

NARANA
MAIYA
v.
VASTEVA
KARANTA.

In *Jugul Kishore v. Jotendro Mohun Tagore*(1), the decree was passed against the husband. In *Bisto Beharee Sahoy v. Lalla Byjnath Pershad*(2) the husband's property was expressly made liable by the decree. Neither of these cases is, therefore, on all fours with the present one, which is governed by the principle laid down by the Privy Council in *Baijun Doobey v. Brij Bhookun Lall Awusti*(3).

The razinamah does not, on its true construction, amount to a gift of an absolute estate to the widow. It merely recognizes the widow's right to possess the property during her life without making alienations.

The dismissal of the claim petition cannot affect the plaintiffs' claim as reversioner, a claim which only became enforceable on the widow's death in 1888. Further, the claim was dismissed without inquiry.

It is finally contended that the debt in question was due from the husband, as is also found by the District Munsif, and that the District Court was wrong in considering this point immaterial.

This was not the case of a voluntary sale by a widow in discharge of her husband's debt, but of a Court-sale in execution of a personal decree obtained against the widow. The Judge is therefore right.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

OULA AND OTHERS (COUNTER-PETITIONERS), APPELLANTS,

v.

BEEPATHEE AND ANOTHER (PETITIONERS), RESPONDENTS.*

Code of Civil Procedure—Act XIV of 1884, ss. 365, 367—Representation of a deceased plaintiff.

Section 365 of the Code of Civil Procedure presupposes that the party claiming to represent a deceased plaintiff is his legal representative, but, if the represen-

1899.
Sept. 15, 18.

* Appeal against Orders Nos. 65 and 66 of 1892.

(1) I.L.R., 10 Cal., 985.

(2) 16 W.R., 49.

(3) L.R., 2 I. A., 275; s.c. I.L.R., 15 Cal., 138.

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tative character is denied, or when two or more persons claim it, the procedure prescribed by section 367 of the Code should be followed.

APPEALS against the orders of S. Subbayar, Subordinate Judge of South Canara, dated 18th January 1892, passed on civil miscellaneous petition Nos. 572 and 573 of 1891.

The facts of this case appear sufficiently for the purpose of this report from the judgment of the High Court.

Ramachandra Rau Saheb and Pattabhirama Ayyar for appellants.
Naraina Rau for respondents.

JUDGMENT.—This was a suit brought by one Kutti Hammad upon a bond executed by his late uncle Abdul Rahiman Kutti. Hammad having since died, Beepathee and Kunhipathu, claiming to be his sisters by adoption, applied to have their names entered on the record in place of the deceased plaintiff. The third defendant denied the adoptions, but the Subordinate Judge granted the application without proper inquiry, and ordered that the suit be proceeded with; hence this appeal. It is contended for the appellants that the Subordinate Judge gave them no opportunity to disprove the alleged adoptions, and that the admission made by the deceased plaintiff is not binding upon them. It is also urged that before respondents were admitted as supplemental plaintiffs, the procedure prescribed by section 367 had not been complied with and the factum of the adoptions determined. On the other hand, the contention for respondents is that the Subordinate Judge has acted in accordance with the provision of section 365, and that no appeal lies from the order made under that section.

As regards the preliminary objection that no appeal lies, it cannot be maintained. In this case the third defendant denied that Beepathu and Kunhipathu were the legal representatives of the deceased plaintiff, and it falls, therefore, under section 367. An appeal is allowed from the order made under that section by section 588, clause 18. I am unable to accede to the contention that section 367 applies only when two or more persons claim to be legal representatives of the deceased plaintiff, and that it is not applicable where there is but one claimant, and the defendant denies his representative character. Section 365 provides that in case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives, apply to the Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall, there-

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upon, enter his name accordingly and proceed with the suit. The section presupposes that the claimant is the legal representative, and then prescribes the procedure which ought to be followed. Section 367 enacts that, if any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit. The language is wide enough to include a sole claimant, whose representative character is denied by the defendant. Reading the two sections together, they show that when there is no dispute as to the applicant being the legal representative, the procedure prescribed by section 365 is to be followed, and, either when the representative character is denied or when two more persons claim it, the procedure prescribed by section 367 should be followed. The bringing in of a representative on the record is not a mere formal act, and there must be a complete judicial inquiry and determination as to whether the claimant is the proper representative. This is further made clear by the procedure prescribed when the legal representative of a deceased sole defendant is brought on the record. In that case the Court is bound to enter on the record the name of the person who is alleged by the plaintiff to be the legal representative, liberty being reserved to the person who is so made defendant to object that he is not the legal representative. When the plaintiff makes the application and causes a new defendant to be put on the record, he does so at his own peril, and if the new defendant is not really the representative of the deceased defendant, the plaintiff will not be able to execute the decree. On the other hand, when a person is substituted for the deceased plaintiff, it is the act of the Court and the substituted person realizes the deceased's estate. The Court must, therefore, satisfy itself that the substituted person is the real representative at or before the hearing of the suit and then deal with it according to law. In the case before us, the Subordinate Judge admitted two documents and a judgment in evidence, and acted upon them without giving the defendants an opportunity to prove their allegation, and I cannot say that there was a proper judicial inquiry. The order of the Subordinate Judge is set aside, and he is directed to hear all the evidence which the parties may adduce and, after holding a proper judicial inquiry

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to determine whether petitioners are entitled to be admitted as the legal representatives of the deceased Kutti Hammad for the purpose of prosecuting the suit, and then deal with the suit according to law. Costs of this appeal will abide and follow the result, and be provided for in the revised judgment or order.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893.
September 28.
December 21.

SHEIK DAVUD SAIBA AND OTHERS (PLAINTIFFS
Nos. 1, 3 AND 4), APPELLANTS,

v.

HUSSEIN SAIBA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Religious Endowments Act—Act XX of 1863—Regulation VII of 1817, s. 13—Discretionary power of a temple committee to appoint new trustees when the power of management is not hereditary—Trusts Act—Act II of 1882, s. 49.

A temple committee appointed under Act XX of 1863 may appoint new trustees when there is no hereditary trustee to add to the existing trustees, but this power, although discretionary, must be exercised reasonably and in good faith, and, according to the principle, which is applicable to public trusts, embodied in section 49 of the Indian Trusts Act. If it is not so exercised, the power may be controlled by a Civil Court of original jurisdiction.

SECOND APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 171 of 1891, reversing the decree of J. P. Fernandez, District Munsif of Coondapoor, in original suit No. 73 of 1890.

The plaintiffs were four of five trustees of a mosque. The eighth and ninth defendants were members of the committee who had appointed the first to sixth defendants additional trustees. The seventh defendant was the fifth original trustee and khazi of the mosque, who had been dismissed from his office by the four other trustees, a proceeding which, *inter alia*, gave rise to rioting, in which two of the plaintiffs took part. The committee then appointed the additional trustees in order to counterbalance the influence of the plaintiff trustees in the management.

* Second Appeal No. 38 of 1893.