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BÁPUJI JAGANNÁTH.

a nuncupative will made in 1871 after the Hindu Wills Act came into force was held to be valid—*Bhugavan Dulabh* v. *Kdlá Shankar*, I. L. R., 1 Bom., 641.

"In the present instance, however, the testator has made an attempt, but an incomplete one, to carry out the provisions of the law and has failed. In *Fernandez* v. *Alves*, I. L. R., 3 Bom., 382, it was held that the actual signature of at least two witnesses must appear on the face of the will. This ruling was followed in *Nitye Gopal Sircar* v. *Nagendranath Mitter*, I. L. R., 11 Calc., 429."

The applicants appealed.

Notice of the appeal was issued to the Judge, and the record and proceedings were sent for.

Bhálshanker Nánábhai appeared for the appellants (original applicants):—The Hindu Wills Act (XXI of 1870) makes the Succession Act applicable only to Hindu wills (1) executed within certain local limits or (2) relating to immoveable property within those limits. This will does not fall within either class and, therefore, section 50 of the Succession Act does not apply. The will is, therefore, valid although not attested by two witnesses.

PARSONS, J.:—The Hindu Wills Act (XXI of 1870) applies section 50 of the Indi[illegible]cession Act to those wills only that are mentioned in s[illegible]es (*a*) and (*b*) of the former Act. The will in quest[illegible] will. We reverse the order of the District Judge and re[illegible] application to be disposed of according to law.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

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August 15.

MOTA'BHAI MOTILA'L, PLAINTIFF, *v.* THE SURAT CITY MUNICIPALITY AND ANOTHER, DEFENDANTS.*

Practice—Procedure—Amendment of plaint—Original form of plaint the test of jurisdiction.

A plaint praying for a declaration that a certain tax was illegal and also for damages for illegal entry into the plaintiff's house was presented to the Court of the First Class Subordinate Judge of Surat. The Judge amended the plaint by striking out the portion "regarding the reliefs other than the relief for damages," and then holding that the claim for damages would lie only in the Small Cause Court, returned the plaint for presentation in that Court.

* Civil Reference, No. 11 of 1895.

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Held, that the Subordinate Judge was not justified in returning the plaint at that stage of the proceedings. The shape in which the suit was originally instituted is the test of jurisdiction.

REFERENCE from T. Hamilton, District Judge of Surat, under section 646B of the Code of Civil Procedure.

The facts are sufficiently stated in the following reference:—

"I have the honour to refer for the orders of their Lordships at the instance of the plaintiff, Mr. Motábhai Motilál, a pleader of this Court, a plaint filed by him first in the Court of the First Class Subordinate Judge, who returned it (on the ground of want of jurisdiction) for presentation in the Court of Small Causes, and then in the latter Court, the Judge of which returned it on the same ground, *viz.*, want of jurisdiction, for presentation in the former Court.

"2. The suit is for a declaration of the illegality of the Surat municipal house-tax recently sanctioned by Government and for damages on account of an alleged illegal entry into plaintiff's house by an officer of the Municipality for purposes connected with the imposition of the said tax.

"3. The Subordinate Judge, [illegible] Class [illegible] in reasons set forth in his judgment, struck out [illegible] clause [illegible] "regarding the reliefs other than the relief [illegible] such a [illegible] ding that the claim for damages would lie only the [illegible] Small Cause Court, returned the plaint for presentation in that Court.

"4. I think it is obvious that he was wrong in so doing, for after exercising jurisdiction by amending the plaint, he could not aver want of jurisdiction with regard to the plaint so amended.

"5. The plaint as originally filed by plaintiff is certainly not one which a Court of Small Causes can entertain, and, therefore, in my opinion, the suit should be remanded to the Court of the Subordinate Judge, First Class, for disposal on its merits."

Hormasji C. Coyáji (*amicus curiæ*) for the plaintiff.

Krishnálál M. Jháveri (*amicus curiæ*) for the defendants.

PARSONS, J.:—The claim was not one within the cognizance of a Court of Small Causes, and the plaint was properly presented to the Subordinate Judge. The latter should have heard and determined the case. The fact that in the course of the hearing he found that the plaintiff was not entitled to the declaration, but only to damages,

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would not justify him in returning the plaint at that stage of the proceedings. The shape in which the suit was originally instituted is the test of jurisdiction.

We return the record and direct the Subordinate Judge to proceed with and determine the case. Costs of all proceedings subsequent to the order of the 1st October, 1894, to be costs in the cause.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

1895. *August* 12.

SAYAD ABDUL HAK SARDA'R DILE'R JUNG BAHA'DUR, C.I.E., (ORIGINAL PLAINTIFF), APPELLANT, v. GULA'M JILA'NI VALAD IMDA'D ALIKHA'N AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Practice—Parties—Defendant who has assigned interest—No right to be made co-plaintiff—Plaintiff without right of action—Attempt to remedy defect by joining others in whom right supposed to lie—Civil Procedure Code (Act XIV of 1882), Sec. 27—Mortgage—Redemption after the expiry of a term—Right of redemption and foreclosure co-extensive—Power expressly given to the mortgagee to call in his money before the expiry of the term—Stipulation unilateral and void of consideration—Right to redeem fettered by confining it to a particular time or to a particular description of persons—Oppressive and unreasonable restraint on the right of redemption.

A defendant who has assigned all his rights in the subject-matter of the suit, and has no longer any interest in it, has no right to be made a co-plaintiff.

A plaintiff who has no right of action when he brings his suit cannot remedy the defect and acquire the right by joining with him persons who have the right of action.

The right of redemption and the right of foreclosure are always co-extensive, and from the postponement of the former the Court will infer an intention to postpone the latter in the absence of express provision on the point; where there is such express provision, giving the mortgagee power to foreclose at any time, any stipulation postponing the mortgagor's right to redeem is unilateral and void of consideration.

A Court of Equity will not enforce any agreement in restraint of the right of redemption which is oppressive and unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage.

A mortgagor cannot, by any contract entered into with the mortgagee at the time of the mortgage, give up his right of redemption or fetter it in any manner by confining it to a particular time or a particular description of persons.

* Appeal, No. 155 of 1893.