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JENKINS, C. J. :—No reference in this case lies, because no order can be made under the second paragraph of section 294 of the Code of Civil Procedure. That section is perfectly clear. The first paragraph of that section requires the permission of the Court to enable the holder of a decree to bid for property. If he gets that permission and gets it without qualification, then the amount due on the mortgage may, if he so desires, be set off. But it may be one of the terms on which permission to bid is granted that there should not be this right of set off. That seems to be the case here. It is clear then that the Subordinate Judge has no power to direct a set off.

We are obliged to the pleaders who have assisted us with their arguments in this case.

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

GANGARAM KEVAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* NAGINDAS KHUSHALDAS (ORIGINAL PLAINTIFF), RESPONDENT.*

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Civil Procedure Code (Act XIV of 1882), section 11—Suit of a civil nature—Administration suit—Estate belonging to a living Hindu debtor—Competency to entertain the suit.

A Civil Court cannot entertain a suit brought to administer the estate belonging to a living Hindu debtor.

Bai Meherbai v. *Maganchand*(1), explained.

APPEAL from an order passed by Dayaram Gidumal, District Judge of Surat, reversing the decree passed by and remanding the case to Jehangirji E. Modi, First Class Subordinate Judge at Surat.

Administration suit.

* Appeal No. 7 of 1907 from order.

(1) (1904) 29 Bom. 96 : 6 Bom. L. R. 853

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The property sought to be administered belonged to a joint Hindu family consisting of one Dhanji and his two sons Mulchand and Tribhovan (defendant No. 1).

The business transactions of Dhanji with the plaintiff resulted in the former agreeing to pay to the latter a sum of Rs. 4,744. After Dhanji's death, his eldest son Mulchand as manager of the family passed acknowledgments from time to time, the last one of which was in October 1903. Mulchand died in 1904. The family estate then passed into the hands of Tribhovan (defendant No. 1).

On the 15th August 1905, the plaintiff commenced an action to administer the estate in the hands of Tribhovan. There were also other creditors of Tribhovan, who had obtained decrees against him. They were made defendants (Nos. 2—8) to this suit. The plaintiff alleged in his plaint that the family estate of defendant No. 1 was worth Rs. 3,500, whereas the debts amounted to over Rs. 11,000.

One of the issues raised by the Subordinate Judge at the trial was: "Is this sort of suit maintainable." This issue he found in the negative and dismissed the plaintiff's suit. His reasons were as follows:—

"We know of suits for the administration of the estates of lunatics and minors: and also the administration of the estate of a deceased debtor. For the form of a plaint in a suit by a creditor for the administration of the estate of his deceased debtor see Form No. 105 in Schedule II to the Civil Procedure Code. But in the present suit there is no administration claimed of the estate of a deceased person. . . . For the sake of argument we shall grant at once that the first defendant is personally liable for the plaintiff's debt. But in that case the suit should be against the first defendant for the amount of the debt itself. There is no precedent that I know of for the administration of the estate of a living debtor except as stated above in the case of insolvency, lunacy or infancy or after a receiver is appointed."

The plaintiff appealed. In appeal the District Judge held that the suit as framed was maintainable in a Civil Court. He therefore reversed the decree passed by the Subordinate Judge and remanded the case to him for trial on merits. His reasons were as follows:—

"The plaintiff's pleader relies strongly on sections 11 and 213 of the Code of Civil Procedure, and on the remarks of Mr. Justice Chandavarkar in 6 Bom.

L. R. 853 at p. 856. In the case before his Lordship, the defendant (one of the creditors) had obtained a decree against the administrator of a Parsi's estate and in satisfaction of the decree obtained a sale-deed with the sanction of the Court under section 257A, Civil Procedure Code. The management of the estate then passed into the hands of another administratrix, who brought a suit to set aside the decree of sale. But both were held binding under sections 244 and 13, Civil Procedure Code, as there had been no fraud or collusion though section 282 of the Succession Act (which applied to the estate) laid down that 'no creditor is to have a right of priority over another by reason that his debt is secured by an instrument under seal or on any other account,' and that 'the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.' Mr. Justice Chandavarkar said at the end of his judgment: 'This result is no doubt to be regretted, because it virtually gives preference to one creditor as against other creditors of the deceased's estate, whereas the rule of law is that they shall all share rateably. But the result is due to the fact that that rule of law has to give way in this case to another rule, *i. e.*, that of *res judicata* which could have been avoided had the Court, which passed the decree in the suit brought on an arbitrator's award by the respondent's father as a creditor of the deceased, treated it, as it should have, as an administration suit and passed its decree accordingly. We think that, we must take this opportunity of impressing upon the mofussil Courts the necessity of treating a creditor's action against a deceased person's estate as an administration suit and insisting upon the amendment of the plaint in such a suit on that basis. Where the plaintiff is not willing to amend, the Court, if it finds the claim proved, should pass a decree simply giving him a declaration of the debt due and a declaration besides that he is entitled to satisfaction of the decree according to law in due course of administration and not otherwise. It is the duty of the Court to see in such actions that one creditor is not enabled to gain advantage over other creditors by getting an unconditional decree for full payment and executing it against the deceased's estate to the prejudice of those creditors.'

The plaintiff's pleader says he has framed his suit in accordance with these remarks and is prepared to make all verbal amendments so as to make it practically an administration suit on behalf of all the creditors of the estate, while the defendant's pleaders say that the remarks apply only to the estate of deceased Parsis governed by section 282 of Act X of 1865. No law, however, is quoted barring the cognizance of a suit like this under section 11 of the Civil Procedure Code."

The defendants appealed to the High Court.

Ratanlal Ranchhoddas, for the appellants:—This is an administration suit as to the estate belonging to a living Hindu debtor. Such a suit cannot lie. Even under the English law, such a suit would not lie. An administration suit postulates the existence

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of the estate belonging to a deceased person. Although there is no express authority saying that an administration suit cannot lie as to the property of a living debtor, but wherever the expression "administration suit" is used it is associated with the estate of a deceased person. See Ashburner's Equity, p. 570: the Judicature Act, 1873, section 34 (3), at p. 496 of Vol. II of the Annual Practice for 1908; and Order XVI, rules 40 and 47 at pages 189 and 195 of Vol. I of the Annual Practice for 1908. And the word "administration" is defined in the Encyclopædia of American and English Law (Vol. I, p. 643), as "the management of the estate of a deceased person who has left no executor." In administration suit in India, the English practice is followed: see *Soobul Chunder Law* v. *Russick Lall Mitter*[1] and *Dhunraj* v. *Broughton*[2].

But in cases where Hindu law applies such an action cannot be maintained. Under it, where property passes by survivorship in a joint Hindu family, there is nothing like an estate belonging to the deceased: see Mitakshara, c. 1, s. 1, pp. 21—24, 27; Vyavahara Mayukha, c. 4, s. 1, p. 3.

N. K. Mehta for the respondent relied on section 11 of the Civil Procedure Code, 1882.

CHANDAVARKAR, J.:—This was a suit brought by the respondent to administer the estate of his debtor Tribhovan. Tribhovan was made a party defendant with his other creditors, and the plaintiff prayed that as the estate of the first defendant was valued at only Rs. 3,500 whereas the debts amounted to Rs. 11,000, it was necessary that the estate should be administered by the Court and that the assets should be realized and rateably distributed amongst the creditors. The Subordinate Judge raising the issue whether such a suit was maintainable decided it in the negative. The District Judge on appeal, has, however, come to a different conclusion relying on certain observations in the decision of this Court in *Bai Meherbai* v. *Muganchand*[3]. But those observations apply to the estate of a

(1) (1888) 15 Cal. 202 at pp. 208, 209.
(2) (1875) 15 Beng. L. R. 296 at pp. 299, 300.
(3) (1904) 29 Bom. 96 at p. 101.

deceased person, and, moreover, it must be remembered that they applied to the estate of a deceased Parsi. Therefore, the decision cannot be treated as an authority on the question whether an administration suit in the case of the estate of a Hindu, living or dead, can be maintained or not. The District Judge has further relied upon section 11 of the Civil Procedure Code. No doubt, according to that section a Court has jurisdiction to try every suit of a civil nature, but treating this, as it no doubt is, as a suit of a civil nature, the question is whether the plaintiff has a right to a decree entitling him to have the property of a living person distributed against the wishes of his other creditors. If these are not willing, the plaintiff is not entitled to force his wishes upon them. These considerations do not apply to the estate of a deceased person.

Under these circumstances we think that such a suit cannot lie. We reverse the decree of the District Judge and restore that of the Subordinate Judge with costs in this Court and the District Court upon the respondent.

HEATON, J.:—I should like to add another reason to that given by my learned colleague. This suit is to obtain the administration by the Court of the property of defendant No. 1; that is to say, in effect, it is a suit to take the administration of his property out of the hands of the owner and to have that property administered, without regard to the owner's necessities or wishes. Stated in that form, it seems to me that very strong argument is needed to show that such a suit could lie, except under a special law such as that relating to insolvency; and nothing to my mind convincing has been put forward.

Decree reversed.

R. R.