

also Mr. Ameer Ali's Personal Law of Mahommedans, Volume II, Edition of 1908, page 256.

The decree appealed from must be reversed and that of the Subordinate Judge restored with costs throughout on the respondents.

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Decree reversed.

R. R.

APPELLATE CIVIL.

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

BHIMAPPA *bin* TAMAPPA (ORIGINAL OPPONENT 10), APPLICANT, v.
KHANAPPA *alias* VENKAPPA *bin* HANMAPPA AND ANOTHER
(ORIGINAL APPLICANT AND OPPONENT 9), OPPONENTS.*

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August 11.

Curator's Act (XIX of 1841), sections 3, 4 and 14—Oath's Act (V of 1840)—Death of representative Vatan-dar—Deceased's widow representative Vatan-dar—Death of the widow—Application by the nearest heir of the deceased male Vatan-dar for possession—Six months, calculation of—Property claimed by right 'in succession'—Inquiry upon solemn declaration—Affidavit upon solemn affirmation.

One Kotrappa, representative Vatan-dar of Deshagat Vatan, died in 1892. His widow Basawa was entered on the Vatan Register as representative Vatan-dar and she held the Vatan property until her death in 1907. Within six months of Basawa's death, Khanappa, who claimed to be the nearest heir of Kotrappa, applied for possession of the property under the Curator's Act (XIX of 1841) and the Judge granted his application. One of the opponents to the application thereupon moved the High Court under the extraordinary jurisdiction contending that,

(1) Under section 14 of the Curator's Act (XIX of 1841) the provisions of the Act could not be put in force because Kotrappa died more than six months before the date of the application, and

(2) In granting the application the Judge did not follow the procedure which is made imperative by the words of section 3 of the Curator's Act (XIX of

* Application No. 61 of 1909 under the extraordinary jurisdiction.

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1841), that is, there was no inquiry upon solemn declaration of the complainant (applicant).

Held, confirming the order, that,

(1) The decease of the proprietor whose property was claimed by right "in succession" referred to in section 14 of the Curator's Act (XIX of 1841) included the decease of Basawa because she was, between the death of her husband and her own decease, the proprietor of the property claimed. All that was to be decided was who should be put into possession of the property in succession to the last deceased holder.

(2) The Judge having acted upon the application of the claimant in addition to his affidavit on solemn affirmation, the statements in the affidavit furnished sufficient grounds for action under section 4 of the Curator's Act (XIX of 1841) having regard to the provisions of the Oath's Act (V of 1840).

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decision of C. E. Palmer, Acting District Judge of Bijapur, in a miscellaneous application under the Curator's Act (XIX of 1841).

One Kotrappa bin Basappa was the last male proprietor of the Deshagat Vatan of Nir Budihal in the Bijapur District. He died on the 2nd June 1892 leaving him surviving a widow Basawa and three daughters. After Kotrappa's death the Deshagat Vatan was transferred to his widow Basawa's name in the Vatan Register and she was in possession and enjoyment of it till her death on the 14th November 1907. On the 29th November 1907 one Khanappa *alias* Venkappa *bin* Hannappa Desai applied to the District Judge of Bijapur stating that as he was the nearest male heir of the deceased Kotrappa he was entitled to succeed to the property and prayed for the appointment of a curator on the ground that Tamappa *bin* Balappa and eleven other persons were wasting and misappropriating the property.

The Judge made an inquiry under the Curator's Act (XIX of 1841) and ordered that the possession of the Deshagat Vatan be delivered to the applicant Khanappa. In his judgment the Judge made the following remarks :—

On the 29th November 1907 the petitioner Khanappa applied to this Court to appoint a curator as the opponents were trying to take possession of the property by forcible means, and there was danger that the Deshagat servants would also misappropriate it. This Court was also asked to determine the right to posses-

sion. This application was supported by an affidavit and furnished sufficient grounds for action. Confirmation of the truth of the matters stated in the application is afforded by the written statement of opponent 11 (Exhibit 21) in which opponent 11 admitted taking possession of the house and moveables at Nir Budihal immediately after Basawa's death though he has since given up asserting his claim to the property in this miscellaneous proceeding. I see no reason therefore to hold that I was not fully justified in taking action under this Act.

Against the said order one Bhimappa *bin* Tamappa, heir and legal representative of Rangappa *bin* Tamappa who was opponent 10 in the District Court, preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V 1908) urging *inter alia* that the District Judge had no jurisdiction to entertain Khanappa's application under section 14 of Act XIX of 1841, that the Judge erred in putting the Act into operation in the absence of any circumstances proving that the original applicant Khanappa was "likely to be materially prejudiced if left to the ordinary remedy of a regular suit," and that the order of the Judge was based on inadmissible evidence. A *rule nisi* was issued calling on the opponents, that is, the original applicant and the original opponent 9, to show cause why the order of the Judge should not be set aside.

Mulla with *G. K. Dandekar* appeared for the applicant (original opponent 10) in support of the rule:—The Judge had no jurisdiction to put the Curator's Act in force in the present case. Kotrappa died in 1892. His widow Basawa succeeded him as a Hindu widow and she died in November 1907. The opponent claimed as a reversioner through Kotrappa and not through Basawa. But his application was not made within six months from Kotrappa's death though it was made within that period from Basawa's death. Therefore under section 14 of the Curator's Act the Judge had no jurisdiction to entertain the application.

Even granting that the Judge had jurisdiction, he acted with material irregularity in the exercise of his jurisdiction, because the conditions precedent to give jurisdiction under the Act as laid down in sections 3 and 4 were not satisfied. The inquiry should have been made on solemn declaration by the opponent and by witnesses and documents at the Judge's discretion. He

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should have satisfied himself with respect to four points mentioned in section 3 before he issued notices of the application. The application was accompanied by an affidavit and the Judge on the very day the application was made, issued notices to us and others. The affidavit cannot be said to be a solemn declaration and the order of the Judge directing notices to issue does not show that he was satisfied as to the four points mentioned in section 3. We have been prejudiced by the procedure adopted by the Judge: *Sato Koer v. Gopal Sahu*⁽¹⁾, *Krishnasami Pannikondar v. Muthukrishna Pannikondar*,⁽²⁾ *Abdul Rahiman v. Katti Ahmed*⁽³⁾.

G. S. Rao appeared for opponent 1 (original applicant):—The Judge says in his judgment that he was satisfied as regards the truth of the allegations made by us in our application. On the day the notices were issued our application was supported by an affidavit and it furnished sufficient ground for action. Basawa was the widow of the last male holder Kotrappa and her status as representative Vatandar was recognized under section 2 of Bom. Act V of 1886. After her death we claimed the property in succession. The widow continues her husband's estate and really the husband's estate is determined by the death of the widow: Phadnis' Vatan Act, p. 132; Mayne's Hindu Law, p. 795 (6th Edn.); *The Collector of Masulipatam v. Caraly Fencala Narrainapah*⁽⁴⁾; *Lallubhai v. Mankuvarbai*⁽⁵⁾.

P. D. Bhide appeared for opponent 2 (original opponent 9).
Mulla, in reply.

Scott, C. J.:—This is an application under section 115 of the Code of Civil Procedure asking for our interference on the ground that the District Judge of Bijapur has acted without jurisdiction in making an order in a summary suit under section 4 of the Curator's Act XIX of 1841.

The occasion for the application which was made to the District Judge and upon which the order complained of was passed, was the death in 1907 of Basawa the widow of one

(1) (1907) 24 Cal. 929.

(3) (1886) 10 Mad. 68.

(2) (1900) 24 Mad. 364.

(4) (1861) 8 Moo. L. A. 529.

(5) (1876) 2 Bom. 388.

Kotrappa who died in 1892. Kotrappa was the representative Vatandar of a Deshagat Vatan in Bijapur territory, and on his death his widow Basawa was entered on the register as representative Vatandar and she held the Vatan property until her death. On her death an application was made by one Khanappa who claimed to be the nearest heir of Kotrappa, for possession of the property under the Curator's Act, and that application was granted. It is the order on that application which is now the subject of this proceeding.

Two points have been raised by the applicant. First, he says that under section 14 of the Act of 1841, the provisions of the Act could not be put in force, because Kotrappa died more than six months before the date of the application. It is, however, admitted that the application was within six months of the death of Basawa, and it is contended on behalf of the opponents that the decease of the proprietor whose property is claimed by right "in succession" referred to in section 14, would include the decease of Basawa in the present case, because Basawa was, between the death of her husband and her own decease, the proprietor of the property which is claimed, and it is claimed "in succession" to her, that is to say, the claimant claims to succeed her in the possession of the property. This view of the section is, we think, correct.

The words of the Act appear to have been very carefully chosen. Thus in the beginning of the preamble we find a reference to "pretended claims of rights by gift or succession." Here the expression is "by succession" and is used to express the point of view of the claimant. Then in the second paragraph of the preamble we have "the circumstance of actual possession when taken upon a succession," that is, regarding the succession from the point of view of the Judge and not from the point of view of an interested party.

In the same way in section 14 we think that the words "by right in succession" are chosen to describe the point of view of the Judge and not the point of view of the interested parties. All that the Judge has to decide is who should be put into possession of the property in succession to the last deceased

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holder. An application was made to him to come to a decision upon that point within six months of the death of Basawa and we therefore think that he acted with jurisdiction in coming to his decision.

It was next objected that even if he had a right to come to a decision upon an application made to him by the applicant, he did not follow the procedure which is made imperative by the words of section 3; for, it is said that he did not inquire upon solemn declaration of the complainant whether there were strong reasons for believing that the party in possession had no lawful title. The materials upon which he came to his decision were the application and in addition to the application an affidavit upon solemn affirmation of the complainant Khanappa to the effect that he alone was the nearest heir to Basawa, that the opponents and distant *Bhaubands* were wasting and misappropriating the property and that this statement was true to his belief and knowledge. The learned District Judge held that the statements in this affidavit furnished sufficient grounds for action under section 4, and we cannot say that he has acted upon materials which are declared to be insufficient by the Act. He has, as it appears to us, entered into the inquiry upon statements made upon solemn affirmation which, having regard to the provisions of Act V of 1840, must be taken to be statements upon solemn declaration. We think there is no ground for interference and we dismiss the application with costs.

Separate sets of costs.

Application dismissed.

G. B. R.
