

SARGENT, C. J.—According to *Bhagvân Dayalji v. Bâlu* ⁽¹⁾, a Subordinate Judge, invested with Small Cause Court powers, has generally to follow the procedure prescribed in the Code of Civil Procedure. This governs his proceedings both in trial and execution, whether the suit is a small cause or not. If the two jurisdictions assigned to the Subordinate Judge's Court and to the Subordinate Judge personally are locally co-extensive (which sometimes they are not), there is no distinction of sides or branches. But where, as in some cases, the ordinary jurisdiction is wider locally than the Small Cause jurisdiction, the Court is in that part of its territory which lies outside the Small Cause Court jurisdiction, to be regarded as a separate Court so far that a decree in a small cause should not generally be executed on property beyond the Small Cause Court jurisdiction without a transfer, *i. e.*, a dealing with the execution as in a suit tried in the usual way, for reasons to be recorded in writing. As all is done by the same Judge, a suggestion and an order recorded in the case are sufficient without a formal transmission as to a distant Court.

(1) L. L. R., 8 Bom., 230.

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DHARAMDA'S
SANTIDA'S
v.
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GOVIND.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

RAYJI RANCHOD NA'IK (ORIGINAL CAVEATOR), APPELLANT v. VISHNU RANCHOD NA'IK (ORIGINAL APPLICANT), RESPONDENT.*

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December.

Probate—Will—Execution in Bombay—Property in Mafussil—Act XXI of 1870, Sec. 2—Act V of 1881, Secs. 2 and 83—The Code of Civil Procedure (Act XIV of 1882), Sec. 177.

Held that the District Judge of Thána had jurisdiction to grant probate of a will executed on 28th October, 1881, by a Hindu woman in the town of Bombay devising immoveable property situated in Thána.

Where the caveator refuses to answer a question, section 177 of the Code of Civil Procedure (XIV of 1882), the provisions of which are extended to proceedings*

* Regular Appeal, No. 35 of 1884, from original decree.

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before the District Judge by section 83 of Act V of 1881, will not justify the Judge in dispensing with the proof of the will set up, and passing a decree in favour of the petitioner.

THIS was an appeal against an order of H. J. Parsons, Judge of the district of Thána. The applicant prayed for the grant, to him, of probate of the will of his mother, Anandibái, who died on the 18th of May, 1882, leaving a will executed in Bombay, dated 28th of October 1881, devising property situated in Thána, and appointing him executor and administrator of her estate. His brother entered a caveat, and contended that the District Judge of Thána had no jurisdiction in the matter, the alleged will having been made within the local limits of the Ordinary Original Civil Jurisdiction of the High Court of Bombay, and the property devised being situated beyond those limits. He also contended that the will was neither legal, nor legally executed, as it lacked his own signature. The Judge held that the matter was governed by the Hindu Wills Act, XXI of 1870, which, he ruled, did not vest in the High Court an exclusive jurisdiction as regards the grant of probate. On the question of the proof of the will the Judge examined the caveator, and asked him if he had attested a will made by his mother in 1877. Though the question was repeatedly put to him, he would neither admit nor deny signature, nor return a direct answer. The Judge thereupon considered that the caveator refused, without lawful excuse, to give evidence, and under section 177 of the Code of Civil Procedure (Act XIV of 1882) decided the case against him, and ordered probate to be given to the applicant.

The caveator appealed to the High Court.

Serjeant Atkinson with *Sealy* for the appellant.—This case is governed by the Indian Probate Act V of 1881: see preamble and section 2. It is not governed by the Indian Succession Act X of 1865 in its entirety; see sections 331 and 332: nor by the Hindu Wills Act XXI of 1870; see preamble and section 2. The preamble shows that the Legislature intended to legislate only as regards the wills of Hindus, &c., in the town of Bombay so far as this presidency is concerned. Section 2 extends portions of the Succession Act to all wills made by Hindus within the local limits of the Ordinary Original Civil Jurisdiction of the

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High Court at Bombay, *so far as relates to immoveable property situate within those limits*,—a qualification which, I submit, applies to wills executed in the town of Bombay as well as to those executed outside. The will in the present case, though executed in Bombay, devises property in Thána. It is, therefore, not a case to which the Hindu Wills Act applies. If so, section 2 of the Probate Act V of 1881 says: *Except in cases to which the Hindus Wills Act applies*, no Court in any local area beyond the limits of the town of Bombay shall receive applications for probate until the local Government has authorized it to do so. The District Judge was not authorized, and had no jurisdiction in this matter.

Ganpat Saddashiv Ráv for the respondent.—The Hindu Wills Act does apply to this case, and, therefore, the Probate Act does not. Section 2 of the former extends portions of the Indian Succession Act to (a) all wills of Hindus executed in Bombay, and (b) all such wills made outside the local limits of the Ordinary Original Civil Jurisdiction of the High Court of Bombay, so far as relates to immoveable property situate within those limits. This limitation does not apply to the former class of wills. All wills, if executed in Bombay, are governed by the Hindu Wills Act independently of the situation of the property.

SARGENT, C. J.—We are of opinion that the construction, contended for by the appellant, cannot be sustained, and that the present case comes within the language of the Hindu Wills Act, Section 2 (a), which applies to all wills of Hindus executed in Bombay, no matter where the immoveable property devised may be situated.

Serjeant Atkinson.—The District Judge was clearly in error in granting probate to the applicant without any proof as to the will set up by him.

Ganpat Saddashiv Ráv.—The Probate Act of 1881 by section 83 extends the provisions of the Code of Civil Procedure (XIV of 1882), section 177 of which justifies the action of the District Judge.

SARGENT, C. J.—In this case the caveator having refused to answer a question put to him by the Court, the District Judge has made an order, under section 177 of the Code of Civil Pro-

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cedure, for grant of probate to the petitioner. The proceeding between the petitioner and the caveator is directed, by section 83 of Act V of 1881, to be in the form of a suit according to the provisions of the Civil Procedure Code. The above section, therefore, of the Code would be applicable under proper circumstances; but it is plain that the discretion which the section confers on the Court is one which, in such a case, would be required to be exercised with more than usual care, and could never justify the Court in dispensing with proof of the will by the petitioner, as was done here. Nor do we think that the question, which the caveator refused to answer, *viz.*, whether he had signed a former will, was such a material one as to forbid our interference on appeal. We must discharge the order, and send the case back for a fresh order to be made on the application. Costs of this appeal to abide the result.

ORIGINAL CIVIL.

Before Mr. Justice Bayley.

1885

February 5,
March 17.

TRICCAM PA'NA'CHAND (PLAINTIFF), v. THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY AND OTHERS (DEFENDANTS).*

Practice—Security for costs—Civil Procedure Code (XIV of 1882), Sec. 380—Cantonment of Wadhwan—British India.

Held, that a plaintiff being a resident in Wadhwan in Káthiáwár and possessed of immoveable property in the cantonment there, could not be required to give security for costs under section 380 of the Civil Procedure Code (XIV of 1880), the cantonment of Wadhwan being within the limits of British India.

SUMMONS in chambers, calling on the plaintiff to show cause why he should not deposit a further sum of Rs. 2,000 as security for the defendants' costs in this suit.

The plaintiff was a resident of Wadhwan in Káthiáwár, and he brought this suit against the defendants through his constituted attorney.

Soon after the plaint was filed, the plaintiff was called upon by the defendants to give security for the costs, and he thereupon lodged in Court a sum of Rs. 1,000.

* Suit No. 143 of 1884.