraph 13 of his affidavit of 12th April, 1893, he submits that no reason has been shown why the estate "should not remain in my possession," and the affidavits of his two co-executors Ahmed bin Essa Khaliffa and Pirbhai Dámji do not lead me to the inference that they have taken possession of the estate; but whatever else they have done, they have left that in the possession of the first defendant. Consequently, I think, for the purposes of this motion, that the suit is sufficiently well constituted. I express no opinion, however, as to whether it may not be necessary, or at any rate advisable, to add the other two executors as defendants before the suit comes on for hearing.

It was then argued that, as the first defendant is an executor, the Court would not appoint a receiver as against him unless gross misconduct on his part was shown. It is quite true that the Court of Chancery will not appoint a receiver against an executor on slight grounds, because his appointment as executor shows that the testator, who must be assumed to have known his character, had confidence in him, and the Court will give the fullest weight to that expression of confidence, and require a much stronger case to be made out for a receiver against an executor than against other persons. In England, however, where this is the rule, a testator by his will disposes only of what is absolutely his among the objects of his bounty; he has, therefore, a right to choose who shall distribute that bounty among those who can claim only under the will. But a Mahomedan testator cannot bequeath more than one-third of his property, in any case, without the consent of his heirs, and the executor has not only to distribute that one-third among the legatees, but also the remaining two-thirds amongt the heirs who claim adversely to the will; consequently there is not the same reason why the appointment by a Mahomedan testator of an executor should receive the same consideration as the appointment of an executor by an English testator does in England.

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Bearing these remarks in mind I will proceed to point out the effect that the evidence on affidavit has had on my mind. At a very early stage I find correspondence about the difficulty the legal advisers of the plaintiff have had in getting access to her, and complaint is made of the obstructiveness of a sepoy who is placed at the entrance of the house. The executor says he was put there by the testator during his life-time. Possibly, but now he must be continued by the first defendant; that clearly appears from his letter of 21st February, 1893, and it also appears from his letter of 30th September, 1892, that he has approved of the sepoy, on one occasion at least, preventing the plaintiff's legal advisers having communication with her. The impression the whole correspondence on this point leaves on my mind is that the first defendant is not anxious that the plaintiff should be encouraged or helped to assert her legal rights, and, without perhaps absolutely ordering the sepoy to stop people from going to see her, has encouraged him in being as obstructive as possible. The plaintiff has a perfect right to assert any claim she may have at law, and also is entitled to see her legal advisers whenever she chooses without any obstruction on his part, and the fact that the first defendant tries to put obstacles in her way of so doing does not impress me in his favour.

The next complaint made against the first defendant is the monthly amount of money which he is paying to the plaintiff, which he defends on the ground that she is getting for the *maintenance* of herself and infant children what she got during her husband's life-time. But the plaintiff's position is now changed. She is entitled not merely to maintenance, but is the absolute owner of one-eighth of her husband's property, and *that* she has a right to receive; whereas the whole tone of the first defendant's affidavits shows that, like most males in this country, he seems to have an idea that females ought not to have the absolute control of their property and are not to get more than maintenance, or certainly not more than the chief male in the family chooses they shall receive.

In considering this point, I take into account the fact that there is some litigation going on in another suit which may diminish the amount of the estate of the deceased; but, as far as I could

gather during the argument of the case, that suit can only affect two houses and a portion of the book-selling and printing business. Consequently it seems to me quite possible, and, if so, proper, that the plaintiff should receive some amount of income (the calculation of how much does not seem to me to involve much difficulty) as her own; yet the first defendant in paragraph 14 of his first affidavit alleges that no division of the deceased's estate can be made until that suit is brought to a final close. Probably no final division can be made till then, but that is no reason why no division at all should be made at the present time. All these acts of the first defendant are facts from which, it seems to me, *some* inference may be drawn that in the hands of the first defendant the property of the deceased may be wasted before the time for final division arrives, though I do not think I should on such grounds alone deprive the first defendant of the control of his testator's estate.

Lastly, there is the charge about the partnership carried on by the deceased and the first defendant. Now I cannot come to a definite conclusion that the first defendant has actually been misapplying any portion of the stock, though admitting, as he does, that he has been removing a portion of it, his explanation is not satisfactory, consisting only of general statements, whereas it was in his power to have given a detailed account of what was done with each parcel of property which left the partnership shop. A more serious matter, however, is the fact that before he has wound up the business, he has opened on his own account another shop of the same description, the natural result of which will be that he will attract the former customers of the partnership to his own shop, and thus entirely destroy the value of the goodwill of the partnership business, the share of the deceased in which ought to have formed a portion of his estate. This conduct is certainly not allowable in an executor who is bound to preserve his testator's estate.

Taking all the facts of the case into consideration I think I must come, on the whole, to the conclusion that there is danger that the estate of the deceased will be wasted in the hands of the first defendant, and that this is a proper case for the appointment of a receiver.

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Attorney for plaintiff:—Mr. *K. D. Shroff.*

Attorneys for first defendant:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorney for the other defendants:—Mr. *K. D. Shroff.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1894.
September 6.

IN RE JEHA'NGIR B. KARA'NI & Co., LIMITED.

HORMASJI RUSTOMJI DASAR AND OTHERS, PETITIONERS, *v.* PESTONJI EDALJI DHA'RWA'R AND ANOTHER, RESPONDENTS.

Company—Voluntary winding up—Inquiry into conduct of liquidators—Indian Companies Act (VI of 1882), Sec. 214—Practice—Procedure.

Where contributories of a company in voluntary liquidation complain of the conduct of liquidators in the winding up, and desire an inquiry under section 214 of the Indian Companies Act (VI of 1882), the proper procedure is by summons in chambers.

Where it is sought to make an officer of a company liable for misapplication of the funds of a company or for misfeasance or breach of trust in relation to its affairs, the sum sought to be recovered should be definitely stated in the summons, and the grounds upon which the application is based should be fully and adequately set out in an affidavit or affidavits.

RULE *nisi* to set aside an *ex-parte* order dated 19th July, 1894, made under section 214 of the Indian Companies Act (VI of 1882), directing an inquiry into the conduct of liquidators, &c. The Jehángir B. Karáni Co., Limited, was registered as a joint stock company in 1892, and carried on the business of booksellers and publishers, &c. On the 23rd May, 1894, the company went into voluntary liquidation, and Pestonji Edalji Dhárwár and Sorábji Kaikhosru Pátuk were appointed liquidators.

On the 12th July, 1894, the petitioners presented a petition to the High Court complaining of the conduct of the liquidators, alleging that they had sold a considerable portion of the company's property very much below its proper value, and bringing other charges against them in connection with the said sales. The following clauses of the petition set forth the petitioners' case:—

"14. Your petitioners are at a loss to account for the extraordinary conduct of the liquidators aforesaid in selling the company's assets at the ridiculous prices aforesaid. Before doing so they did not cause any valuation or inventory of the assets to