

The Revenue Commissioner should be informed that in making a reference to this Court under the Stamp Act the original document should be sent with the reference. In this case the original document has not been sent and we have had to look at a certified copy.

1902.

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RAM-  
CHANDEA.

*Order accordingly.*

## TESTAMENTARY JURISDICTION.

*Before Mr. Justice Russell.*

JEHANGIR RUSTOMJI DIVECHA (APPLICANT) v. BAI KUKIBAI  
AND OTHERS (OPPONENTS).

1903.

January 15.

*Executor—Will—Probate—Probate granted to some of the executors—Executors who have not proved may call for inventory and account from executors who have proved and are managing the estate.*

One Ardeshir R. Divecha, a Parsi inhabitant of Bombay, died in 1900. By his will he appointed his wife, his eldest son and two other persons, of whom the applicant was one, to be his executors, his wife and eldest son being named as managing executors. In 1901 the two latter applied for probate. The other two executors, though called on to join in the application, did not do so. The Court granted probate to the wife and the son, and reserved leave to the other executors to apply. No application was, however, made by them. In 1902 the applicant called upon the managing executors for an inventory and account of the deceased's estate. The applicant had no beneficial interest in the estate. It was contended for the managing executors that the applicant had no right to require an inventory and account from them.

*Held*, that the applicant was entitled to an inventory and account. The facts that under section 179 of the Indian Succession Act (X of 1865) the property of the deceased vested in the applicant as executor of the will, and that he might at any time apply for probate, gave him an interest sufficient to justify his application.

CITATION issued at the instance of Jehangir Rustomji Divecha, calling upon the opponents, two of the executors of the will of one Ardeshir Rustomji Divecha, to appear before the Judge in Chambers within eight days after service and "then and there to exhibit on oath a true and perfect inventory and a just account of the property and credits of the said Ardeshir Rustomji

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Divecha, late of Bombay, Parsi, deceased, and file the same at the procuracy of Jehangir Rustomji Divecha or otherwise show cause to the contrary, &c., &c."

The deceased Ardeshir Rustomji Divecha died in July, 1900, leaving his widow Bai Kukibai (the opponent), five sons and five daughters.

By his will he appointed as his executors his widow Bai Kukibai, his eldest son Jijibhoy, his brother Jehangir Rustomji Divecha (the applicant) and his cousin Sorabji Dadabhoy Divecha, and he appointed the said Bai Kukibai and his said eldest son Jijibhoy to be managing executors "to carry on the management appertaining to his house."

In January, 1901, Bai Kukibai and Jehangir applied for probate and before doing so they wrote to Jehangir Rustomji (the applicant) and Sorabji Dadabhoy (the other executor named in the will) inquiring whether they wished to join in the said application. Not receiving any reply they got probate issued to themselves on the 13th February, 1901, in the usual form, leave being reserved to Jehangir and Sorabji to come in and apply. At the date of this citation neither of them had made any application.

By his said will the testator disposed of his whole property for the benefit of his widow (Bai Kukibai) and his sons and daughters. The applicant Jehangir Rustomji was given no beneficial interest whatever in the estate.

After obtaining probate Bai Kukibai and Jijibhoy proceeded to administer the estate. They did not, however, file any inventory or account.

On the 9th December, 1902, the applicant Jehangir called upon Bai Kukibai and Jijibhoy to file an inventory and account and required them to give him inspection of the books and papers relating to the estate of the deceased. They denied that he had any right to inspection or to require an inventory, &c.

He thereupon on the 22nd December, 1902, issued the above citation.

*Lowndes* for the opponents showed cause :—The applicant has no interest in the estate and has not obtained probate. He has therefore no right to require us to file an inventory or to get

inspection. The only persons interested under the will support us and do not want any inventory or account to be filed: Coote's Probate Practice (11th Edition), page 251; Williams on Executors, Vol. I, pages 841-844; *Paul v. Nettlesfold*<sup>(1)</sup>; *Huggins v. Alexander*<sup>(2)</sup>; Indian Succession Act (X of 1865), section 277; Henderson's Succession Act.

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*Inverarity contra*:—The property of the testator has vested in my client as one of the executors named in the will: section 4 of the Probate and Administration Act (V of 1881); section 179 of the Succession Act. How can it be said he has no interest in it?

RUSSELL, J.:—On the 22nd December, 1902, the citation herein was issued. (His Lordship read the citation as above and continued.)

The applicant is one of the executors named in the will of the deceased. Leave has been reserved to him to apply for probate.

The point of law raised by Mr. Lowndes is a novel one as far as I have been able to discover, his argument being that the applicant has not an interest sufficient to support his citation. This involves the question as to what is the position of an executor in India.

By section 3 of the Indian Succession Act (X of 1865) "executor" is defined as a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. Section 179 of that Act, which agrees with the fourth section of the Probate and Administration Act (V of 1881) provides that "the executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." Section 179 applies to Parsis: see Parsi Succession Act (XXI of 1865), section 8. The effect of section 179 is to put the law in India on the same footing as that in England: see Williams on Executors (7th Edition), page 629, and *cf. Jaykali v. Shibnath*<sup>(3)</sup> and *Kherodemoney v. Doorgamoney*.<sup>(4)</sup> Probate is made operative as the authenticated evidence, and not at all as the foundation, of the executor's title, for he derives all interest from the will

(1) (1824) 2 Adams 237.

(3) (1866) 2 Beng. L. R. 1 (O.C.)

(2) (1735-6) *Ibid* in Notes p. 238.

(4) (1879) 4 Cal. 455 at p. 463.

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itself and the property of the deceased vests in him from the moment of the testator's death. In England any person having an interest or appearance of an interest may call on the executor to exhibit an inventory and account, and a probable or contingent interest is enough: see *Phillips v. Bignell*<sup>(1)</sup>; *Myddleton v. Rushout*<sup>(2)</sup>; *Rymes v. Clarkson*.<sup>(3)</sup> It seems to me that if the property vests in the executor he has an appearance of an interest at all events. And inasmuch as he may at any time apply for probate, he has a contingent interest sufficient to entitle him to call upon his co-executors to account. I therefore must decide this point in favour of the applicant.

*Citation made absolute.*

Attorneys for applicant—*Messrs. Payne, Gilbert, Sayani and Moos.*

Attorneys for opponents—*Messrs. Sorabji and Jehangir.*

(1) (1811) 1 Phil. 239 p. 241.

(2) (1797) *Ibid* 244.

(3) (1809) *Ibid* 22 at p. 37.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Aston.*

1903.

January 9.

CHINTAMAN NILKANT AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,  
v. GANGABAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Practice—Procedure—Civil Procedure Code (Act XIV of 1882); sections 362, 544 and 582—Appeal—Death of joint appellant pending appeal—Legal representatives of deceased appellant not brought on the record—Appeal proceeded with by surviving appellant—Power of Court to hear the appeal and reverse whole decree.*

In a suit for partition, the lower Court passed a decree for the plaintiffs. Two of the defendants, who denied the plaintiffs' right and claimed the property as their own, filed a joint appeal. Pending the appeal one of them died, and her representatives were not brought on the record. The surviving appellant, however, proceeded with the appeal and, at the hearing, the decree of the lower Court was reversed and the plaintiffs' suit dismissed. The plaintiffs filed a second appeal to the High Court and contended that the lower Appellate Court ought not to have heard the appeal inasmuch as it had abated, or at all events that that Court had no power to reverse the lower Court's decree so far as it related to the deceased appellant.

\* Second Appeal No. 536 of 1900.