

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1911.

October 5.

BAI NANDKORE (ORIGINAL APPLICANT), APPLICANT, *v.* SHA MAGANLAL VARAJBHUKHANDAS AND ANOTHER (ORIGINAL OPONENTS), OPONENTS.*

Succession Certificate Act (VII of 1889), sections 9, 25, 26—Civil Procedure Code (Act V of 1908), section 96—Succession Certificate—Condition of Security—Appeal.

An order granting a succession certificate accompanied by a condition that security should be given is appealable.

An order directing that a certificate should not be granted unless security is furnished is not appealable.

Bai Devkore v. Latchand Jivandas⁽¹⁾ explained.

APPLICATION under the extraordinary jurisdiction, section 115 of the Civil Procedure Code (Act V of 1908), against an order passed by Rattanji Mancherji, Judge of the Court of Small Causes at Ahmedabad with appellate powers, setting aside an order passed by M. J. Yajnik, Joint Subordinate Judge, in the matter of an application for succession certificate under Act VII of 1889.

One Harivallabh Mulchand died in or about the year 1906 after making a will by which he bequeathed, among other things, a share of the Ahmedabad Manufacturing and Calico Company to his sister Bai Ganga. Bai Ganga died intestate on the 7th January 1910 and after her death Bai Nandkore, a daughter of Harivallabh's sister, applied, as the heir of the testator's sister, for a succession certificate with respect to the said share under the Succession Certificate Act (VII of 1889). The application was opposed by Bai Dhankore, a daughter of the sister of Bai Ganga's mother, and by Shah Maganlal Varajbhukhandas who was the son of a daughter of the maternal uncle of Bai Ganga.

The Subordinate Judge found that under the will of Harivallabh, Bai Ganga was the absolute owner of the property she got from her brother including the property for which the certificate was sought and he passed the following order :—

* Application No. 151 of 1911 under extraordinary jurisdiction.

(1) (1894) 19 Bom. 790.

I will however order that the said certificate should issue as applied for on the applicant furnishing security to the extent of the value of the property for which a certificate has been applied for.

The opponent, Shah Maganlal Varajbhukhandas, appealed and the Appellate Court found that the will of Harivallabh gave to Bai Ganga only a limited interest and that under the terms of the will the opponent was entitled to the share. The appeal was, therefore, allowed and the order of the first Court was set aside.

Bai Nandkore preferred an application under the extraordinary jurisdiction, section 115 of the Civil Procedure Code (Act V of 1908), urging *inter alia* that the Appellate Court erred in exercising a jurisdiction not vested in it, as no appeal lay against the order passed by the Court of first instance under Act VII of 1889. A *rule nisi* was issued requiring the opponents to show cause why the order of the Appellate Court should not be set aside.

G. N. Thakore for the applicant in support of the *rule nisi*.

L. A. Shah for opponent Shah Maganlal, to show cause.

SCOTT, C. J. :—In this case there was a contest between the claimants as to the right to a succession certificate in relation to a share belonging to a deceased testator. One of the claimants claimed as the heir of the testator's sister who, the other claimant said, had only a life-interest, and the other claimant claimed as remainder-man under the will upon the termination of the life-interest of that sister.

The Subordinate Judge decided in favour of the heir of the sister whereas the Judge with Appellate Powers, on appeal, decided in favour of the remainder-man.

The order granting the certificate was accompanied by a condition that security should be given, and upon the strength of the existence of that condition, it is contended before us that no appeal lay from the order of the original Court. In support of this contention the decision of this Court in *Bai Devkore v. Lalchand Jivandas*⁽¹⁾ has been relied on.

1911.

BAI
NANDKORE
v.
SHA
MAGANLAL.

(1). (1894) 19 Bom. 790.

1911.

BAI
NANDKORE
v.
SHA
MAGANLAL.

Now that decision was given in a case where there was no contest apparently between two different persons claiming a succession certificate, but the brother-in-law of the woman who claimed the succession certificate contended that the grant should not be made to her unless she was ordered also to furnish security, and the Judge ordered that she should furnish security upon taking the grant. It was against the order that she should furnish security that she appealed. It was held that no appeal lay. The Acting Chief Justice states the grounds of the appeal to the District Court of Broach: (1) that the order requiring security was erroneous, as she was the absolute owner of the moveables of her husband; (2) that the legislature did not intend that security should be required from absolute owners by right of heirship. The question, then, before the High Court was whether the discretion of the original Court in deciding that security should be taken from the widow, ought to be interfered with in an application under section 622 (Civil Procedure Code, 1882). It is true that there is a paragraph in the judgment of the Acting Chief Justice at page 793 which indicates that in his opinion, as in the opinion of the Allahabad High Court, a conditional order for the grant of the certificate would not be an order for the grant of the certificate. That expression of opinion was not necessary for the decision of the case. Mr. Justice Fulton, the other Judge, in delivering judgment said that he felt satisfied that the Assistant Judge was right in following *Bhagwani v. Manni Lal*⁽¹⁾ and holding that no appeal lay against the order of the Subordinate Judge requiring the petitioner to furnish security under section 9 of Act VII of 1889 as a condition precedent to granting her a certificate. Then he goes on to say: "It may be that when the Subordinate Judge makes a final order granting or refusing the certificate, such order, if unfavourable to the applicant, and the grounds on which it is based, will be appealable under section 26"; so he treats the question before the Court as a question whether the order requiring security is appealable or not and holds that no appeal lies. This is the view which has

(1) (1891) 13 All. 214.

been taken in the Madras High Court in several reported cases and also by the Calcutta High Court.

In the present case, however, as we have stated, the real question is which person was entitled to a grant of the certificate.

The question has been argued as to the rights of the respective parties to the grant of a certificate, and the certificate has been granted after a consideration of those rights. That order granting the certificate was, in our opinion, appealable under section 26. The grant of the certificate does not under the Act finally determine the rights of the parties. Section 25 of the Succession Certificate Act (VII of 1889) provides: "No decision under this Act upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties." We, therefore, do not think it necessary or desirable to express the opinion that we have formed as to the rights of the respective parties under the will of the testator.

We discharge the rule with costs.

Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

GOVIND ANNAJI BODHANI (ORIGINAL PLAINTIFF), APPELLANT, v. TRIMBAK
GOVIND DHANESHWAR (ORIGINAL DEFENDANT), RESPONDENT.*

*Hindu Law—Rights to well and water—Indivisible rights—Presumption—
Partition of property which is joint.*

Under Hindu Law, rights to water and wells belonging to a joint family are indivisible, if they are numerically unequal; and, after partition these must be enjoyed by the separated co-parceners by turns.

SECOND appeal from the decision of C. Fawcett, District Judge of Ahmednagar, reversing the decree passed by H. A. Mohile, Subordinate Judge of Ahmednagar.

* Second Appeal No. 332 of 1909.

1911.

BAT
NANDKORR
v.
SHA
MAGANLAL.

1910.

February 14.