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be dismissed with costs on the plaintiffs throughout, but that if the said costs be paid and the said amendment be made, the Subordinate Judge do proceed to re-hear and determine the suit on the amended plaint. Under the provisions of section 373 we give leave to the plaintiff whose name is struck out to file, if so advised, a fresh suit in respect of his own cause of action.

Decrees reversed.

ORIGINAL CIVIL.

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

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GORDHANDAS SOONDERDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI RAMCOOVER AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Will—Hindu will—Probate—Administration—Necessity of probate or letters of administration—Indian Succession Act (X of 1865), sections 181 and 187.

Notwithstanding the terms of section 181 of the Indian Succession Act (X of 1865) a residuary legatee claiming under the will of a Hindu resident of Bombay can obtain a grant of administration with the will annexed which will satisfy the requirements of section 187, and until he does so he is not entitled to establish his claim.

APPEAL from Russell, J.

One Mulji Jaitha was a Hindu resident in Bombay. He had no ancestral property and he began to do business about the year 1824. Subsequently he took his then only existing son Soonderdas Mulji into partnership, the two being joint in food, worship and estate.

The firm of Mulji Jaitha & Co. was very prosperous and acquired great wealth, and in October, 1872, Mulji Jaitha and his son Soonderdas executed a deed of trust whereby a large amount of property was settled for the benefit of the sons of Soonderdas.

At the date of the said deed Soonderdas Mulji had only one son, namely, Dharamsi Soonderdas, born in 1864, but subsequently, viz., on the 14th December, 1874, a second son was born to him, namely, the plaintiff Gordhandas.

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Soonderdas Mulji died on 13th January, 1875, leaving a will. Mulji Jaitha died on the 14th August, 1889, leaving a will dated 30th October, 1888.

Dharamsi Soonderdas died on the 28th February, 1899, leaving a will. He left one son, namely, Karsandas Dharamsi. The family was joint in all respects.

In September, 1899, the plaintiff Gordhandas filed this suit praying for a declaration that the trust deed of 1872 was inoperative and void and that the property comprised therein remained the property of the settlors, namely, Mulji Jaitha and Soonderdas Mulji, and for the construction of the wills of Soonderdas Mulji and Mulji Jaitha and for a declaration of the interests of the plaintiff under the same and, if necessary, for the administration of the estate of Mulji Jaitha.

At the hearing the Court held that the trust deed was inoperative, that the properties mentioned therein had never vested in the trustees, and that the will of Soonderdas Mulji was inoperative inasmuch as he never had any property of his own. The Court further declared that under the will of Mulji Jaitha, the plaintiff and his brother Dharamsi Soonderdas were entitled in equal shares to all the property left by Mulji Jaitha, and that under section 187 of the Indian Succession Act the plaintiff should take out letters of administration with the will annexed to Mulji Jaitha's estate. In his judgment Russell, J., said:

> From what has been said it will be seen that, in my opinion, the plaintiff is entitled to succeed to a half share in all the property included in the deed of trust and all other property left by Mulji Jaitha and the additions and accretions thereto and thereof since the death of Mulji Jaitha. But having regard to the provisions of section 187 of the Indian Succession Act, which applies to the will of Mulji Jaitha (see the Hindu Wills Act), the decree will not be drawn up until the plaintiff has obtained letters of administration with the will annexed to that.

The decree being drawn up in accordance with the above judgment stated that—

> This Court being of opinion that the plaintiff is not entitled to the relief prayed for by him consequent upon the above declaration unless and until letters of administration with the will annexed of the will of Mulji Jaitha have been obtained, &c., &c.

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From this part of the decree the plaintiff appealed, alleging that he could not obtain probate of the said will, not being named therein as an executor, and that as a Hindu he was not bound to obtain letters of administration to the estate of a Hindu with the will annexed.

Branson and *Raikes* for appellant.

Davar and *Setalvad* for respondents.

Scott (Acting Advocate General) for Government.

The following authorities were cited in argument:—Indian Succession Act (X of 1865), section 187; *Mun Mohan Ghossal* v. *Pureshnath Roy*(1); *Narasimmulu* v. *Gulam Hussain*.(2)

JENKINS, C.J.:—The plaintiff by this suit, among other things, seeks that the will of Mulji Jaitha may be construed; that the interests of the plaintiff and the other persons thereunder may be ascertained and declared; and that in particular it may be declared that certain property specified in the plaint was at the time of the death of the said Mulji Jaitha at his disposal, and that the same has been (subject to the other legacies therein mentioned) validly disposed of by his will in favour of the plaintiff and Dharamsi Soonderdas in equal shares; and for administration.

Mr. Justice Russell construed the wills and decided in the plaintiff's favour, but he directed that the decree should not be drawn up until the plaintiff obtained letters of administration with the will annexed. From this direction the plaintiff has appealed to this Court, but without making the Government a party. This omission, however, has now been rectified.

The whole question turns on the effect of section 187 of the Succession Act (X of 1865), which provides: "No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the 180th section."

(1) (1874) 22 Cal. W. R. 174. (2) (1892) 16 Mad. 71.

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For the appellant it is argued that the section has no application here, because there is no executor now in existence, and section 181 provides that probate can be granted only to an executor appointed by the will. If the appellant is right, it would seem that his argument is destructive of his right to relief in this Court. Turning, however, to section 196, we find that "where the deceased has appointed an executor who has died before he has proved the will, a residuary legatee may be admitted to prove the will and letters of administration with the will annexed may be granted to him of the whole estate or of so much thereof as may be unadministered." With this must be read the definition of "probate" given in section 3 of the Act, which provides that "probate" means "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." Reading sections 187 and 196 and this definition together, I am of opinion that, notwithstanding the terms of section 181, the plaintiff, as residuary legatee, can obtain a grant that will satisfy the requirements of section 187, and that until he does so he is not entitled to establish his claim in this Court.

This reading of the Act is in accordance with the decision in *Mun Mohan Ghossal* v. *Pureshnath Roy*,[1] and so I adopt it with the greater confidence.

The result is that Mr. Justice Russell's decree must be confirmed. The appellant must pay the costs of the Government and recover them out of the estate of Mulji Jaitha; the costs of the other parties will be paid in accordance with the agreement at which they have arrived.

Decree confirmed.

Attorneys for the appellant—*Messrs. Mansukhlal, Damodar and Jamsetji.*

Attorneys for the respondents—*Messrs. Craigie, Lynch and Owen*, and *Edgelow and Gulabchand.*

(1) (1874) 22 Cal. W. R. 174.