

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

RA'GHAVENDRA MA'DHAV, APPLICANT, *v.* BHIMA' AND OTHERS,
OPPONENTS.*

1891.
July 30.

Succession Certificate Act VII of 1889, Sec. 4—Undivided brothers—Decree obtained by one of two undivided brothers—Right of surviving brother to execute decree—Certificate of heirship.

A decree was obtained by one of two undivided brothers. He died, and the surviving brother applied for execution of the decree.

Held, that if the debt was in its nature a family debt, the right to execute the decree would have devolved on him by survivorship and not as the heir of his deceased brother, and in that case no certificate of heirship under section 4 of Act VII of 1889 would be necessary; but if, on the contrary, the debt was part of the separate property of the deceased, the applicant could only execute the decree as heir, and must, in that case, obtain a certificate to enable him to proceed.

THIS was a reference made by Ráo Bahádur Káshináth Bákrishna Maráthe, First Class Subordinate Judge of Dhárwár, under section 617 of the Civil Procedure Code (Act XIV of 1882).

Ganesh Mádhav, one of two undivided brothers, obtained a money decree in his own name against Bhimá and others in the Court of the First Class Subordinate Judge of Dhárwár in his Small Cause jurisdiction. After his death the surviving brother Rághavendra (the applicant) presented an application for the execution of the decree as the heir of the deceased. The Subordinate Judge thereupon referred the following question for the decision of the High Court:—

“Can an undivided brother apply for execution of a decree obtained by his deceased brother independently of the applicant, without a certificate under section 4 of Act VII of 1889?”

The opinion of the Subordinate Judge on the above question was in the negative.

In the reference the Subordinate Judge made the following remarks:—

* Civil Reference, No. 8 of 1891.

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“ * * * The present case materially differs from the ruling on page 362 of the Printed Judgments of 1890, inasmuch as the present applicant was no co-judgment-creditor with the deceased, and now comes in as heir, and does not state in the application that he claims by right of survivorship. As the deceased undivided brother was permitted to sue independently for a debt apparently due to him, the applicant can claim payment of the debt as effects of the deceased person, and not by virtue of the choate or inchoate right to a share in the undivided family property.

“I feel, however, a doubt as to the spirit of the above quoted ruling, because by stretch of imagination all co-parceners in the family property of a Hindu may be regarded as claiming the effects of deceased co-parceners by the right of survivorship.”

There was no appearance for the parties in the High Court.

SARGENT, C. J.:—If the debt was in its nature a family debt, the right to execute the decree would have devolved on the applicant by survivorship, and not as the heir of the deceased brother; and in that case the ruling in *Somechand Bhikhabhai v. Badhar Jagmal*⁽¹⁾ should be followed. If, on the contrary, the debt was part of the separate property of the deceased, the applicant can only execute the decree as his heir, and must, in that case, obtain a certificate to enable him to proceed.

Order accordingly.

(1) P. J. for 1890, 362.