

merely a question of dignity under the cover of a religious office. If we were to interfere in such cases, we should be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another. We think, therefore, that the point raised by Mr. Jayakar, namely, that the suit is for damage incurred by his client by reason of the unauthorized use by the defendant of the name, to which the plaintiff alone is entitled, does not arise upon the pleadings.

On these grounds we confirm the decree with costs.

Decree confirmed.

R. R.

1910.

GADIGEXA
v.
BASAYA.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

PIROJSHAH BIKHAJI AND OTHERS (ORIGINAL CAVEATORS Nos. 1, 2 AND 3),
APPELLANTS, v. PESTONJI MERWANJI (ORIGINAL APPLICANT),
RESPONDENT.*

1910.

February 22.

Probate and Administration Act (V of 1881), section 81—Indian Succession Act (X of 1865), section 250—Will—Probate—Caveator—Interest possessed by the caveator.

The provisions of section 81 of the Probate and Administration Act, 1881 (which correspond with those of section 250 of the Indian Succession Act, 1865) enact that the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is, there should be no dispute whatever as to the title of the deceased to the estate, but that the person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise.

Abhiram Dass v. Gopal Dass (1) followed.

APPEAL from an order passed by E. J. Varley, District Judge of Surat.

Proceedings for probate.

This was an application by Pestonji to take out probate of a will made by one Meherwanji Bomanji.

* Appeal No. 28 of 1909.

(1) (1889) 17, Cal. 48.

1910.

PIROJSHAH
BIKHAJI
v.
PESTONJI
MERWANJI.

In the proceedings that followed caveats were filed by four persons of whom the appellant Pirojshah claimed a share in some of the property which the testator had disposed of claiming it as his own: and the other two claimed that certain property disposed of by the will was mortgaged by them to the testator who had treated it as his own.

The preliminary question that arose in the lower Court was whether those three persons were entitled to come in as caveators at all. The District Judge held that they were not on the following grounds:—

It appears that caveator No. 1 is mentioned in paragraph 10 of the will as having an interest in certain joint property, or rather the surplus which might remain after the defraying of certain charitable charges. The other caveators are only interested to this extent that they have litigations pending with the deceased testator.

The English practice as to caveats is regulated by Statute 20 and 21 Victoria 77 section 53 and rules thereunder framed. For obvious reasons the validity of a will can only be contravened by a limited class of persons—relations beneficiaries under the will propounded as a former will, etc.

A creditor unless he has also had letters of administration granted to him cannot dispute a will (William's Law of Executors pages 279-280).

The English Procedure as to 'Caveats' does not appear to have been in any way abrogated by anything incorporated into either the Probate and Administration or Succession Acts (Acts V of 1881 and 10 of 1865). Nor as argued by opponent's pleader does the appearance of a party claiming to be interested after entry of caveat *ipso facto* make the proceedings "contentious" Cf. sections 253 and 253A of Act X of 1865, nor is section 261 imperative until the *locus standi* of the caveator, if challenged, has been established. The caveator as mortgagor has no *locus standi*. I. L. R. Calcutta XIX, p. 48 refers to mortgagors.

I. L. R. Calcutta VI, pages 429--460 decide that an attaching creditor may oppose. The case is an old one, and the remarks of Field J. seem to go beyond the English practice. So far as the caveators are concerned, there is no interest of theirs which would in any way be prejudicially affected by the grant of Probate to an Executor, with whom the existing litigation would be carried on.

The mere fact of citations having issued under section 250 calling upon persons claiming to have an interest, does not estop the propounder of the will from challenging the interest set up by the caveator, nor make the proceedings "contentious."

1910.

 PIRJOSHAI
 BIKHAJI
 v.
 PESTONJI
 MEERWANJI.

The caveators appealed.

L. A. Shah, for the appellants:—The appellants have an interest enough to contest the will. The will contained recitals against the appellant's interest, which if allowed, would be evidence of title. See *Nobeen Chunder Sil v. Bhobosoonduri Dabee*⁽¹⁾. Even attaching creditors and mortgagees of the estate of a deceased person, are held to have interest to oppose a will: See *Kishen Dai v. Satyendra Nath Dutt*⁽²⁾; *Kashi Chandra Deb v. Gopi Krishna Deb*⁽³⁾.

N. K. Mehta, for the respondent:—A person who is entitled to oppose the grant of probate to a will must derive his interest from the testator and not have a right against him. See *Abhiram Dass v. Gopal Dass*⁽⁴⁾.

Further in proceedings for grant of probate, Courts cannot go into questions of title: *Ochavaram Nanabhai v. Dolatram Janietram*⁽⁵⁾. See also *Rahamtullah Sahib v. Rama Rau*⁽⁶⁾.

In the cases relied upon by the appellants, the caveators had no interests adverse to the testator.

Shah was heard in reply.

CHANDAVARKAR, J.:—We think the case falls within the principle of *Abhiram Dass v. Gopal Dass*⁽⁴⁾. The provisions of section 250 of the Indian Succession Act, X of 1865, and section 81 of the Probate and Administration Act, V of 1881, are that the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is to say, there should be no dispute whatever as to the title of the deceased to the estate, but the person who wishes to come in as caveator must show some interest in that estate derived from the deceased by inheritance or otherwise. That is the construction which the Calcutta High Court has put upon the section in the case above referred to, and that seems to be in accordance with the language of the section itself. In the present case caveator No. 1 claims adversely to the alleged testator. Ac-

(1) (1880) 6 Cal. 460.

(2) (1901) 23 Cal. 441.

(3) (1891) 19 Cal. 48.

(4) (1889) 17 Cal. 48.

(5) (1904) 28 Bom. 644.

(6) (1894) 17 Mad. 373.

1910.

PIROJSHAH
BIKHAJI
v.
PESTONJI
MERWANJI.

ording to the latter, the caveator has no interest whatever in the property. But according to caveator No. 1, he and the alleged testator were sharers in the properties concerned. Therefore, to the extent of the share which this caveator alleges he has in the properties, he claims adversely to the testator. So also as regards caveators Nos. 2 and 3, the alleged testator claims complete ownership of the property by reason of a sale to him, whereas the caveators in question claim the properties as their own mortgaged to the testator. Therefore, that is an adverse interest claimed by them.

We confirm the order with costs.

Order confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.

February 24.

DATTAMBHAT RAMBHAT JOSHI (ORIGINAL PLAINTIFF), APPELLANT, v. KRISHNABHAT BIN GOVINDBHAT JOSHI AND SIX OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 67—Usufructuary mortgage—Debt payable within a fixed period—Expiry of the period—Mortgagee's right to an order for sale.

Where under a usufructuary mortgage the mortgage debt is made payable within a fixed period, the mortgage is not purely a usufructuary mortgage and the mortgagee has, in the absence of a contract to the contrary, the right to an order under section 67 of the Transfer of Property Act (IV of 1882) that the property be sold after the debt has become payable.

Mahadaji v. Joti(1) and *Krishna v. Hari*(2), explained.

SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum with appellate powers, confirming the decree of S. S. Phadnis, Second Class Subordinate Judge of Chikodi.

* Second Appeal No. 425 of 1909.

(1) (1892) 17 Bom. 425.

(2) (1908) 10 Bom. L. R. 615.