

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.*

MANASING AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

AMAD KUNHI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Succession Certificate Act—Act VII of 1889, ss. 4, 17—Probate issued from Native Court in Cutch—Certificate of Political Agent—Suit in British India.

A suit in British India by the executors of the will of a native of Cutch was dismissed, on its appearing that the plaintiffs were furnished only with probate issued from a Native Court, of which they produced a copy certified by the Political Agent of Cutch, and since stamped in accordance with the Court Fees Act, 1870:

Held, that the plaintiffs were not entitled to a decree without taking out probate or letters of administration in British India under Act V of 1881 or a certificate under Act VII of 1889, but instead of dismissing the suit, the Court should have allowed time for the plaintiffs to have so completed their title to sue.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suits Nos. 109 to 113, confirming the decrees of A. N. Anantha Rama Ayyar, Additional District Munsif of Calicut, in original suits Nos. 54 and 77 of 1889 and Nos. 300, 349 and 350 of 1890.

Suits brought by the plaintiffs claiming to represent the estate of one Singjo Rayasi Sait, deceased, to recover debts due by the defendants to that estate.

The testator was a native of Cutch, but the District Munsif found that he carried on business and left property within the jurisdiction of the District Court of South Malabar.

The plaintiffs were the executors appointed under his will and had obtained probate of the will in the Native Court of Bhuj, and they now produced and filed as exhibit E a true copy of the probate signed and sealed by the Political Agent at Cutch. The plaintiffs had presented this document to the District Court of South Malabar and paid stamp fees to the amount of Rs. 1,032 upon it. Both the Lower Courts held that exhibit E did not

* Second Appeals Nos. 1219 to 1223 of 1891.

establish the defendants' right to maintain the suits, which they accordingly dismissed.

MANASING
v.
AMAD KUNHI.

The plaintiffs preferred these second appeals.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and *Rama Rau* for appellants.

Bhashyam Ayyangar, *Sankarum Nayar* and *Govinda Menon* for respondents.

JUDGMENT.—The plaintiffs (appellants 1 to 5) are the executors of the will of one *Singji Rayasi*, a native of *Cutch*, and they sue through their agent *Purushottaman Amarasi Sett* to recover a debt due to the estate of the deceased.

By section 4 of Act VII of 1889 it is enacted that no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, except on the production, by the person so claiming of (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or (ii) a certificate granted under this Act and having the debt specified therein.

The Lower Courts have found that the plaintiffs are not entitled to sue, inasmuch as they have produced neither probate nor letters of administration, nor a certificate granted under Act VII of 1889.

It is contended by the learned *Advocate-General* that the executors having obtained probate of the will and letters of administration granted by the Judge of *Varisht Court* of *Bhuj*, and being unable to claim probate in *India*, are entitled, on proof of the will and of their status as executors of such will, to recover debts due to the estate of the deceased.

The Court of the *District Judge* of *South Malabar* having been, by the notification published at page 253 of the *Fort St. George Gazette*, dated 30th April 1889, authorized to receive applications for probate or letters of administration under Act V of 1881, it was open to the plaintiffs (appellants) to obtain under section 5 of the Act letters of administration with a copy of the will annexed.

“In regard to the title of executors and administrators,” says *Story* (*Conflict of Laws*, 8th Edn., § 512) “derived from a grant of administration in the country of the domicil of the deceased, it is to be considered that that title cannot, *de jure*,

MANASING
v.
AMAD KUNHI.

“extend, as a matter of right, beyond the territory of the govern-
ment which grants it. It has hence become a general doctrine
of the common law that no suit can be brought or maintained
by an executor or administrator in his official capacity in the
Courts of any other country except that from which he derives
his authority to act, in virtue of the probate and letters testa-
mentary or the letters of administration there granted to him.
If he desires to maintain a suit in any foreign country, he
must obtain new letters of administration and give new security
according to the rules of law prescribed in that country before
the suit is brought.”

The probate or letters of administration referred to in section 4, clause (i) of Act VII of 1889, must be probate or letters of administration granted under Act V of 1881, and as the plaintiffs have not obtained such, they were not entitled to a decree. Then it is argued that the provisions of Act VII of 1889 have been substantially complied with, as a certificate in the form, as nearly as circumstances admit, of the second schedule has been granted to the plaintiffs 1 to 5 by the Political Agent of Cutch, and such certificate has been stamped in accordance with the provisions of the Court Fees Act of 1870.

We think the Lower Courts were right in holding that the copy of probate produced by plaintiffs and marked exhibit E is not a certificate granted by a British representative in a foreign state within the meaning of section 17 of Act VII of 1889. There is nothing to show that the Political Agent when he affixed his signature to the true copy of the probate intended to grant such a certificate as is required by Act VII of 1889. If he had no such intention, but merely affixed his signature with reference to the provisions of section 86 of the Evidence Act, the payment of the Court fees required by the Court Fees Act, 1870, although it proves the *bona fides* of the plaintiffs, will not validate the grant of letters of administration as a certificate.

We think, therefore, that the Lower Courts were right in holding that plaintiffs were not entitled to a decree, but were wrong in dismissing their suit. They should have allowed time for the plaintiffs to take out probate or letters of administration or to produce such a certificate as is required by the Act.

We set aside the decrees of the Courts below and remand the suit to the Court of First Instance, which will grant the plaintiffs

a reasonable time within which to comply with the provisions of Act VII of 1889, failing which the suit must be dismissed.

MANASING
v.
AMAD KUNHI.

All questions of costs must stand over until a final decision is given.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.

KRISHNAN (PLAINTIFF), APPELLANT,

v.

CHADAYAN KUTTI HAJI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1892.
March 12.
April 26.

Transfer of Property Act—Act IV of 1882, s. 85—Non-joinder of puisne mortgagee in a mortgage suit—Civil Procedure Code—Act XII of 1882, ss. 278-283—Mortgage decree—Claim in execution to mortgage premises.

A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee :

Held, (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit; (2) that the second mortgagee was estopped from now re-asserting his claim.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 472 of 1887, reversing the decree of J. A. deRozario, District Munsif of Pynad, in original suit No. 178 of 1886.

Suit instituted in April 1886 to recover certain land with mesne profits.

In original suit No. 124 of 1875 one Koyotti obtained a decree for the redemption of a kanom on the land now in question. To enable him to effect the redemption, he borrowed Rs. 3,000 from

* Second Appeal No. 234 of 1891.