

1916.

MOTA
HOLIAPPA

v.

VITHAL
GOPAL.

pay its own costs," the learned Judge evidently having been of the opinion that the plaintiff had succeeded on at least half the claim and the defendant on the other half. And we need only add that the part on which the plaintiff succeeded is by far the most substantial and important.

This being our view it necessarily follows that the present appeal fails and the decision of the lower Courts must be confirmed with all costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

1916.

August 8.

Before Mr. Justice Beaman and Mr. Justice Heaton.

KAVASJI SORABJI AIBADA (ORIGINAL APPLICANT), APPELLANT *v.* BAI
DINBAI (ORIGINAL OPPONENT), RESPONDENT.*

Probate—Letters of Administration—Executor not renouncing on citation must take out probate—Letters of Administration can otherwise issue.

An executor called upon by citation to accept or renounce is clearly compellable, if he accepts, to take out probate within a limited time. If he does not do so, Letters of Administration with copy of the will annexed may be granted to any competent applicant.

APPEAL from the decision of M. S. Advani, District Judge of Surat.

Application for Letters of Administration to the estate of one Manekji.

Manekji, who was the husband of opponent, had made a will on the 6th May 1912, whereof the opponent was appointed the sole executrix. After Manekji's death, she carried on the management of his estate as directed in the will; but she did not take out probate of the will.

* First Appeal No. 44 of 1916.

The applicant applied to the District Judge of Surat for issue of Letters of Administration to the estate of Manekji and for an order directing the opponent to produce the will in Court.

The opponent replied that she was not willing to renounce the executorship; that she was managing the estate in conformity with the will; and that it was not necessary for her to take out probate.

The District Judge dismissed the application, being of opinion that where an executor does not renounce he cannot be compelled to take out probate.

The applicant appealed to the High Court.

G. N. Thakor, for the appellant:—The respondent ought either to renounce the executorship or to take out probate: *Motibai v. Karsandas Narayandas*; ⁽¹⁾ *Dayabhai Tapidas v. Damodar Tapidas*. ⁽²⁾ Under sections 187 and 190 of the Indian Succession Act, no suit could be brought for the enforcement of the claims of the appellant's son as a *dharamputra* under the will, unless a probate or Letters of Administration have been taken out.

K. N. Koyajee, for the respondent:—There is no provision in the Indian Succession Act to compel an executor to take out a probate. If the executor refuses to act in accordance with the provisions of a will, the Court can take action under section 198 of the Act.

BEAMAN, J.:—An executor called upon by citation to accept or renounce is clearly compellable, if he accepts, to take out probate within a limited time. If he does not do so Letters of Administration with copy of the will annexed may be granted to any competent applicant. This is the principle of the decisions in the cases of

⁽¹⁾ (1893) 19 Bom. 123.

⁽²⁾ (1895) 20 Bom. 227.

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Motibai v. Karsandas Narayandas⁽¹⁾ and *Dayabhai Tapidas v. Damodar Tapidas*.⁽²⁾ The lower Court has decided this as a preliminary point against the applicant and decided it wrongly.

There is a further question of fact to be answered. The opponent denies that the applicant is a beneficiary under the will or has any interest whatever in the estate of the deceased. If that be so, he would clearly have no *locus standi* in any such proceedings as these. But that question must be dealt with by the learned Judge below.

We set aside his order and remand the application to be disposed of in accordance with the foregoing observations.

Costs to abide the result.

Order set aside.

R. R.

(1) (1893) 19 Bom. 123.

(2) (1895) 20 Bom. 227.

APPELLATE CIVIL.

1916.

August 10.

*Before Sir Stanley Batchelor, Kt., Ag. Chief Justice
and Mr. Justice Shah.*

KASHIBAI ALIAS JANKIBAI KOM RAMCHANDRA DINKARRAO GHATAGE (ORIGINAL PLAINTIFF), APPELLANT v. TATYA BIN GENU PAWAR AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2, 11, 12, 13 AND 14), RESPONDENTS.*

Hindu Law—Adoption—Will in favour of a grand-daughter—Simultaneous execution of adoption deed as well as will—Construction of documents—Adopted son's consent, binding effect of—Disposition good as a family arrangement.

One B died leaving him surviving his widow L and a predeceased son's daughter K (plaintiff). B, before his death, recommended L to adopt A,

* Second Appeal No. 123 of 1914.