ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

1906. *September* 3.

HAFIZABOO (PLAINTIFF-APPELLANT) *v.* MAHOMED CASSUM MURAD AND OTHERS (DEFENDANTS-RESPONDENTS).*

Civil Procedure Code (Act XIV of 1882), sec. 44, Rule (b)—Meaning of the rule—Claim by an heir "as such".

H. brought a suit against M. and others, the executors of I., in which two causes of action were united. One was in respect of property in the possession of the defendants which the plaintiff claimed by right of inheritance to her father E. S. and A. his widow. The other claim was in respect of monies alleged to have been paid by the plaintiff to I. and invested by him on her behalf.

The defendants contended that there was a misjoinder of causes of action:

Held by Batty, J., following *Ashabai* v. *Haji Tyeb Haji Rahimtulla*(1), that there was a misjoinder within the meaning of section 44 (*b*) of the Civil Procedure Code.

The plaintiff appealed.

Held: (Reversing the decision of the lower Court) that the first of the two causes of action above set out was not a claim by an heir as such.

Ashabai v. *Haji Tyeb Haji Rahimtulla*(1) not followed.

Per JENKINS, *C.J.*:—Those to whom Rule (*b*) of section 44 of the Code relates have the common characteristic that they owe their legal condition to the death of another. But there are others of whom this can be predicated, as for instance legatees or next-of-kin, who are not named in Rule (*b*). Executors, administrators and heirs have this characteristic in common, not shared by legatees and next-of-kin, namely, that not only do they acquire title from the deceased, but they may represent him. In this is to be found the clue to the meaning of the rule.

THE plaintiff was the daughter of one Ebrahim Suleman who carried on business and owned property jointly and in partnership with his brother Mahomed Suleman till his death. Ebrahim died leaving him surviving his widow Amaboo and his daughter the plaintiff, and leaving the partnership property in the hands of his brother. Mahomed Suleman married Amaboo, and they died in 1863 and 1867 respectively, leaving as the sole issue

* Appeal No. 1434; Suit No. 382 of 1905.

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of their marriage a son Issub. Issub entered into the management of all the properties in the possession of his father and continued in possession till his death in 1902. He left a will whereby the defendants were appointed executors, and they took possession of the property.

The plaintiff claimed an interest in the said property either on the footing of having been a partner with Issub, or on the footing that the property of her father Ebrahim Suleman was employed in the said business, and that after his death the said property which devolved on herself and Amaboo, and that at the death of the said Mahomed his share in his property which devolved on Amaboo, and that on the death of Amaboo, the share in the property which devolved on the plaintiff, continued to be employed in the said business.

The plaintiff formulated a further claim against the property in the hands of the defendants under the following circumstances. In 1867 the plaintiff paid to Issub Rs. 40,000, out of which he purchased on her behalf property consisting of lands at Rander, a house at Nagdevi Street in Bombay, and 120 shares of the Rangoon Surti Bara Bazar Co., Ld. The certificates and the title-deeds of the property remained with, and were at the date of suit in the hands of, the plaintiff, but the same were all in the name of Issub. The dividends on the shares were first received by the plaintiff; but after Issub opened the *pedhi* in Bombay, he received the dividends and credited them in his books. He also received the rents of the house at Nagdevi Street. The plaintiff stated in the plaint that she was not aware how the said dividends and rents were entered in the books of the said Issub as the plaintiff used to send for money to the *pedhi* when she required it for her private purposes and the same was always sent to her, as were also the sums required for the household expenditure. She further stated that the income of the said Rander lands had always been, and was still being received by the plaintiff. She therefore prayed "that it may be declared that the lands at Rander, the house at Nagdevi Street, Bombay, and the 120 shares of the Rangoon Surti Bara Bazar Co., Ld., abovementioned are the property of the plaintiff and that the defendants may be ordered to execute all convey-

ances and transfers and to do all other acts to vest the same in the plaintiff."

In their written statement the defendants contended *inter alia* that the suit as framed was not maintainable, having regard to the provisions of section 44, Rule (*b*) of the Civil Procedure Code, inasmuch as it included claims by the plaintiff in her own right and also as an heir of Ebrahim Suleman, of Mahomed Suleman and Amaboo.

On the 20th February 1906 the defendants took out a Judge's summons for the trial of preliminary issues and on 24th March 1906 the summons was made absolute and preliminary issues were framed. On 21st April 1906 the said issues were tried by Batty, J., who delivered the following judgment :—

BATTY, J. :—The plaintiff in this suit claims as the daughter of one Ebrahim Suleman as against the defendants, executors of one Issub Esmail deceased, that her rights in the property now in the hands of defendants as executors may be ascertained and declared; and that for that purpose the estates of her deceased father, her mother Amaboo, and of the aforesaid Issub, son of plaintiff's mother Amaboo by a second marriage with the brother of plaintiff's father, may, so far as necessary, be administered and effect be given to her rights.

With these prayers the plaintiff combines a further claim as against the estate of Issub, alleging that in 1867 Issub had purchased with plaintiff's money certain lands, a house and 120 shares in a company, in respect of which property she now seeks an account, and an order for the conveyance and transfer thereof to vest the same in herself.

Four preliminary issues had been fixed as follows :—

(1) Whether this suit as framed is maintainable?

(2) Whether the plaintiff has not misjoined several causes of action in this suit?

(3) Whether the plaintiff can join in this suit a claim made in her own right with claims made as heir of Ebrahim and heir of Amaboo?

(4) Whether the plaintiff can join in this suit claims made as heir of Ibrahim and heir of Amaboo?

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Mr. Lowndes for the defendant claimed the right to begin. But, having regard to section 179 of the Code of Civil Procedure and to the fact that defendants only contended that the plaintiff had combined prayers for relief which could not be maintained in the same suit, and did not contend that on the facts alleged the plaintiff was not entitled to any part of the relief which she seeks, I held that plaintiff was not deprived of the right to begin given by that section. The Advocate General, who appeared for the plaintiff, admitted that if the ruling in *Ashabai* v. *Haji Tyeb Haji Rahimtulla*[1] be followed, then the present suit must be open to objection under section 44 (*b*) of the Code. But he urged that the Allahabad High Court had dissented from that decision in *Ahmad-ud-din Khan* v. *Sikandar Begam* [2] and that distinction is to be made between a suit brought by a plaintiff to enforce rights on his own account because he is an heir, and a suit in which plaintiff sues in a representative capacity alleging that he is an heir and suing as such. Mr. Lowndes for the defendant on the other hand contended the ruling of Sir Charles Sargent in *Ashabai* v. *Haji Tyeb Haji Rahimtulla* [1] had been uniformly followed by this Court in practice and was binding, and that the reasoning of the Allahabad High Court would extend the application of the section to a creditor having a certificate to collect debts. He also objected that the claim for the 120 shares could not in any case be combined with that for immoveable property, but stated that the claim really felt to be embarrassing in this case when combined with a prayer for administration, is that which is urged in respect of the benami purchase of the Rander and Nagdevi properties and the shares alleged to have been made by Issub on behalf of the plaintiff, and that if this claim were eliminated no further objection would be taken.

The Advocate General was unwilling to amend the plaint. As intimated at the conclusion of the arguments, I consider myself bound to follow the ruling of Sir Charles Sargent in *Ashabai* v. *Haji Tyeb Haji Rahimtulla*[1]. Were it not for that decision I might have preferred to construe the phrase "heir as such" in Rule 44 (*b*), Civil Procedure Code, as applicable only to a party

(1) (1882) 6 Bom. 390. (2) (1896) 18 All. 256.

who represents the estate with reference to which he sues or is sued, a construction apparently consistent with the last three words of the Rule, and with the contrast, throughout its provisions, drawn between a claim by an heir personally on his own account, and a claim in which he represents a deceased person. But though the object of the Rule may have been merely to prevent a litigant from claiming in the same suit both for and against the estate of a person deceased whether as executor, administrator or heir, I think the decision in *Ashabai* v. *Haji Tyeb Haji Rahimtulla*[1] is binding so far as this Court is concerned. The plaint must be returned for amendment of the plaint under section 53 (*b*) (iii) accordingly. The time fixed for return of the plaint amended is four months. The combination with a prayer in respect of immoveable property with a prayer in respect of the 120 shares has not been argued on both sides, and as none of the other issues have been discussed I record no finding thereon.

The costs of the Judge's summons of 20th February 1906 and order thereon (24th March 1906) are to be borne by the plaintiff as also the costs of the hearing.

The plaintiff appealed against this order.

Strangman (with *Davar*) for the appellant:—The question for the Court is the construction of Rule (*b*) of section 44 of the Civil Procedure Code. Mr. Justice Batty felt bound, though he was inclined in the plaintiff's favour, to follow the decision of Sir Charles Sargent in *Ashabai* v. *Haji Tyeb Haji Rahimtulla*[1]. It is submitted that that decision is not the correct construction of Rule (*b*) and causes great hardship to poor people who are driven to bring separate suits.

The decision has been dissented from by the Allahabad High Court in *Ahmad-ud-din Khan* v. *Sikandar Begam*[2], and is also contrary to the English practice contained in Order XVII, Rule 5 of the Rules of the Supreme Court. See *Padwick* v. *Scott*[3]. Rule (*b*) of section 44 is founded on Order XVII, Rule 5.

Weldon (with *Lowndes*) for the respondent:—It is submitted that the decision of Sir Charles Sargent is correct, but in the event

(1) (1882) 6 Bom. 330. (2) (1896) 18 All. 256.
(3) (1876) 2 Ch. D. 736 at p. 743.

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of this Court disagreeing with that view the respondents should not be made liable for the costs of these proceedings as the decision of Sir Charles Sargent has been followed in these Courts for over twenty years. It is further contended that in this suit there has been misjoinder within the meaning of section 44, Rule (*a*).

JENKINS, C. J.:—The only question on this appeal is as to the meaning of section 44 (*b*) of the Civil Procedure Code. The suit is brought against the executors of Issub Esmail and in it two causes of action have been united. One is in respect of property in the possession of the defendants to which the plaintiff lays claim by right of inheritance to Ebrahim Suleman and Amaboo the wife of Mahomed Suleman. The other is in respect of moneys alleged to have been paid by the plaintiff to Issub and invested by him on her behalf.

The defendants object that there is thus a misjoinder of causes of action having regard to the provisions of section 44 (*b*) of the Civil Procedure Code.

The objection came before Batty, J., who rightly considered himself bound by the decision in *Ashabai* v. *Haji Tyeb Haji Rahimtulla*[1] to hold in the defendants' favour.

But as that was the decision of a single Judge we are not so bound.

The argument for the defendants is that in respect of the first of the two causes of action the plaintiff's claim is by an *heir as such*.

But for the decision in *Ashabai's* case[1] I should have thought this clearly was not so, and after giving that decision the most careful consideration I still remain unconvinced by it.

Those to whom Rule (*b*) of section 44 relates have the common characteristic that they owe their legal condition to the death of another. But there are others of whom this can be predicated, as for instance legatees or next-of-kin, and yet they are not named in Rule (*b*).

(1) (1882) 6 Bom. 390.

It is therefore safe to assume that it is something beyond devolution on death that induced the legislature to single out executors, administrators and heirs for special treatment.

Have these executors, administrators and heirs any common characteristic not shared by legatees and next-of-kin? Undoubtedly they have, for not only do they acquire title from the deceased but they may represent him. In this, I think, is to be found the clue to the meaning of the rule. Thus a claim may be made by or against the heir of a deceased Hindu as his representative, and again this same person may claim for his own benefit and in his own personal right property of which the beneficial ownership has devolved on him by inheritance from, that is to say as heir to, this deceased Hindu. His legal capacity in the two cases is absolutely distinct, and in my opinion it is only in reference to his representative capacity that it can be said a claim has been made by or against an heir as such.

This view (in my opinion) not only is in harmony with principle, but is sanctioned by the concluding words of the rule where it is expressly said that he *represents* the deceased.

This conclusion too is supported by the decision of the Allahabad High Court in *Ahmad-ud-din Khan* v. *Sikandar Begam*[1], and also by the tenor of the English rule (Order XVIII, Rule 5, formerly Order XVII, Rule 5) on which Rule (*b*) of section 44 is obviously based.

The order therefore of Batty, J., must be set aside. It is said that the suit is obnoxious to Rule (*a*) of section 44. With that we have no concern on this present appeal, and any objection on this score must be taken (if at all) in the ordinary course and on proper materials.

Having regard to the fact that the respondents had in their favour a previous decision we direct that the costs of the summons, of the trial of the preliminary issue, and of the appeal be costs in the suit.

Attorneys for the Appellants:—*Messrs. Payne & Co.*

Attorneys for the Respondents:—*Messrs. Crawford, Brown & Co.*

Order set aside.

W. L. W.

(1) (1896) 18 All. 256.