APPELLATE CIVIL.

1905.
June 15.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

CHHOTALAL HARKISANDAS, A MINOR BY HIS GUARDIAN MOTHER BAI JASODA, APPLICANT, *v.* NABIBHAI MIANJI AND OTHERS, OPPONENTS.*

Civil Procedure Code (Act XIV of 1882), section 295—Assets—Rateable distribution—First decree against three judgment-debtors—Subsequent decree against only one of them.

Section 295 of the Civil Procedure Code (Act XIV of 1882) governs where the first decree is against three judgment-debtors and the decree on which the petitioner relies is against one of those three.

Nimbaji v. *Vadia Venkati* (1) not followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Gulabdas Laldas, Second Class Subordinate Judge of Broach, with respect to rateable distribution of assets in execution proceedings.

One Nabibhai Mianji filed a suit, No. 13 of 1904, against his debtors Amichand Nathu, Manishankar Madhavram and Bhaiji Narasinh for the recovery of Rs. 339-1-9. The suit was filed on the 6th January 1904. Attachment before judgment was levied on the defendants' moveable property and a decree was passed allowing the claim on the 27th January 1904. A darkhast, No. 390 of 1904, was presented for the execution of the decree on the 18th February 1904 and Rs. 1,057-4-1 were realized as assets by the sale of the attached property.

While the said proceedings were going on, one Sorabji Ratanji, who had already filed a suit, No. 782 of 1903, on the 22nd December 1903, against the aforesaid three defendants for recovery of money and had obtained an order for attachment before judgment, got a decree in his favour on the 14th June 1904. On the 2nd July following, he presented a darkhast, No. 1201 of 1904, for the execution of the decree.

On the 20th April 1904, one Jamnadas Jivandas got a decree, No. 145 of 1904, against Amichand Nathu alone for the recovery of Rs. 283-7-9. Afterwards Jamnadas having assigned his rights

* Application under the extraordinary jurisdiction No. 13 of 1905.

(1) (1892) 16 Bom. 683.

under the decree to Chhotalal Harkisandas, a minor represented by his mother and guardian Bai Jasoda, the assignee presented a darkhast, No. 1499 of 1904, for the execution of his decree on the 28th September 1904.

The three decree-holders, thereupon, having claimed rateable distribution of the assets which were in the hands of the Názir, the Court allowed rateable distribution between Nabibhai Mianji and Sorabji Ratanji, and relying on the decision in *Nimbaji* v. *Vadia Venkati*[1] rejected the claim of Chhotalal Harkisandas on the ground that his decree was against only one of the judgment-debtors.

Chhotalal, therefore, preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), urging that the Court failed to exercise jurisdiction that was vested in it in disallowing rateable distribution to the applicant under section 295 of the Civil Procedure Code. A *rule nisi* having been issued to the opponents Nabibhai Mianji, Sorabji Ratanji and Amichand Nathu to show cause why the order complained against should not be set aside,

Nandvadan K. Mehta appeared for the applicant in support of the rule.

G. S. Rao appeared for the opponents to show cause.

JENKINS, C. J.:—The only question that arises on this application is whether section 295 governs where the first decree is against three judgment debtors, and the decree upon which the petitioner relies is against one of those three.

Though there may be in certain circumstances a practical difficulty in giving effect to that view without complicated inquiries, still we think it right for the sake of uniformity to follow the decision of the Full Bench of the Calcutta High Court in *Gonesh Das Bagria* v. *Shiva Lakshman Bhakat*[2] which has been recently approved by the Allahabad High Court in *Gatti Lal* v. *Bir Bahadur Sahai*[3] and is in accordance with the view of the Madras High Court, see *Ramanathan Chettiar* v. *Subramania Sastri*[4].

(1) (1892) 16 Bom. 683.
(2) (1903) 30 Cal. 583.
(3) (1904) 27 All. 158.
(4) (1902) 26 Mad. 179.

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It is true that a different view was adopted in *Nimbaji* v. *Vadia Venkati*[1], but as it was the decision of a single judge, it is not binding on us, and out of deference to the concordant of opinions of the other High Courts we decline to follow that decision.

The result is that we make the rule absolute.

We make no order as to costs, seeing that the Subordinate Judge was right in following the decision in *Nimbaji* v. *Vadia Venkati*[1], though it was the decision of a single judge.

The case to be remanded and to be determined in accordance with these remarks.

G. B. R. *Rule made absolute.*

(1) (1892) 16 Bom. 683.

PRIVY COUNCIL.

1905 *
March 24, 28, 29, 30.
May 24.

BAI GANGABAI AND OTHERS, SOME OF THE PLAINTIFFS, *v.* BHUGWANDAS VALJI (DEFENDANT) AND OTHERS (THE REMAINING PLAINTIFFS).

[On appeal from the High Court of Judicature at Bombay.]

Will—Probate—Deed-Poll executed at same time as will and referred to in it—Will giving benefit to Solicitor who prepared it—Onus of proof—Testamentary writing—Succession Act (X of 1865), section 51.

A will made reference to a deed-poll which was executed at the same time, and also contained clauses under which the solicitor who prepared it took some benefit, and was appointed an executor of the will, and a trustee of the testator's estate. The first Court granted probate of the whole will, but the High Court on appeal varied that order by directing that the passage referring to the deed-poll and that giving remuneration to the solicitor should be omitted in the grant of probate.

Held by the Judicial Committee that the onus was on the solicitor to show that the deed-poll and the disputed parts of the will expressed the true intention of the testator who understood and approved of them, and that on the evidence and under the circumstances of the case he had discharged that onus.

The law relating to the case of a person taking a benefit under a will prepared by himself as laid down by Lord Wensleydale in *Barry* v. *Butlin*[1], and approved of in *Fulton* v. *Andrew*[2] followed.

* *Present* : Lord Davey, Lord Robertson and Sir Arthur Wilson.

(1) (1838) 2 Moore's P. C. 480. (2) (1875) L. R. 7 H. L. (E. and I. Ap.) 448.