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bound by the provisions of section 211. It is true that possession has not yet been delivered to the decree-holder. But this fact does not prevent the clear provisions of the law being followed.

We must vary the decree of the lower appellate Court by limiting the mesne profits to three years subsequent to 12th January, 1887, the date of the High Court decree. Appellant must pay his own costs and half respondents'.

Decree varied.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

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March 9.

BANK OF BOMBAY (ORIGINAL DEFENDANTS), APPELLANTS, *v.* AMBALAL SARABHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Bank of Bombay—Shares—Registration and transfer of shares—Rights of surviving co-parceners—Necessity of probate or letters of administration—Presidency Banks Act (XI of 1876), *Secs.* 20, 22 *and* 23.

Thirteen shares of the Bank of Bombay stood in the name of one Sarabhai, who died in March, 1895. The plaintiff, who was the minor son of Sarabhai and joint and undivided with him, applied to the Bank to have the shares transferred to his name as the sole surviving co-parcener. The Bank contended they were not bound to do so without production of the probate of the will of Sarabhai or letters of administration to his estate.

Held, (reversing RUSSELL, J.) that having regard to the terms of the Presidency Banks Act (XI of 1876) the Bank were right in their contention. For a share in the Bank, for the purpose of devolution or survivorship, must be deemed, as far as the Bank was concerned, the exclusive property of its registered holder, and that, therefore, the sole surviving co-parcener of a deceased Hindu cannot demand that the Bank of Bombay should by reason of his survivorship register him as a shareholder in respect of shares in the Bank which stand in the name of his deceased co-parcener.

THIS was an appeal from the decision of Russell, J., who directed the defendant Bank to issue fresh certificates in the name of the plaintiff in respect of the shares standing in the name of the deceased Sarabhai.

The facts sufficiently appear from the judgment of Russell, J., which was as follows:—

* Suit No. 798 of 1899; Appeal No. 1094.

RUSSELL, J.:—By his plaint in this suit, which was filed on the 19th of December, 1899, the plaintiff says that he and his father, the late Sarabhai Maganbhai, were members of a joint Hindu family and continued joint and undivided until the death of the latter in March, 1895, on which event the property of the family came to the plaintiff as sole surviving member by right of survivorship. The said family property comprised 13 shares of the defendant Bank bearing Nos. 1081—1085, 14530, 14531, 5835, 8674, 11306, 12588, 17065, 19243 purchased out of the family funds in the name of the said Sarabhai as the head male member and manager of the family and now standing in his name in the Bank's register. The plaintiff applied to the defendant Bank for transfer of the shares and payment of the dividends thereon in his own right, but the Bank refused to do so without production of the probate of the will of the said Sarabhai or letters of administration to his estate. The plaintiff submits that the shares did not form part of the estate of the said Sarabhai and could not vest in his executors and administrators as such, and that the same came to him by survivorship and ought to be transferred to his name without probate or letters of administration. The plaintiff offered to make a declaration of the co-parcenery and the plaintiff's right to the shares, and to give an indemnity to the Bank, which, however, refused to comply with the plaintiff's demand. The plaintiff submits that the Bank is not justified in insisting on its requisition for probate or letters of administration, and that its refusal to comply with the plaintiff's demand is wrongful. The plaintiff prays that he is entitled to the shares and dividends thereon as sole surviving member of the joint family and to deal with the same as his own; that the defendant Bank may be decreed to transfer the said shares to the name of the plaintiff or to the name of his guardians under Act VIII of 1890 and to pay him the dividends on the shares accrued and to accrue due, and to do all acts and things necessary to vest the shares in the plaintiff and for costs and other relief.

No written statement was put in by the defendant, but Mr. Macpherson (with the Advocate General) raised the issue "whether the plaintiff is entitled to any and what relief," and

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Mr. Inverarity for the plaintiff raised the issue "whether the defendants are entitled to demand probate of the will or letters of administration to the estate of Sarabhai Maganbhai."

From the evidence before me it appears that there was an old banking firm of the name of Karamchand Premchand belonging to Sarabhai's grandfather Karamchand. Karamchand had two sons, Maganbhai and Motibhai. Motibhai had no sons and died before Maganbhai. Maganbhai adopted Sarabhai. And Maganbhai, Motibhai, and Sarabhai were members of the joint and undivided Hindu family. Maganbhai's property was ancestral and he died in 1864, and Sarabhai continued the family firm under the same name. The only property that Sarabhai had was acquired from his father. The plaintiff was the natural son of Sarabhai and was joint and undivided with him till his death in March, 1895. It is also proved that the shares of the defendant Bank are ancestral property in the hands of the plaintiff and were bought from the firm's fund.

This suit was filed by the plaintiff by his next friend Chimanlal Nagindas, who with seven other gentlemen was appointed guardian of the estate of the plaintiff, who is a minor, and the said Chimanlal was alone appointed guardian of his person by an order of the District Court of Ahmedabad, dated the 24th of January, 1896. By an order of this Court, dated the 18th January, 1899, purporting to be made under Act XXVII of 1866, the right to transfer the shares in question (together with others) and to receive the dividends, &c., thereon was vested in the said Chimanlal Nagindas, and during the minority of the plaintiff the said Chimanlal was authorized to transfer the share, and receive the dividends, and was further ordered to transfer them to the plaintiff on his attaining majority.

The sole question to be decided is "Is the Bank of Bombay justified in insisting upon probate or letters of administration as above mentioned?" The Bank of Bombay, as is well known, is governed by Act XI of 1876 (the Presidency Banks Act, 1876), section 23 of which is as follows:—

"When by the death of any proprietor or shareholder his stock or shares shall devolve on his legal representative the Bank

shall not be bound to recognise any legal representative of such proprietor or shareholder other than a person who has taken out from a Court having jurisdiction in this behalf probate of the will or letters of administration to the estate of the deceased."

The shareholders are defined as "the duly registered holders from time to time of the shares of the Bank." Sarabhai came within that definition. Mr. Macpherson argued (*inter alia*) that section 20 of the Act must be complied with. Paragraph 1 of section 20 runs as follows:—

"Every transfer of stock or shares may be by endorsement on the certificate or in such other form as the Board from time to time may approve, and shall be presented to the Bank accompanied by such evidence as the Board may require to prove the title of the transferor."

But it appears to me that section 23 refers to a transmission of shares, section 20 to transfer. These two are entirely distinct. One means a transfer by the act of parties, the other means transmission by devolution of law: see *In re Bentham Mills Spinning Co.*[1] It was next objected that the plaintiff was a minor, but I do not find anything in the Act to prevent a minor, under circumstances like the present, from being registered as a shareholder. In England a minor can sign a memorandum of association of a company: see *Laxon & Co.*[2], and table A, article 45, contemplates a minor voting by his guardian or any one of his guardians if more than one (Lindley, page 39). "An infant may be a member of a company, but he can repudiate his shares whilst he is an infant or on coming of age." In India, however, an infant is not "competent to contract," but in the present case the plaintiff is not contracting in any sense of the word. It was next objected that section 22 precluded the Bank from being bound by, or affected by notice of any trust to which any share might be subject in the hands of the holder thereof, but Mr. Inverarity's answer to that seems to me to be correct, *viz.*, that section 22 has no application when the trustee is dead, but only applies when he is alive, and, moreover, the managing member of a Hindu family is not a trustee: see Mayne's Hindu Law, section 269.

(1) (1879) 11 Ch. Div., 900. (2) (1892) 3 Ch., 555.

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Considerable stress has been laid on the risk that the Bank would be exposed to in having to decide who were the members of the joint Hindu family or what was the property thereof, but I have only to construe the Act without respect to such considerations, and there seems considerable force in Mr. Inverarity's objection that if a member of a joint Hindu family did take out letters of administration, and got the shares transferred to his name and misappropriated them, the Bank would have no defence to a suit filed against them by other members of the family entitled to the shares.

The real point, it seems to me, is, can the shares in this case be said to have devolved on the *legal* representative of Sarabhai?

Representation implies succession—and as Mr. Mayne says, section 246: "There is no such thing as succession, properly so called, in an undivided Hindu family. The whole body of such a family, consisting of males and females, constitutes a sort of corporation, some of the members of which are co-parceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance. In Malabár and Kánara, where partition is not allowed, the idea of heirship would never present itself to the mind of any member of the family. Each person is simply entitled to reside and be maintained in the family house, and to enjoy that amount of affluence and consideration which arises from his belonging to a family possessed of greater or less wealth. As he dies out, his claims cease, and as others are born, their claims arise. But the claims of each spring from the mere fact of their entrance into the family, not from their taking the place of any particular individual. Deaths may enlarge the beneficial interests of the survivors by diminishing the number who have a claim upon the common fund, just as births may diminish their interests by increasing the number of the claimants. But although the fact that A is the child of B introduces him into the family, it does not give him any definite share of the property, for B himself has none. Nor upon the death of B does he succeed to anything, for B has left nothing behind to succeed to. Now in the rest of India the position of an undivided family is exactly the same, except that within certain limits each male member has, and in

Bengal some females have, a right to claim a partition, if they like. But until they elect to do so, the property continues to devolve upon the members of the family for the time being by survivorship and not by succession."

Sir William Markby in his Elements of Law, section 780: "We in Europe have long been accustomed always to deal with the law of succession as connected with the rupture of the family by death; the Hindu lawyers deal with it as connected with the rupture of the family by partition. It might be said that there is, in fact, no Hindu law of succession, but only of partition."

Moreover, if probate or letters of administration were granted, these shares would not be comprised therein. For section 3 of the Probate and Administration Act V of 1881 defines "Probate" as the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator, and "Administrator" as a person appointed by competent authority to administer the estate of a deceased person when there is no executor; and section 4 of that Act after stating that "the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such," expressly goes on: "but nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person." This latter clause is a re-enactment of clause 3 of the Hindu Wills Act XXI of 1870 which is repealed by section 154 of the Probate and Administration Act (V of 1881). An executor or administrator could not swear that these shares were the property of the deceased, and, consequently, probate or letters of administration could not affect them. I may mention that in the case of *Gokuldas Madhowji* v. *The Mofussil Company and others* (No. 499 of 1885), a report of which I have been supplied with from the *Bombay Gazette* of the 23rdof July, 1886, in which judgment was given by Scott, J., on 26th July, 1886, a similar point is decided in the way I am deciding the present case.

It is not necessary for me to decide whether the *ex parte* order under Act XXVII of 1866 was good or bad, because under section

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52 of that Act the Bank will be completely indemnified if acting upon the order. The result is that I must pass a decree for the plaintiff. I direct the defendants to issue fresh certificates in the name of the plaintiff in respect of the shares above specified, and to pay all dividends accrued due, or to become due, to the said Chimanlal Nagindas during the plaintiff's minority, and the receipt of the said Chimanlal Nagindas to be a sufficient discharge to the defendants. I further direct that the plaintiff and the said Chimanlal Nagindas do indemnify the Bank in respect of the issue of such shares and payment of such dividends to the satisfaction of the Bank, but, in the event of the parties disagreeing, the question of the sufficiency of such indemnity to be decided by the Judge in chambers. The defendants must pay the costs of this suit, but the plaintiff should, I think, pay the costs, if any, of such indemnity; but if any application to the Judge in chambers be necessary hereafter, the costs thereof are to be dealt with by that Judge. On fresh certificates being issued by the Bank as above decreed the present certificates to be handed to the Bank for cancellation.

Lang (Advocate General) and *Macpherson*, for appellants.

Inverarity, for respondent.

The judgment of the appeal Court was delivered by

JENKINS, C. J.:—The point for decision in this appeal is, whether the sole surviving co-parcener of a deceased Hindu can demand that the Bank of Bombay should, by reason of his survivorship, register him as a shareholder in respect of shares in the Bank, which stand in the name of his deceased co-parcener, without production of probate or letters of administration. Mr. Justice Russell has decided this point in the affirmative, and from this decision the Bank have presented this appeal.

The Bank of Bombay is regulated by the Presidency Banks Act of 1876, which in its 3rd section provides that in the Act "shareholders" means the duly registered holders from time to time of the shares of the Bank, and "registered" means registered in the books of the Bank. Chapter V of the Act deals with certificates and the transfer and transmission of shares, and

provides for a change in the legal title to shares in three ways: (*a*) by transfer by the act of shareholder; (*b*) by survivorship; (*c*) by transmission on death, insolvency or bankruptcy, or (in the case of female member) on marriage. (See sections 20, 22 and 23.) Here we are not concerned with a change of proprietorship effected or to be effected by transfer: the operative event in this case is death. There are in reference to it three possible views: (1) that it resulted in a survivorship under the Act; (2) that it gave rise to a transmission by devolution under the Act; and (3) that the contingency is unprovided for, and its results have to be determined apart from the Act.

Now survivorship under the Act takes place when the share is vested in more than one holder; for in that case the shareholders shall, as between themselves and the Bank, be considered as joint owners with benefit of survivorship. But a share is only vested in holders when they are duly registered in the books of the Bank as the holders of that share. In this case these conditions did not exist; for the deceased alone was the registered holder of the share: therefore it is clear that there was no survivorship under the Act.

Was there, then, a transmission within the meaning of section 23 on the death of the deceased shareholder? In reference to this question, section 22 has a most material bearing. It provides that the shareholders for the time being and no other persons shall be members of the Bank, and that the Bank shall not (subject to an exception not now material) be bound or affected even by notice of any trust to which the share may be subject in the hands of the holder.

This provision, it will be noticed in passing, goes further than section 29 of the Indian Companies Act of 1866. The effect of section 22 as it appears to me, then, is, that a share, as between the Bank and all who may be interested in it, is the exclusive and separate property of the registered shareholder.

This result, it should be noted, arises not out of mere contractual obligation, but out of a provision of legislative force capable of moulding the rights of individuals in a form not possible by mere contract. It was argued that on the death of a share-

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holder the provisions of section 22 come to an abrupt end: but this appears to me to be putting too narrow a construction on the words. I prefer to take the view expressed by James, L. J., in *Baird's case*[1], where he says "the dead shareholder remains, —that is, the estate remains—a member," and to say that, until there is such a transmission as the Act sanctions, the deceased holder must be treated as the shareholder for the time being, and the share must be deemed to be in his hands as the holder thereof even after his death, so that the Bank is not bound or affected by notice of any trust relating to the share.

The Legislature has, in my opinion, only given effect to what the conduct of the business requires when it provided that the Bank had only to do with the legal title to the share, and that a share was, for the purpose of devolution or survivorship, to be deemed, so far as the Bank was concerned, the exclusive property of its registered holder or holders.

But if for the purposes of the Act the share was the exclusive property of the deceased holder, on his death the legal title did not survive; but it devolved on his legal representative, so that section 23 of the Act applies. That section provides that the Bank shall not be bound to recognise any legal representative other than a person who has taken out from a Court having jurisdiction in this behalf probate of the will or letters of administration to the deceased. It has, however, been argued that, in view of the provisions of section 4 of the Probate and Administration Act, section 23 of the Presidency Banks Act cannot be treated as applicable. Section 4 provides:—

"The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him.

"But nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person."

It is said that inasmuch as the beneficial interest in the share passed by survivorship, the share would not, according to the words of the section, vest in the executor or administrator. But

(1) (1870) L. R., 5 Ch., 725 at p. 735.

this argument is founded on an obvious fallacy; it confuses the legal title and the beneficial interest, and assumes that because the beneficial interest has survived, the legal title must follow suit. But as I have pointed out, it is with the legal title alone that we are concerned, and that has not survived.

We have not at present to consider in what way representation should be taken out, or what duty should be paid; it is sufficient to hold, as in my opinion we should, that the present is a case in which section 23 of the Presidency Banks Act applies, and that, if the Bank so requires, probate or letters of administration must be produced.

I have not overlooked the reference made by Mr. Inverarity to the order purporting to have been passed under section 52 of Act XXVII of 1866, but in my opinion that makes no difference to the Bank's rights. I notice that the order under appeal directs the Bank to issue fresh certificates in the name of the plaintiff. The plaintiff is, however, a minor, and, though the point has not been raised before us, I desire to guard myself against being taken to assent to the proposition that the Bank can be forced to accept an infant as a shareholder (cf. *Symon's case*[1]). In the view, however, that I take of the Presidency Banks Act, no question of this kind can arise in the event of transmission or death. (See sections 8 and 13 of the Probate and Administration Act, 1881.)

In my opinion the decree of Mr. Justice Russell must be reversed, the suit must be dismissed, and the appeal allowed with costs.

CANDY, J., concurred.

Attorneys for the Bank (appellant defendant):—Messrs. *Crawford, Brown and Co.*

Attorneys for the plaintiff respondent:—Messrs. *Bhaishankar and Kanga.*

(1) (1870) L. R., 5 Ch., 298 at p. 301.