

are some observations by way of obiter in the judgment of MUKERJEE, J., who invokes the aid of justice, equity and good conscience in favour of equal apportionment to all decree-holders. It has been laid down by the Judicial Committee that under section 53 of the Transfer of Property Act if one creditor is preferred by a debtor honestly that would not be a preference which would avoid the transaction. I am referring to this for the purpose of showing that a person who is diligent enough to get from his debtor his rights is not to be asked to give them up because there are others who have similar rights but who have not taken steps to enforce them. If there is any one principle which guides our Courts, it is the principle of enabling persons who are diligent enough to secure their rights to get full satisfaction of their claims without compelling them to share the property of the judgment-debtor along with others who did not move promptly in the matter.

I would, therefore, allow the petition and set aside the order of the District Munsif and direct him to proceed with the matter in the light of the above observations.

K.R.

UMMA
VENKATA-
RATNAM & Co.
v.
ADAMJI
USMAN & Co.
SERHAGIRI
AYYAR, .

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Ayling.*

SURAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

ANNAPURNAMMA (DEFENDANT), RESPONDENT.*

1919,
February, 26.

Specific Relief Act (I of 1877), sec. 42—Hindu Law—Suit by a Hindu for a declaration that a will alleged to have been executed by another member of the family giving his widow power to adopt is forged—Maintainability of.

A member of a Hindu family can maintain a suit under section 42 of the Specific Relief Act for a declaration that a will alleged to have been executed by another member of the family giving his widow power to adopt is a forgery.

SURAYYA
v.
ANNA-
PURNAMMA.

Bobba Padmanabhudu v. Bobba Buchamma (1918) 35 M.L.J., 144, followed; *Sreepadam Venkataramanna v. Sreepadam Ramalakshamma* (1912) I.L.R., 35 Mad., 592, not followed.

APPEAL against the decree of V. R. KUPPUSWAMI AYYAR, Subordinate Judge of Kistna at Ellore, in Original Suit No. 50 of 1917.

One Mallampalli Petteyya alias Pattisachelam died about the end of August 1914, leaving his widow, the defendant, who alleged that he had left a will giving her power to adopt a son. As she was a minor, her father presented the will before the Sub-Registrar for registration, who registered it as genuine in spite of the opposition of the plaintiffs. The plaintiffs then brought this suit against the widow for a declaration that the will was a forgery, alleging that the deceased was a minor and an undivided co-parcener with the plaintiffs and that the will was a fabrication by the father of the defendant. The defendant pleaded that the will was genuine, that the mere execution of the will did not give the plaintiffs a cause of action, that her husband was divided in status from the plaintiffs and that though he was a minor at the time of making the will, the same was valid in law as it did not dispose of any property but only gave her power to adopt. Two issues were framed :—(1) whether the alleged will giving power to adopt having been executed admittedly by a minor is not valid, and (2) whether the plaintiffs' suit is maintainable. Relying on the authority of *Sreepadam Venkataramanna v. Sreepadam Ramalakshamma*(1), the Subordinate Judge dismissed the suit on the second issue.

The plaintiffs preferred this appeal.

V. Suryanarayana for the appellants.—The plaintiffs have a cause of action and the suit is maintainable. I rely on *Bobba Padmanabhudu v. Bobba Buchamma*(2) as enunciating the sounder view which dissents from that in *Sreepadam Venkataramanna v. Sreepadam Ramalakshamma*(1).

V. Ramadoss for the respondent.—The suit does not lie. Mere execution of the will containing only a power to adopt without an actual adoption does not give a cause of action; see *Sreepadam Venkataramanna v. Sreepadam Ramalakshamma*(1), *Rama Row v. The Raja of Pittapur*(3), *Saudagar Singh v.*

(1) (1912) I.L.R., 35 Mad., 592.

(2) (1918) 35 M.L.J., 144.

(3) (1919) I.L.R., 41 Mad., 219.

Pardip Narayan Singh(1), *Janaki Ammal v. Narayanasami Aiyer*(2), *Jaipal Kunwar v. Indar Bahadur Singh*(3). No suit will lie to set aside an oral consent of a reversioner to adopt. When there is a difference of opinion in same Court the proper procedure is to refer the matter to a Full Bench: see *Buddha Singh v. Lattu Singh*(4).

SURAYYA
v.
ANNA-
PURNAMMA.

WALLIS, C.J.—The Subordinate Judge has proceeded upon the WALLIS, C.J. authority of the decision in *Sreepadam Vekataramanna v. Sreepadam Ramalakshamma*(5), but this case has been dissented from in *Bobba Padmanabhudu v. Bobba Buchamma*(6), which I prefer to follow. I am unable to agree with the observation in the former case that section 42 of the Specific Relief Act does not authorize such a suit as this. The effect of the widow setting up a will giving her power to adopt is in my opinion to challenge the absolute right of the plaintiff to succeed on her death if he survives her and to convert him in the language of English Law from an heir apparent into an heir presumptive. The rule that Courts in India will not entertain a suit by the plaintiff for the declaration that he is a nearer reversioner than the defendant is not in my opinion based on the view that such a suit does not come within the terms of section 42 but on the settled practice of the Court in the exercise of its discretion under the section and has been so treated by Lord PARKER of Waddington in *Saudagar Singh v. Pardip Narayan Singh*(1). Where a will giving authority to adopt is being set up by a widow it is expedient that the question should be settled at once and not left open until the best evidence has disappeared, and a suit such as this may therefore be regarded as in the nature of a suit *quia timet*. I would allow the appeal, reverse the decree, and remand the suit for disposal according to law.

Costs will abide the result.

AYLING, J.—I agree in the order proposed and adhere to my opinion expressed in *Bobba Padmanabhudu v. Bobba Buchamma*(6).

AYLING, J.

N.R.

(1) (1918) I.L.R., 45 Calo., 510 (P.C.)

(2) (1916) I.L.R., 39 Mad., 634, at p. 638 (P.C.).

(3) (1904) I.L.R., 26 All., 233, at p. 243 (P.C.).

(4) (1915) I.L.R., 37 All., 604, at pp. 622, 623 (P.C.).

(5) (1912) I.L.R., 35 Mad., 592.

(6) (1918) 35 M.L.J., 144.