

to the District Court by the section, nor were they given by any section of the Civil or Criminal Procedure Code.

Though that was in a Civil Court and the present case arose in a Criminal Court, we think the same reasoning must be held applicable. The power to take, or call for, further evidence given by section 428, Criminal Procedure Code, is expressly limited to appeals under that chapter, *i.e.*, under chapter 31 of the Code. Section 195 is not part of that chapter nor does the section itself give any power to call for further evidence.

We must therefore hold that the District Magistrate had no power to make the order calling for further evidence. We set aside the order and direct the District Magistrate to restore the case to his file and deal with it according to law.

BENSON, C.J.,
AND
ABDUR
RAHIM, J.
KRISHNA
REDDY
v.
EMPEROR.

APPELLATE CIVIL.

*Before Sir R. S. Benson, Officiating Chief Justice, and
Mr. Justice Sankaran-Nair.*

CARALAPATHI CHUNNA CUNNIAH AND OTHERS (DEFENDANTS),
APPELLANTS,

1909.
August 25.

v.

COTA NAMMALWARIAH (PLAINTIFF), RESPONDENT.*

*Indian Succession Act, X of 1865, ss. 82, 187—Will—Bequest to widow,
how to be construed.*

Section 187 of the Succession Act does not debar a defendant from relying on a will, in respect of which no Probate or Letters of Administration have been taken out, as he is not seeking to establish a right as executor or legatee.

In a case to which the Hindu Wills Act applied, a testator made a bequest to his widow in the following terms:—"I give all the remaining properties of every sort which fell to my share to my wife Andalu. Therefore, the aforesaid Andalu herself should enjoy all the remaining properties":

Held, on the construction of the will, that the widow took only a limited estate. The operation of the ordinary rule of Hindu Law that a bequest to a wife, without words creating an absolute estate, conferred only a limited interest, was excluded by section 82 of the Succession Act. The fact that the donee was a widow, the absence of words of inheritance, and of words conferring powers of alienation were not sufficient to show that she took only a restricted interest.

* Original Side Appeal No. 12 of 1908.

ENSON, C.J., These circumstances, however, coupled with the recital in the will that she
 AND should "enjoy" the estate, indicated the intention of the testator that she
 SANKARAN- should have no powers of alienation.
 NAIR, J.

CARALAPATHI APPEAL from the judgment and decree of J. Boddam, dated 29th
 CHUNNA January 1908, in the exercise of the ordinary original civil
 CUNNIAH jurisdiction of this Court in Civil Suit No. 200 of 1906.
 v.

COTA
 NAMMALWA-
 RIAH.

The facts of this case are fully set out in the judgment.

The Hon. The Advocate-General and *K. Srinivasa Ayyangar*
 for appellants.

The Hon. Mr. *V. Krishnaswami Ayyar* and *F. V. Srinivasa Ayyangar*
 for respondent.

JUDGMENT.—It was first argued before us that the defendants are not entitled to claim under the will as they have not taken out Probate or Letters of Administration. Section 187 of the Indian Succession Act is relied upon. But it has been decided that a defendant is not precluded by that section from relying upon a will as he is not seeking to establish a right as executor or legatee (*See Janaki v. Dhanu Lall*(1)).

The next question is whether under the will left by Cota Theperumaliah who died in 1874, his widow took an absolute estate or only a widow's estate. After making certain bequests the testator made the gift in question in the following terms:—"I give all the remaining properties of every sort which fell to my share to my wife Andalu. Therefore my aforesaid wife Andalu herself should enjoy all the remaining property." Under section 82 of the Succession Act "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him." This is undoubtedly in conflict with the rule that where a husband bequeaths immovable property to his wife without words expressly creating an absolute estate, she takes only a widow's interest. This rule is based on the fact that a Hindu presumably knows that widows do not take absolute estates of inheritance which they are entitled to alienate. We cannot now apply this rule to cases to which section 82 applies. We can restrict the widow's interest therefore only if the other terms of the will justify such restriction. The circumstances that she is a widow, that there are no words of inheritance,

(1) (1891) I.L.R., 14 Mad., 454.

or words authorising her to alienate, are not in themselves sufficient to show that the widow takes only a restricted estate, as in such cases there is no presumption to be raised under section 82; the words themselves showing that she took an absolute estate. But we may take the circumstances into consideration in construing the other provisions of the will. The recital in the will that his wife should "enjoy" the property is important to indicate the intention of the testator. He does not leave any specific property to his wife and without words of inheritance or words empowering her to alienate which are usually inserted when it is intended to give an absolute estate, he leaves the property to her to 'enjoy.' We are inclined, therefore, to think he did not intend that his widow should have the power to alienate the estate. At the time of the will and of his death, he had a nephew and daughters and it is not likely that he intended to enable the widow to alienate the estate to strangers. We therefore dismiss the appeal and the memorandum of objections with costs.

BENSON, C.J.,
AND
SANKARAN-
NAIR, J.
—
CARALAPATHI
CHENNA
GUNNAH
v.
GOTA
NAMMALWA-
RIAH.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, Mr. Justice Miller and Mr. Justice Sankaran-Nair,

IN THE MATTER OF DESU MANAVALA CHETTY, APPELLANT.*

1908.
July, 16, 19.
1909.
August 20.

Court Fees Act VII of 1870, s. 19-I (1) and III schedule—"Property held in trust not beneficially"—Undivided share of deceased coparcener not 'property held in trust not beneficially'—Surviving coparcener applying for Letters of Administration liable to pay court-fees on the value of share of deceased coparcener.

Under the Mitakshara Law as administered in this part of India, an undivided coparcener has power to mortgage or alienate his undivided share and he can at any time enforce partition of his own share. He cannot therefore be said to hold his own share of the undivided property "as trust-property," not beneficially or with general power to confer a beneficial interest in it, within the meaning of these words as used in Annexure B of the form for valuation in Schedule III of the Court Fees Act, although, as regards the shares of others, he may be said to so hold them.

* Original Side Appeal No. 43 of 1908.