SARGENT, C. J.—Following the decision in *Ganpatrám* v. *Isakji Ádamji*(1), we answer the first question ref the Subordinate Judge in the negative. The re-sal Collector being a nullity, the Subordinate Judge will c the second question as if the Collector had issued no the subject.

(1) *Supra*, p. 322.

*Order accord*

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## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Cana*

MAGANLA'L PURUSHOTTAM AND OTHERS, (ORIGINAL DEFENDA APPELLANTS, *v.* GOVINDLA'L NAGINDA'S, (ORIGINAL PLAINTIF RESPONDENT.*

*Declaratory decree—Section 42 of the Specific Relief Act (I of 1877)—Defence raised in the lower Court—Objection taken for the first time in appeal.*

Bái Jáver, a Hindu widow, made a will disposing of property of which sh an award she had only the use during her life and to which the plaintiff, her son, entitled after her death. While she was still living the plaintiff filed this suit pr ing that the will might be declared invalid. The defendants were the testatr and those who took under the will. While the suit was pending, the testatr died. The Subordinate Judge passed a decree in plaintiff's favour and declar the will invalid.

The defendants appealed, and contended for the first time, in appeal, that th allegations in the plaint, *viz.*, that the will was in their favour and that they (th defendants) were interested in denying the plaintiff's title as reversioner, did not constitute a case in which, in the exercise of a sound judicial discretion, a declaratory decree ought to be made.

*Held*, that as the objection was taken for the first time in appeal, it would be unjust to allow the defendants to benefit after they had failed to resist G.'s claim on the merits.

*Held*, further, that the will of J. should be declared to be invalid so far as it operated to defeat the award.

THIS was an appeal from the decision of Ráo Bahádur Chunilál Maneklál, First Class Subordinate Judge of Ahmedábád.

* Appeal, No. 96 of 1890.

laintiff, Govindlál Nagindás, having brought a suit
s mother, Bái Jáver, it was referred to arbitration, and
ators passed an award, which declared that the plaint-
titled to all money, ornaments, &c., in the hands of his
ái Jáver, after her death. It provided that until then
remain in possession. The award also directed that
Rs. 4,000 should be given to the plaintiff by his mother
ided that, in case of default of payment by his mother,
nlál Purushottam and others should pay that sum to the
it

the passing of the award, Bái Jáver made a will, stating
that she had entrusted ornaments, worth Rs. 5,000, to the
ff for safe custody, but that he denied receipt thereof; that
ing to the terms of the award she had paid Rs. 4,000 to
aintiff, but that he denied having received that sum also
ad received it from Maganlál Purushottam and others; that,
upon Maganlál Purushottam and others obtained a decree
st her for the amount, ordering that the judgment-debt
d be satisfied from her estate. By the will she gave her pro-
to the defendants. The plaintiff thereupon brought a suit
inst her and the other defendants, praying that the will might
declared null and void. He alleged that by the award he was
titled to the property after her death, and that she had other-
se disposed of it.

His mother, Bái Jáver, (defendant No. 1), died while the suit
pending in the Subordinate Judge's Court.

The Subordinate Judge found that Bái Javer was not compe-
ent to make the will, and declared that the plaintiff was entitled
o all the property, moveable and immoveable, of Bái Jáver after
ier death.

The Subordinate Judge in his judgment remarked:—"This will is evidently in favour of, and for the benefit of the other defendants, and attempts to prejudice the rights of the plaintiff. There is, however, not an atom of evidence to show that Bái Jáver had paid Rs. 4,000 to the plaintiff or had entrusted ornaments of Rs. 5,000 for safe custody to the plaintiff. Her evidence taken on commission contradicts the statement the will, because

there she has deposed on oath that the plaintiff co. theft and took away the ornaments. The will having made for the benefit of the other defendants, those have been properly made parties to the suit, and t Jáver had died pending this suit, the cause of actio. against the surviving defendants. The will is clearly in beyond the authority of Bái Jáver to make. The st- made therein against the interests of the plaintiff are f. false and not supported by any evidence."

Against the decree passed by the Subordinate Jud, defendants appealed to the High Court.

*Govardhanrám Mádhavrám Tripáthi* for the appella In this suit the plaintiff Govindlál prayed that the will ma his mother, Bái Jáver, should bedeclared to be invalid, a lower Court made the declaration sought for. We submit under the circumstances of the present case, a suit for a dec tion cannot lie, because a widow has absolute power over the n able property inherited from her husband—*Dámodar Mádh* v. *Purmánandás Jeewandás*

[SARGENT, C. J.—A will can operate only after the death of testator. The present suit for a declaration to set aside the was brought during the lifetime of the testatrix.]

As regards us there was no cause of action at all—*Colvin Col & Co.* v. *Barbara Elias*(2). Even supposing that the plaintiff had cause of action, still it had not accrued to him when the suit w filed, as the testatrix was living at the time. The point as to th want of cause of action was taken by us in our written statement By inadvertence an issue was not raised on that point in the lower Court. The point goes to the root of the case, and it should be allowed to be taken for the first time, even in a second appeal, like the points of jurisdiction and limitation. The cause of action having arisen after the presentation of the plaint, that is, when the testatrix died, the plaintiff cannot proceed with the suit—*Prannáth Sháha* v. *Mádhu Khulu*(3).

(1) I. L. R., 7 Bom., 155. (2) 11 Calc. W. R. Civ. Rul., 40.
(3) I. L. R., 13 Calc., 96.

*Sadáshiv Ráo* for the respondent:—The award only interest to Bái Jáver and after her death it gave the us. The will of Bái Javer contradicted our title to ty to which we were entitled under the award, and f affairs we could not allow to continue—*Kalián Singh Singh*(1). The will of Bái Jáver created an interest of the appellants; we had, therefore, a cause of action iem, and we were entitled to join them in the suit under 2 of the Specific Relief Act. The discretion given to a first instance in entertaining a suit, cannot be interfered a Court of appeal—*Sant Kumár* v. *Deo Saran*(2). If the suit be dismissed for absence of cause of action when it ed, another suit will have to be filed, and the same question ave to be decided over again. We had a cause of action the suit was filed, because our rights under the award were ened under the will.

ARGENT, C. J., referred to *Ráni Pirthi Pal Kunwar* v. *Ráni ín Kunwar*( ).]

e point as to the want of cause of action was not specifically n in the lower Court, nor was any issue framed with respect . The objection ought to have been taken in the first Court *eo Singh Rái* v. *Dakho*(4). It is now too late to raise the ection in appeal. The appellants ought to have shown that discretion vested by section 42 of the Specific Relief Act was properly exercised by the lower Court. The deposition of ái Jáver clearly shows that she in collusion with the appellants anted to prejudice our interest as much as possible.

*Govardhanrám Mádhavrám Tripáthi* in reply:—In our written tatement we clearly say that there was no cause of action, and a laintiff cannot come to Court without having any cause of action. The point as to the absence of the cause of action is allowed even n second appeal—*Lachman Prasád* v. *Bahádur Singh*(5); *Anandrám Jivrám* v. *Káshirám Anandrám*(6). The circumstances of the present case are not such as would justify the Court in passing a

(1) I. L. R., 7 All., 163.
(2) I. L. R., 8 All., 365.
(3) L. R., 17 I. App., 109; I. L. R., 17 Calc., 933.
(4) I. L. R., 1 All., 688.
(5) I. L. R., 2 All., 884.
(6) P. J. for 1882, p. 307.

declaratory decree. There is no evidence in the case to
Bái Jáver was colluding with us to defeat the intere
plaintiff. A man cannot be sued simply on the grou
legacy has been given to him under an invalid will.

SARGENT, C. J.—The plaint alleges that Bái Jáver h
will of the property, which was the subject of the awar
which by the award the plaintiff was to be entitled af
Jáver's death. The will is said to be in favour of the
ants, who thus, it was contended, became, in the langu
section 42 of Specific Relief Act, "interested to deny" the
tiff's title as reversioner.

It has been contended before us that these allegations
constitute a case in which in the exercise of a sound judici
cretion a declaratory decree ought to be made. Had th
jection been taken in the first Court, we should hesitate
before holding that a declaratory decree ought to be ma
such a suit as against either the widow or the other defen
The judgment of the Privy Council in *Ráni Pirthi Pal Ku*
v. *Ráni Gumán Kunwar*[1] has an important bearing on
point, and also shows that a declaratory decree may be rever
on appeal, on that ground. But here the objection has
taken for the first time on appeal, and we agree with the
marks of Mitter, J., in *Rám Kanaye Chuckerbutty* v. *Prosun*
*Coomár Sein*[2] that it would be "unjust to allow the defendan
to benefit by it after they had failed to resist the plaintiff's clai
on the merits." After Bái Jáver's death there was still the sam
cause of action against the defendants as existed at the time the
plaint was filed, *viz.*, that they were "interested in denying the
plaintiff's title." The decree of the Court, however, should, we
think, to avoid doubts which might arise in future litigation, be
amended by declaring that the will of Bái Javer is invalid
so far as it operates to defeat the award, having regard to what
subsequently took place during Bái Jáver's life-time. Parties
to pay their costs.

*Decree amended.*

(1) 17 I. A., 10; I. L. R., 17 Calc., 933. (2) 13 Calc. W. R. Civ. Rul., 176.