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Can, then, the decision be supported on the ground that there has been no such leave as section 462 contemplates? We think not. That section obviously contemplates the existence of a guardian and a pending litigation; but here, when the agreement was entered into, there was neither a guardian for a suit nor a suit. But though section 462 can have no application, that does not preclude the plaintiff from showing that on other grounds the decree is not binding on him. The result is that we must reverse the decree of the lower Appellate Court and remand the case for a hearing on the merits. The costs will abide the result.

Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

PURSHOTTAM DEVJISHET THAKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* KALA GOVINDJI THAKAR (ORIGINAL DEFENDANT), RESPONDENT.*

1901. *December* 2.

Executor—Legacy—Suit by one legatee for a legacy—Right of executor to have other legatees made parties to the suit—Civil Procedure Code (Act XIV of 1882), sections 32 and 34—Form of suit—Practice—Procedure—Liability of executor for breach of trust—Trust Act (II of 1882), section 23.

A legatee is entitled to sue an executor for a legacy bequeathed to him by a Hindu testator in the mofussil.

In case such a suit is brought by one legatee, the executor may apply for his own protection that other legatees shall be made parties, so that if any rateable abatement is requisite the extent of such abatement may be ascertained in a manner binding on all parties interested. But any such application must be made at the earliest possible opportunity, having regard to the provisions of section 34 of the Civil Procedure Code (XIV of 1882), and in any case it is within the discretion of the Court to decide whether the addition of such parties is necessary "in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit" (see section 32).

If an executor commits a breach of trust in respect of trust property that has come to his hands, he is liable under section 23 of the Indian Trusts Act (II of 1882) to make good the loss to the beneficiaries or legatees.

* Second Appeal No. 290 of 1901.

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PURSHOTTAM v. KALA GOVINDJI.

SECOND appeal from the decision of Thakurdas Mathuradas, Assistant Judge at Thána, reversing the decree passed by L. G. Fernandez, First Class Subordinate Judge of Thána.

Suit against an executor for a legacy.

The plaintiff brought the suit against the defendant, who was the executor of the will of one Lalji Govind. The plaintiff claimed a legacy of Rs. 500 and he claimed it from the testator's estate or from the defendant (executor) personally.

The defendant (executor) pleaded that the estate was not sufficient and that he was not personally liable.

The Subordinate Judge of Thána found that defendant had in his hands assets more than sufficient to meet all the legacies, and awarded plaintiff's claim.

As to the form of the suit the Judge in his judgment said:

The form of the suit was not objected to until the hearing had closed. I cannot say that the form of the suit was not objectionable. Though there was no specific allegation or suggestion of a *devastatit*, yet the personal claim involved such a suggestion, and the evidence was directed to show misappropriation and concealment of property by defendant in order to evade payment of legacies.

The defendant appealed to the District Court at Thána. The learned Assistant Judge reversed the decree, and dismissed the suit as imperfectly framed. He was of opinion that the plaintiff should have filed an administration suit. He said:

The question is whether the suit in its present form will lie and whether the plaintiff should have brought an administration suit. I am of opinion that he should have brought a suit for an account of the outstandings, cash and stock-in-trade, and for their due administration under section 213, Civil Procedure Code: see *In re Ainsworth Cockeroff* v. *Sanderson* (1895 W. N. 153). The suit should have been brought by the plaintiff for himself and for the benefit of the other legatees. The other legatees should have been joined as parties, or they would have had the opportunity of putting forth their claim under the last paragraph of section 213 of the Civil Procedure Code. If an account is taken in the presence of all the legatees, they would be bound by it and the defendant would not have to give separate accounts to each of the legatees individually. If the assets or fund are found insufficient, proportionate reduction in all the legacies would be made: and there would be no room for undue or inconvenient preference. I asked the plaintiff to amend the plaint and to add all the legatees as parties, or to do either of these things, but he declined, saying that the suit as framed by him was proper and that he had

nothing whatever to do with the other legatees. The only course open to me, therefore, is to dismiss the suit, as one not properly framed.

Plaintiff appealed to the High Court.

M. B. Chaubal for appellant (plaintiff) :—The objection as to the frame of the suit was never raised in this form in the Court of first instance. The question then was merely as to the absence of a specific allegation or suggestion of a *devastatit* in the plaint.

The plaintiff, being entitled to the legacy under the terms of the will, can sue to recover it from the executor, and it is immaterial to the plaintiff whether his suit is called an administration suit or by any other name. The executor completely represents the whole estate and all the persons interested, and it is not necessary to join them all in the suit: see Williams on Executors, pp. 1916, 1919-1920.

The objection is in substance one of want of parties, and such objection should not have been raised at the stage at which the lower Appellate Court permitted it. See *Trimbak* v. *Vishnu*[1]; *Vesaji* v. *Purshotam*[2]; *Venkata* v. *Venkatesh*[3]; *Chimniram* v. *Chhaguiram*[4]; *Ramji* v. *Shekh Ahmad*.[5]

D. A. Khare for respondent (defendant) :—A suit to recover a legacy cannot lie—at all events where the executor has not given his assent: see Williams on Executors, page 1828. The terms of the will show that the executor was not to get any personal estate. The executor says that the assets are not sufficient to meet the legacies: hence the plaintiff, in order to get his legacy, must establish that the assets are sufficient. One legatee cannot bring such a suit. He must bring an administration suit and join all the other legatees whose presence is necessary. If the assets are not sufficient a general reduction must be made, and therefore all the legatees have an interest in the suit. This is not a mere question of parties. It is a question as to the form of the suit. The lower Appellate Court gave the plaintiff an opportunity to join the other legatees as parties, which, however, he declined to

(1) (1887) P. J. p. 6.
(2) (1887) P. J. p. 272.
(3) (1889) P. J. p. 362.
(4) (1890) P. J. p. 183.
(5) (1891) P. J. p. 98.

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do. At the Original Side of this Court a suit like the present is never allowed. If plaintiff distinctly refused the offer of the Court below, he cannot now complain.

FULTON, J.:—We think that the Assistant Judge was in error in holding that the plaintiff was not entitled to sue the executors of Lalji's will for the legacy of Rs. 500 bequeathed to him.

It is true that according to the rule explained in *Deeks* v. *Strutt*,(1) under English law a legatee who wishes to enforce payment of his legacy must file a suit for administration, but even without making all persons interested parties he can obtain an order for administration against the executors who fully represent the estate: see *May* v. *Newton*.(2) In the mofussil in India the executors of the will of a Hindu do not, in the character merely of executors, take any estate in the property unless it is conferred on them by the terms of the will: see *Maniklal* v. *Manchershi*.(3) They get the powers conferred on them by the will, and if they accept the position of executors must exercise those powers in conformity with its provisions. If they commit a breach of trust in respect of the trust property that has come into their hands, they are liable under section 23 of the Indian Trusts Act to make good the loss to the beneficiaries or legatees. If sued by one legatee, it is open to them, if necessary for their own protection, to ask that other legatees shall be made parties, so that if any rateable abatement is requisite the extent of such abatement may be ascertained in a manner binding on all parties interested. But any such application must be made at the earliest possible opportunity, having regard to the provisions of section 34 of the Civil Procedure Code, and in any case it is within the discretion of the Court to decide whether in the circumstances the addition of such parties is necessary "in order," in the language of section 32, "to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit."

In the present case the objection taken by the defendant was not that raised by the Assistant Judge, and we think the latter

(1) (1794) 5 T. R. 690. (2) (1887) 34 Ch. D. 347.

(3) (1876) 1 Bom. 260.

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was not justified in dismissing the suit because the plaintiff refused in the Appellate Court to add the other legatees.

We, therefore, reverse the decree of the Assistant Judge and remand the appeal for disposal on the merits. Costs in this Court to be costs in the appeal.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

1901.
December 4.

TARVADI BHOLANATH HARISHANKER (DEFENDANT AND PETITIONER), APPLICANT, *v.* BAI KASHI AND ANOTHER (PLAINTIFFS AND AUCTION-PURCHASERS), OPPONENTS.*

Mortgage—Mortgage-debt, nature of—Moveable or immoveable property—Mode of attaching and selling a mortgage-debt in execution—Civil Procedure Code (Act XIV of 1882), sections 268, 274—Effect of sale of mortgage-debt in execution.

A mortgage-debt is moveable property within the meaning of section 268 of the Civil Procedure Code (Act XIV of 1882); and its sale in execution by public auction carries with it the right to proceed against the mortgaged property even though there may have been no attachment and sale under section 274 of the Code.

Where a mortgage-debt had been attached in execution under section 268 of the Civil Procedure Code (XIV of 1882) and sold under section 297, *Held*, that the Court had no jurisdiction to set aside the sale.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, XIV of 1882) against the decision of F. X. DeSouza, Joint Judge of Ahmedabad, confirming the order passed by Ráo Bahádur Chandulal Mathuradas, First Class Subordinate Judge, A. P., at Ahmedabad.

Application under section 311, Civil Procedure Code, 1882, to set aside a sale in execution.

In 1889 Bai Kashi and another (opponents) obtained a money decree against the applicant. On the 9th June, 1897, they applied under section 268 of the Civil Procedure Code (XIV of 1882) for execution by attachment of a mortgage-debt due to

* Application No. 101 of 1901, under extraordinary jurisdiction.