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true one, their Lordships find nothing in the evidence to suggest that the meaning which most easily fits the words leads to any unreasonable conclusion, or that it was not the real intention of the parties.

They will humbly advise His Majesty to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant:—*Messrs. Payne and Lattey.*

Solicitors for the respondent:—*Messrs. Cameron, Kemm & Co.*

APPELLATE CIVIL.

Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

1901. *February* 5.

SHARIFA (ORIGINAL DEFENDANT), APPELLANT, v. MUNEKHAN (ORIGINAL PLAINTIFF), RESPONDENT.*

Minor—Suit to recover custody of—Suit by a father for the recovery of his children illegally detained—Tort—Death of defendant pending suit—Survival of cause of action against defendant's heirs—Practice—Procedure.

A Civil Court has jurisdiction to entertain a suit by a father to recover possession of his minor children illegally detained by a stranger. Such a suit is not barred by the provisions of the Guardian and Wards Act (VIII of 1890).

A Mahomedan sought to recover possession of his minor daughters, who were alleged to have been illegally detained by the defendant Mukimbhai. Pending the suit Mukimbhai died, and the suit was continued against his widow Sharifa as his heir and legal representative, on the ground that the minors were in her possession.

Held, that the cause of action did not survive as against the widow of the deceased defendant, and that therefore the suit could not proceed. The cause of action which gave rise to the suit was extinguished when the defendant Mukimbhai died.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat, reversing the decision of Ráo Bahádur K. B. Marathe, First Class Subordinate Judge at Surat.

The plaintiff, a Mahomedan, sued to recover possession of his two minor daughters, aged 13 and 11 years, respectively, from one Mukimbhai Dhumunbhai, the defendant, alleging that he had left

* Second Appeal No. 473 of 1900.

them with the defendant on his (plaintiff's) way from Bombay to Junagád, and that on his return defendant refused to give them up.

Mukimbhai pleaded *inter alia* that the suit would not lie, and that the plaintiff was not entitled to the custody of the minors as they had been married according to Mahomedan law and custom to defendant's sons with the plaintiff's knowledge and consent.

During the pendency of the suit the defendant Mukimbhai died; and the plaintiff thereupon placed on the record the defendant's widow, Bai Sharifa, as his heir and legal representative, and proceeded with the suit.

Bai Sharifa pleaded *inter alia* that the cause of action did not survive as against her.

The Subordinate Judge held that the suit lay against Mukimbhai, and that the cause of action survived as against Sharifa, his widow, as the minors were in her possession. But he found that they had been married to Sharifa's sons with the plaintiff's knowledge and consent. He therefore held that the plaintiff was not entitled to the custody of the minors, and dismissed the suit.

On appeal the District Judge held that the cause of action survived as against Sharifa, as the minors were in her possession, and that although they had been married to Sharifa's sons, the marriages were not legal for want of plaintiff's consent and authority. He based his finding of this fact upon (*inter alia*) certain entries in the Kazi's books.

He reversed the first Court's decree and awarded the plaintiff's claim.

Against this decision Sharifa preferred a second appeal to the High Court.

G. S. Rao and *R. W. Desai* for appellant (defendant):—The lower Court has misconstrued the entries in the Kazi's register. It was also wrong in holding that on the death of the original defendant, Mukimbhai, the cause of action survived as against his widow. The suit is based upon a tortious act committed by the deceased Mukimbhai. On the death of the wrongdoer, his heirs and legal representatives cannot be held responsible for his acts. The suit therefore comes to an end. *Actio personalis moritur*

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cum personâ — *Phillips* v. *Homfray*.(1) If Mukimbhai's heirs have committed any separate wrong, a fresh action should be brought against them for it, but the present suit cannot be continued against them on the cause of action which existed against Mukimbhai.

Manubhai Nanabhai for respondent (plaintiff) :—There is no misconstruction of any documents, but assuming that the Kazi's register is misconstrued, the finding of the lower Court does not rest entirely upon the entries in that book. There is other evidence in the case which supports it, and the finding being one of fact is conclusive in second appeal. The suit is one for the recovery of the minors illegally detained by the deceased defendant and after his death by the present defendant. The maxim *Actio personalis* does not apply. It applies in cases where damages are sought to be recovered for the tortious acts of a wrong-doer. *Phillips* v. *Homfray*(2) shows that the cause of action does survive in an action for the recovery of a specific chattel.

[JENKINS, C.J.—Can a minor be treated as a chattel ?]

Not now, though it was so under the Roman Law. For damages, the cause of action does survive.

[JENKINS, C.J.—The detention of the minors by the widow is not an act done in her capacity as heir of the deceased defendant.]

No; but she illegally detains them after his death. The objection to the continuance of the suit is purely technical and nothing can be gained by compelling the plaintiff to file a fresh suit. The present defendant has been a party to the suit almost from its beginning and cannot be prejudiced. Section 578 of the Civil Procedure Code (Act XIV of 1882) covers a case like the present.

[JENKINS, C.J.—Can such a suit lie in a Civil Court ?

Such a suit will lie in Indian Courts. A writ of *habeas corpus* can only be issued by the High Court, and that too within the local limits of its original jurisdiction. Section 491 of the Criminal Procedure Code (Act V of 1898) prevents the High Court from issuing such a writ to residents in the mofussil.

[JENKINS, C.J.—Are there any English case where an action was brought by a father to recover the custody of his minor children ?]

(1) (1883) 24 Ch. D. 439. (2) (1883) 24 Ch. D. 439.

Dominus Rex v. *Smith*(1) and *The Queen* v. *Clarke*(2) seem to show that an action would lie at common law. A writ of *habeas corpus* is a summary remedy, but it does not exclude the ordinary remedy by action. There is nothing in the law of India to bar a suit like this. Section 11 of the Civil Procedure Code (Act XIV of 1882) empowers a Civil Court to try all suits of a civil nature except those the cognizance of which is barred by any enactment. There being no enactment debarring such a suit, the Court is competent to try it. Such suits have often been brought in Courts in India. Were it otherwise, the High Court having no power to issue a writ of *habeas corpus* to residents in the mofussil, there would be no remedy to the aggrieved party in a case like the present.

Mayne on Hindu Law (6th Ed.), page 222; *In re W. H. Hutton and his wife*(3); *Muchoo* v. *Arzoon Sahoo*(4); *Raj Begum* v. *Nawab Reza Hossein*(5); *Abasi* v. *Dunne*(6); *Krishna* v. *Reade*(7); *Venkamma* v. *Savitramma*(8); Appeal from Order No. 5 of 1892.

G. S. Rao in reply:—We submit that the law in India is substantially the same as in England. In England no action lies at the instance of a father who seeks to recover the custody of his minor children. His remedy is either by a writ of *habeas corpus* or by petition to the Court of Chancery. So too in India a writ of *habeas corpus* may be issued in Presidency towns, whilst in the Mofussil, Act IX of 1861 enabled a father to recover the custody of his minor children by an application to the District Judge and not by a regular suit. Upon such application the District Judge had power to order the production of the children in Court and pass such other order as he deemed proper. This Act (IX of 1861) is now repealed by the Guardian and Wards Act (VIII of 1890), and the provisions of this Act as regards the custody of minors are reproduced in Act VIII of 1890. The Legislature has thus provided a special remedy in such cases, and that remedy alone should be resorted to. In most of the cases cited no objection was raised to the jurisdiction of the Court.

(1) (1733-34) Strange's Rep. 982.
(2) (1857) 7 E. & B. 186 at p. 193.
(3) (1865) 3 W. R. Recorder's Ref. p. 5.
(4) (1866) 5 W. R. 235.
(5) (1865) 2 W. R. 76.
(6) (1878) 1 All. 598.
(7) (1885) 9 Mad. 31.
(8) (1888) 12 Mad. 67.

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JENKINS, C.J.:—This is a suit by a Mahomedan father to recover possession of his two daughters, his case being that he left them with Mukimbhai Dhumunbhai, who afterwards declined to restore them. The defence on the merits was that the plaintiff had willingly given the two girls in marriage according to Mahomedan law and custom.

The first Court on the evidence held this plea established, but the District Judge on appeal came to the opposite conclusion. The appellate Court's decision, however, proceeded on a misapprehension as to the effect of Exhibits 54 and 55, so that in no case could it be allowed to stand. The only question is whether we ought to send the case back or dispose of it here on the other grounds urged before us.

The first point for consideration is whether such a suit will lie, for it is argued that the analogy of English procedure and the provisions of Act VIII of 1890 are opposed to its maintenance. We are, however, concluded by authority; for it has been held by Mr. Justice Bayley and Mr. Justice Candy, in appeal from Order No. 5 of 1892, that such a suit will lie. It appears to me under the circumstances profitless to enter on any discussion of the question; for even if we disagreed with that decision we could only refer the matter to a Full Bench. When, however, the Legislature comes to amend Act VIII of 1890 (which I trust may be at no distant date), it will, I think, be worthy of consideration whether the procedure under the Act should not be explicitly substituted for an ordinary suit and the position of a father at the same time made clear.

Another objection urged—not now for the first time, but from the very first—is that the cause of action came to an end on Mukimbhai's death. The lower appellate Court has held that the cause of action survived. Now this means that it could be continued against his successors, but while the District Judge so held, he failed to give effect to his opinion, for he allowed the suit to proceed against one only of these heirs on the ground that the suit was not "against the estate of the deceased but against him personally, and after his death against the person who in succession to himself unlawfully detains the minors." In other words it is the present defendant's wrong that justifies the continuance of the suit against her.

But clearly her own wrong can only be matter of adjudication in a suit commenced against her, therefore there was in strictness no jurisdiction to pronounce on it in a suit commenced against another. It is said, however, that section 578 of the Civil Procedure Code cures the defect; but if in this suit there was no jurisdiction to try the defendant's individual wrong, this is not so. Besides this, as I have already indicated, the District Judge's misapprehension of Exhibits 54 and 55 would in any case have necessitated a reversal, so that we do not reverse or remand the decree on the ground that the suit was wrongly continued against Sharifa, but being compelled to reverse it on another ground I find in this objection a reason for not remanding it. I am glad to be able to arrive at this decision in view of the age the girls have reached and the time they have been in their present custody.

The decree therefore must be reversed. Each party to bear his or her own costs throughout.

CHANDAVARKAR, J.:—This was a suit instituted by the plaintiff Munekhan Shavlikhan in the Court of the First Class Subordinate Judge at Surat to recover possession of his two minor daughters from the defendant Mukimbhai Dhumunbhai. That defendant pleaded, *inter alia,* that the plaintiff was not entitled to the custody of the girls, as he had given them away in marriage, according to Mahomedan law and custom, to the defendant's sons, and that the claim was barred by Act VIII of 1890. The defendant Mukimbhai, however, having died while the suit was pending, his widow, Bai Sharifa, was brought on the record as his heir. In her written statement she adopted her husband's plea, but contended that the suit after his death did not lie, as the cause of action mentioned in it could not survive as against her. The Subordinate Judge overruled all the legal pleas raised by the deceased defendant and his widow, but rejected the plaintiff's claim on the ground that the girls had been married with the free will and consent of the plaintiff.

The plaintiff appealed, and the District Judge of Surat has found that "a form of marriage was gone through between the defendant's deceased husband Mukim, as representative of his two sons on the one part, and as between some other persons on behalf of the plaintiff's minor daughters on the other part, but

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that it is not proved that this person, who represented himself as the father of the minors, was the plaintiff." He therefore reversed the Subordinate Judge's decree and awarded the claim.

Three points have been raised before us in this second appeal against the District Judge's decree, *viz.* (1) that the plaintiff's remedy is not by a regular suit in the Subordinate Judge's Court but by an application under the Guardians' and Wards' Act (Act VIII of 1890) to the District Judge; (2) that as the suit was originally instituted against the defendant Mukimbhai Dhumunbhai for his tortious conduct in illegally depriving the plaintiff of his children and detaining them in his custody against the will of the plaintiff, the cause of action abated on the defendant's death and did not survive against his widow or any other heir; and (3) that the District Judge has misconceived the evidence in the case in finding that the plaintiff did not give away his daughters in marriage to the defendant's sons.

As to the first point, there are some rulings of the Calcutta High Court, reported in Sutherland's Weekly Reporter, that under Act IX of 1861 a father who seeks the custody of his children should proceed by an application to a District Court and not by a regular suit in the Court of a Subordinate Judge. On the other hand, in the matter of the petition of *Kashi Chunder Sen*,[1] Broughton, J., held that the Act did "not create any new right or liability, but it simply provides a special remedy for a right or liability already existing. That being the case, parties might resort either to the ordinary form of a suit or resort to the special form given by the Act," and he relied in support of that view on the cases referred to by Sir Barnes Peacock in the case of *The Collector of Pubna* v. *Romanath*.[2] The High Court of Madras adopted the same view in *Krishna* v. *Reade*.[3] They were all rulings under Act IX of 1861. That Act has been repealed by the Guardians' and Wards' Act (VIII of 1890), and though its provisions have been more or less reproduced in the latter, the language of the Guardians' and Wards' Act is not altogether free from difficulty. The Punjab Chief Court has indeed held in ruling No. 10 of the Punjab Records for 1897 that

(1) (1881) 8 Cal. 266. (2) (1867) Ben. L. Rep. Sup. Vol. p. 630.
(3) (1885) 9 Mad. 31.

a father claiming the custody of his children is, since the passing of the Guardians' and Wards' Act, debarred from proceeding by a regular suit, but must proceed by an application under that Act to a District Court.

There is, however, a decision of this Court in appeal from Order No. 5 of 1892, where the point which we are now considering was gone into by Bayley and Candy, JJ., and it was held that the Guardians' and Wards' Act did not debar a Subordinate Judge from entertaining a suit of this nature. In the absence of any express enactment to the effect that the special remedy provided by the Guardians' and Wards' Act was intended by the Legislature to supplant the ordinary remedy, we think we ought to follow the decision of this Court in the case above cited. We therefore hold that the suit was rightly brought in the Subordinate Judge's Court.

Passing, then, to the merits of the case, we think that the District Judge's finding, that though the marriages are proved, the plaintiff was not present and somebody else represented himself at them as the father of the minors, is based on a misconception of the evidence in the case. He declines to accept the testimony of the witnesses examined for the defendant, because, as he puts it, "these people belong to the lowest dregs of the populace." We cannot, it is true, interfere with the Judge's appreciation of the evidence; but the reason he has given for discarding their sworn testimony appears to be not a legally sound reason, because it is tantamount to saying that the evidence of people who "belong to the lowest dregs of the populace" is *for that reason* absolutely inadmissible. The District Judge, in fact, omits to consider the evidence of these witnesses on its merits because their *status* in society is low. This Court cannot accept a finding of fact arrived at without an application of sound principles to the consideration of evidence as binding upon it.

Apart from that, however, the finding of the District Judge is also based upon a misreading of the two entries in the Kazi's books (Exhibits Nos. 54 and 55). These are in Persian, and have been officially translated for us; and we do not think that they are open to the criticism of the District Judge that they contradict the deposition (Exhibit 84) of the Naib Kazi. It is

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not necessary, however, to reverse the decree and remand the case for a fresh finding on this ground, because we think the appellant is entitled to succeed on the other ground which has been argued before us.

The suit was originally brought against the defendant Mukhimbhai for his tortious conduct in illegally depriving the plaintiff of the custody of his children. It was of the nature of an *actio personalis,* and it is clear law that the cause of action in such a suit does not survive when the defendant dies. As held in *Phillips* v. *Homfray,*[1] penal actions arising from wrong are not generally available against the heir. The mere fact that the present appellant is Mukhimbhai's widow and heir cannot therefore make her responsible for his wrong. If she had, after his death, detained the minors in her custody, it is a fresh tort, giving rise to a new cause of action, for which a fresh suit would have to be brought. It is contended before us that in allowing the suit to be continued against the appellant as the widow and heir of the deceased defendant, the lower Court has committed a mere irregularity, and that we should not reverse the decree under section 578 of the Code of Civil Procedure. But it is not a mere irregularity. The objection which was taken in the Subordinate Judge's Court at the outset goes to the very root of the case, as the cause of action which gave rise to the plaint and on which the merits turned was extinguished, according to law, the moment the defendant died—see per Melvill, J., in *Fakira* v. *Konherrav*[2] in special appeal No. 342 of 1873 and in *Sakharam* v. *Dholapa*[3] in special appeal No. 244 of 1876. If we yield to the argument we should be practically allowing a suit brought against A for his tort to be continued on his death against B for the same, merely because B happened to be one of A's heirs. The minors have now arrived at the age of discretion, and there can be no hardship in leaving the plaintiff to such remedy for the recovery of his children as he may have by law.

I therefore concur in reversing the decree of the Court below and rejecting the plaintiff's claim, leaving each party to bear his or her own costs in all the Courts.

Decree reversed.

(1) (1883) 24 Ch. D. at p. 456. (2) 1877 P. J. p. 77. (3) (1876) P. J. p. 243.