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Relief Act, but falls within the description of suits mentioned in clause (*x*) of that section, and even if the defendant is an agriculturist this Court has jurisdiction to try the suit. I am led to this conclusion by the apparent scheme to be inferred from the provisions of the section and particularly by the expression " contracts other than the above " to be found in clause (*x*).

As pointed out by Lord Macnaghten in *Mt. Bachi* v. *Bikhchand*[1] the Dekkhan Agriculturists' Relief Act gives extraordinary reliefs in certain particular cases specified in the Act, and there is no reason for extending the same.

Attorneys for plaintiff : Messrs. *Shamrao, Minochehr* and *Hiralal.*

Attorneys for defendant : Messrs. *Ghulam Ali & Co.*

Issue found in the affirmative.

B. K. D.

[1] (1910) 13 Bom. L. R. 56.

ORIGINAL CIVIL.

Before Mr. Justice Rangnekar.

VENIDAS NEMCHAND *v.* BAI CHAMPAVATI.*

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November 27.

Petition for probate—Bombay High Court Rules (Original Side), Rules 602 and 609—Indian Succession Act (XXXIX of 1925), section 295—Will—Caveator setting up another will—Such will should be propounded in another petition—Practice.

If on a petition for probate, the caveator sets up another will of the testator, it is obligatory upon him to file a separate petition to propound the will set up by him. The result in such a case is, that there are two separate suits which may either be heard together or be consolidated.

THIS was a petition for probate of the last will and testament of one Vanmali Virji. According to the plaintiff the deceased made his last will on April 14, 1925. To this petition a caveat was filed by the widow of the deceased alleging that the will annexed to the

*T. & I. J. Suit No. 16 of 1927.

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petition (Exhibit A) was not the last will and testament of her deceased husband or that in any case, it was not his last genuine will and testament. In her affidavit in support of the caveat, she further alleged that the last will and testament left by her deceased husband, was one dated December 23, 1926 (Exhibit No. 1), and contended that the alleged earlier will of April 14, 1925, was in any event superseded by the later will set up by her. On the petition coming on for hearing, the following four issues were raised :—

(1) Whether the writing Exhibit A to the petition dated April 14, 1925, is the last genuine will and testament of the deceased?

(2) Whether the writing dated December 23, 1926, Exhibit No. 1 to the defendant's affidavit is the last genuine will of the deceased?

(3) Whether probate should be granted of both the said writings or either of them; and if so, of which?

(4) Whether in any event the plaintiff is entitled to a grant of probate in respect of the writing of April 14, 1925, on the grounds alleged in paragraph 13 of the defendant's affidavit.

Objection was raised to issues (2) and (3).

Jinnah, with *Kania*, for the plaintiff.

Coltman, *M. C. Setalvad*, and *Daphtary*, for the defendant.

RANGNEKAR, J. :—[His Lordship, after setting out the facts and issues raised, proceeded :—] The point raised relates to a question of procedure under the testamentary and intestate jurisdiction of this Court as to what is the proper procedure to be followed where two wills are set up by two persons in regard to the same estate, and I have taken time to consider my decision in order to settle the practice once for all.

The first question is, what is the procedure to be followed? For that I have to turn to section 295 of the Indian Succession Act and Rule 602 of the Original Side Rules. Section 295 provides that wherever there is contention in probate proceedings, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

Rule 602 of the Original Side Rules states that upon the affidavit in support of the caveat being filed, the petitioner for probate or letters of administration shall be called upon by notice to take out a summons, and the proceedings shall be numbered as a suit in which the petitioner shall be the plaintiff and the caveator shall be the defendant. The proceeding in such suit shall, as nearly as may be, be according to the provisions of the Code of Civil Procedure. In *Chotalal* v. *Bai Kabubai*[1] it was held that a petition for probate or letters of administration becomes contentious not upon the entry of a caveat, but upon the filing of the affidavit in support of the caveat, and it is in consequence of the filing of the affidavit that the matter becomes a suit. Under Rule 600, the affidavit of the person, who wants to oppose the grant, has to state the right and interest of the caveator and the grounds of the objections to the application. It is clear, therefore, that under this rule it is open to a caveator to set up an earlier or a later will revoking or superseding the will in respect of which a grant is asked for, and put forward any grounds which would disentitle the plaintiff to a grant. Therefore, the contention that the affidavit of the

[1] (1897) 22 Bom. 261.

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caveator is really his written statement in the suit is correct, but only to this extent.

Now, in a probate suit the only issue before the Court is whether the will propounded or in respect of which a grant is asked for is the last will and testament of the deceased. The issues objected to require an adjudication from the Court upon the will which is set up in answer to the plaintiff's claim. This, in my opinion, as I shall presently point out, can only be done by way of a counter-claim. It is obvious, if the provisions of the Civil Procedure Code are to be followed, that a defendant in a probate suit in this Court cannot set up a counter-claim, for the Code does not recognise any counter-claim. That being so, I do not think that the defendant can be allowed to set up the alleged will of December 23, 1926, by way of a counter-claim.

As far as I know the practice in this Court has been that where there are two wills in regard to the same estate, the parties interested in opposing the grant of probate have to file their respective caveats in each case, so that the petition becomes a suit in each case and the suits are numbered and both the suits are heard together or are consolidated. Admittedly, the probate practice under our rules and the Indian Succession Act differs considerably from that in England. I shall presently consider what the position is under the English law. For the present I want to consider whether the practice which we have been following is inconsistent with or not supported by such provisions of the law as we have in this country.

In this connection the first important rule is Rule 559, which requires that an application for probate shall be made by petition with the will annexed . . . which is to be in form No. 77 in the Schedule, or as near thereto as required and is to be accompanied by certain documents, two of which are: (1) executor's oath (to be endorsed

on the will) according to form No. 79; and (2) affidavit of one of the attesting witnesses, if procurable, according to form No. 80. Similar provision is made for an application in cases where letters of administration are applied for under Rule 560. Rule 567 requires that the petition for probate or letters of administration should be subscribed by the petitioner and should be verified by him. The next important rule is Rule 585 which says :—

"The oath of the executor or administrator with the will annexed, whenever possible, shall be endorsed on the will. When this is not possible such oath of the executor or of the administrator is to be subscribed and sworn or affirmed by him, as an affidavit and then filed in the Registry."

The forms make it clear that after the will is lodged, it has to be filed. It is also necessary that the original, before any step is taken, should be produced along with the petition.

It is curious that there is no provision made in our rules for the issue of citations, but, for that, one has to turn to section 283 of the Indian Succession Act, under which the District Judge has to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. I may state here that so far as the practice of this Court is concerned we have only two kinds of citations : (1) to accept or refuse the grant, and (2) to come and see the proceedings. Many of the citations one is familiar with under the English law do not find place in any of the provisions of the law or the rules here.

In 1926 this state of things was brought to the notice of the late Sir Lallubhai Shah, who was then the Testamentary Judge, and in order to ensure finality in probate proceedings that learned Judge ordered that before a suit was placed on board for hearing, citations to see the proceedings should be served on all the persons

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interested in the estate. Apparently there was no regular practice before that for the issue of such citations and on October 9, 1925, the Testamentary Registrar put up a notice as follows :—

"In future when a Caveat is filed in a petition for Probate or Letters of Administration with or without the will annexed by a person claiming to be interested in the estate, citations will be required to be served on all persons who are mentioned in the petition as being next-of-kin or otherwise interested in the estate, to enable them to see the proceedings before the suit is placed on board for hearing."

There can be no doubt that any grant which is issued in the absence of citations on proper parties is liable to be attacked or even set aside under section 263 of the Indian Succession Act, ill. (ii) to which runs as follows: "The grant was made without citing parties who ought to have been cited." There are numerous authorities to show, to which it is not necessary to refer, that if a grant is made without the issue of citations on proper parties interested in the estate, the grant is defective.

It is clear, therefore, that if the counter-claim of the present defendant is allowed and if her contentions are correct, the defendant will obtain an adjudication of the will set up by her without complying with any of the rules laid down by this Court. It is clear on the Rules as they stand that one cannot ask for probate of any will unless one files a petition as required by the Rules. Admittedly the will set up by the defendant is not filed; it has been merely brought in, and lodged along with her caveat. Further, any decision on this point would not be final and cannot estop those who ought to have been cited if the Rules had been complied with and the will set up on a proper petition. The same question is liable to be re-opened and readjudicated later on. And, in my opinion, it is to put an end to this uncertainty of litigation that the practice to which I have referred seems to have been started and is really based upon the rules of this Court.

It is not necessary for me to refer to all the precedents which I have been able to find on the record of this Court. I will only mention two or three particular cases. In *In re Dorabji Cursetji Shroff*, deceased, a petition for letters of administration was filed by three of his next-of-kin. A caveat was filed and the matter was turned into Suit No. 14 of 1920. The caveators contended that the deceased had left a will which was lost, but they produced the draft of the will. In order to get a pronouncement on the draft will the caveators filed a petition for probate of the draft. The plaintiffs in Suit No. 14 of 1920 were asked to file a caveat which they did. That was turned into Suit No. 2 of 1921. Both the suits were heard together. There were cross-appeals which were also heard together. In *In re Gordhandas Sunderdas*, which came before Sir Lallubhai Shah, the caveators set up a will in defence but no issue as to pronouncing upon the validity of the will set up by the defendant was allowed to be raised. In *In re Adi Mahomed Haji Esmail Haji Sidick*, deceased, the daughter of the deceased applied for letters of administration claiming that the deceased had left no lawful widow. The widow filed a caveat in this petition. But in order to claim letters of administration for herself she was directed to file a separate petition to which the daughter filed a caveat. Both petitions were turned into suits and were heard together.

Mr. Coltman relies upon Rule 609 under which it is open to this Court to follow the practice and procedure of the Probate Division of the High Court of Justice in England in cases not provided for by this chapter or by the rules of procedure laid down in the Indian Succession Act, 1925, or by the Civil Procedure Code. But we have here a definite Rule, viz., Rule 602, which lays down that the procedure in contentious matter after it has become a suit should be that laid down in the Civil

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Procedure Code and therefore I do not think that Rule 609 is applicable.

I am not so sure that the practice in England is in any way different from the practice which we have been following in this Court. As far as I have been able to find, the Courts in England do not take cognisance of a will unless it is filed and it is only when a will is filed that citations are allowed to be issued. In contentious cases in England any person who becomes aware of the existence of a will which would adversely affect his interest under an earlier will can cite the executors and beneficiaries under such will to propound it. Therefore, simply bringing a will in the Registry, even in England, does not entitle a person to get any adjudication upon the will unless it is filed and unless all persons interested as well as the executors are cited to propound it. The precise point is made clear by reference to Form of Pleading No. 276 at page 1008, 16th Edition, Tristram and Coote's Probate Practice. The Form is headed: "Defendant pleads against Will and Codicil propounded by Plaintiff, and claims Probate, of earlier Will." Paragraph 6 runs as follows: "The deceased made his true last will, . . . and thereby appointed the defendant sole executor thereof. The defendant claims—(1) That the Court will pronounce against the said will and codicil propounded by the plaintiff; (2) that the Court will decree probate of the will of the deceased." The foot-note to the form says that paragraph 6 is a counter-claim and would now be so headed in a defence. The marginal note is, "Pleading against Plaintiff's Will and propounding earlier Will."

To the same effect are the observations in Brown on Probate, at page 322, where the pleas ordinarily relied upon by the defendant such as want of execution, etc., are set forth. There the following remarks appear: "Finally by way of counter-claim, the defendant

propounds another will and concludes by claiming that the Court do reject the prayer of the plaintiff and grant probate of the will propounded in the statement of defence." In reply the plaintiff joins issue on all the allegations in the statement of defence until he comes to the new will which he alleges to have been revoked by the will propounded by him in his statement of claim.

Rule 40 of the "Contentious Business Rules and Orders" makes the position clear. It runs as follows :—

"If one party propounds a will or testamentary script in his declaration, and the adverse parties, or either of them, desire to propound another will or testamentary script, the adverse parties must, with their pleas, deliver to the opposite party and file in the registry a declaration propounding such other will or testamentary script, to which the opposite party shall plead; and the form of declaration, and the pleadings and proceedings arising therefrom, shall be the same as are directed by the rules and orders of this court in respect to the original declaration delivered and filed in the cause." (Tristram and Coote's Probate Practice, 16th Edition, page 809.)

It appears that the original rule before 1865 was as follows :—"If one party propound a will in his declaration and the other party in his plea allege existence of another will, each party may, with and subject to the permission of the Judge, adduce proof at the trial or hearing of the cause of the validity of the will upon which he relies." After 1865 that rule was amended, and the amended rule now clearly requires that a party who sets up another will other than that which is sought to be propounded in the particular action must file it in the registry and propound it.

In England every probate action is commenced by a writ of summons. The writ has to bear the Registrar's certificate that sufficient affidavit in support has been filed.

It seems to me, therefore, that merely bringing in and leaving a will in the Registry is not sufficient even in England for the Court to take cognisance of it. No petition is necessary according to the English practice,

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whereas here, as I have already pointed out, no person can obtain probate or letters of administration unless a proper petition accompanied by necessary documents is filed. It seems to me that the position in England is that where the defendant sets up another will he has to propound it by way of counter-claim. A counter-claim of this kind cannot, however, be allowed here under the provisions of the Civil Procedure Code which are made applicable to testamentary suits by our Rule 602. I am, therefore, clearly of opinion that the practice followed in our Court, where two wills are set up relating to the same estate, is sound and should be strictly followed. I must, therefore, disallow the second and third issues unless the defendant is willing to propound the will which she sets up. As to whether she should be allowed to do so and if so on what terms is a question on which I will now hear counsel.

I have heard counsel on the question as to whether the suit should be adjourned to enable the defendant to propound the will set up by her. I have also heard counsel on the question as to costs or the terms on which the defendant should be allowed now to propound the will dated December 23, 1926. The order I make is as follows :—

Suit adjourned. To be on Board on March 26 peremptorily. Liberty to the defendant to take steps to propound the will set up by her. Costs reserved. Issues Nos. 2 and 3 to be struck off. The defendant to file the petition in three weeks and to furnish the plaintiff with a copy within four days after the filing of the petition. In default suit to be on board in the first week of January 1929. The plaintiff to file his caveat and affidavit if so advised on January 15, 1929. Affidavit of documents within a week thereafter. Inspection forthwith.

Attorneys for petitioner: Messrs. *Malvi, Mody* and *Ranchhoddas.*

Attorneys for caveatrix: Messrs. *Thakoredas & Co.*

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ORIGINAL CIVIL.

Before Mr. Justice Rangnekar.

KANJI SHIVJI v. VASANJI SHIVJI AND COMPANY.*

1928 December 20.

Indian Limitation Act (IX of 1908), Article 164—Civil Procedure Code (Act V of 1908), section 2; Order XXI, rule 50—Order—Decree.

An order granting leave to execute a decree against any person on the ground that he is a partner, made under Order XXI, rule 50, sub-rules (2) and (3) of the Civil Procedure Code, 1908, is not a decree. Article 164 of the Indian Limitation Act, 1908, does not apply to such an order.

THE facts are fully set out in the judgment.

Jinnah, for the plaintiff.

B. J. Desai, for the defendant.

RANGNEKAR, J.:—This summons raises the question as to whether an order made under Order XXI, rule 50, sub-clauses (2) and (3), of the Civil Procedure Code, granting leave to the decree-holder to execute the decree against a person other than such a person as is referred to in sub-rule (1), clauses (*b*) and (*c*), as being a partner, is a decree within the meaning of section 2, sub-clause (2), of the Civil Procedure Code.

The plaintiff obtained a decree for Rs. 33,628-11-0 against the defendant firm on July 27, 1927. The writ of summons was served on Shivji Sojpal, one of the partners in the defendant firm. Being desirous of executing the decree against the other partners including the applicant Doongersi Shivji, the plaintiff took out a chamber summons under Order XXI, rule 50, Civil Procedure Code, and, on September 16, 1927, obtained an order granting leave to execute the decree

*O. C. J. Suit No. 1267 of 1927.