

There is no decided case on the exact point. We have been referred to the cases of *Ramchandra Yashvant Sirpotdar v. Sadashiv Abaji Sirpotdar*,⁽¹⁾ *Vasudev v. Balaji*,⁽²⁾ *Tangya Fala v. Trimbak Daga*⁽³⁾ and *Bhaiji Shamrao v. Hajimiya Mahamad*.⁽⁴⁾ But these are all cases of co-sharers, where the point of departure for limitation would be as in Article 144.

Here the redeeming mortgagor had no interest in the property in question, and was merely holding it as having been compelled to redeem it, and so long as the charge he had on it was not discharged. The leading case seems to me to be that of *Vasudev v. Balaji*.⁽²⁾ In this case the other party interested was a co-mortgagor and twelve years limitation was held to apply by Sir Lawrence Jenkins and the point of departure was the date of redemption.

The other point—the real character of the transaction of the sale of the equity of redemption by Exhibits 62 and 63—has been found against the appellants on the facts by both Courts below.

I think that the suit was not in time and that the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

⁽¹⁾ (1886) 11 Bom. 422.

⁽²⁾ (1902) 26 Bom. 500.

⁽³⁾ (1916) 40 Bom. 646.

⁽⁴⁾ (1911) 14 Bom. L. R. 314.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

RAMGOPAL HAJARIMAL MARWADI AND OTHERS (ORIGINAL OPPONENTS),
APPELLANTS v. JAITUNBAI, WIDOW OF YASINBHAI OF KATRAD, BY HER
GENERAL AGENT FAKIR MAHOMED MAHAMADBHAI (ORIGINAL PETITIONER),
RESPONDENT.*

1932
August 11

Indian Succession Act (XXXIX of 1925), sections 263, 273—Probate—Forgery of will—Application to revoke probate—Subject-matter—Value of estate for which probate was granted—Appeal—Jurisdiction—Bombay Civil Courts Act (XIV of 1869), section 28A (2).

*Second Appeal No. 299 of 1931.

1932
RAMCHANDRA
KHASERAO
v.
GANESH
BALWANT
Murphy J.

1932

RAMGOPAL
HAJARIWAL
v.
JAITUNBAI
YASINBHAI

The value of the subject-matter of a probate application is the estate which is the subject of the probate; and if an application is made for revocation of probate on the ground of forgery, the subject-matter in such an application must be decided by the value of the whole estate for which probate is granted.

Laxmi v. Abu,⁽¹⁾ followed.

The appellants were appointed executors of a will. Probate was granted to the appellants in respect of the property under the will which was valued at Rs. 6,680. Pending the probate proceedings respondent's husband purchased from a chela of the deceased testator a portion of the property, covered by the will, valued at Rs. 1,600. The respondent applied for revocation of the probate on the ground that the will was a forgery. The Subordinate Judge, acting under the powers conferred by section 28A of the Bombay Civil Courts Act, 1860, dismissed the application. An appeal was preferred to the Assistant Judge who reversed the order of the Subordinate Judge. On second appeal to the High Court:

Held, that the Assistant Judge had no jurisdiction to entertain the appeal as the subject-matter of the application was the estate for which probate was granted and which was admittedly over Rs. 5,000.

SECOND APPEAL against the decision of S. K. Patkar, Assistant Judge at Ahmednagar, reversing the order made by G. M. Phatak, First Class Subordinate Judge at Ahmednagar.

Petition for revocation of probate.

One Narsingdas Guru Haribhajasdas made a will on April 17, 1918, appointing the opponents executors. Narsingdas died on April 19, 1918. Probate of the will was granted to the opponents on January 15, 1920. Pending the probate proceedings, one Raghunathdas, a chela of the deceased testator, sold to the petitioner's husband, Yasinbhai, certain land covered by the will for a consideration of Rs. 1,600. Opponents dispossessed Yasinbhai of the lands in dispute. Yasinbhai filed a suit which on his death was withdrawn by the petitioner with liberty to file a fresh suit. On November 16, 1926, the present application was filed by the petitioner for revocation of the grant of probate on the ground that the will was a forgery.

The application was made in the first instance in the Court of the District Judge and for the purposes of

⁽¹⁾ (1908) 32 Bom. 634.

jurisdiction the claim was valued at Rs. 1,600. The application was sent by the District Judge to the First Class Subordinate Judge for disposal. The Subordinate Judge dismissed the application as he was not satisfied that the will was a forgery.

On appeal to the Assistant Judge, a preliminary objection was raised that the appeal did not lie to the District Court. The Assistant Judge overruled the objection on the following grounds :—

“ Section 28A of the Bombay Civil Courts Act, 1869, empowers the High Court to invest any Subordinate Judge within such local limits and subject to such pecuniary limitation as may be prescribed with all or any of the powers of a District Judge under the Indian Succession Act and paragraph 2 of that section provides that the order made by Subordinate Judge shall be subject to appeal to the High Court or to the District Court according as the amount or value of the subject-matter exceeds or does not exceed Rs. 5,000. So it is apparent that the question of appeal has to be decided according to the value of the subject-matter and as in this case the value of the subject-matter is mentioned to be Rs. 1,600 an appeal will lie to the District Court and not to the High Court. It is true that the entire property covered by the will is worth over Rs. 5,000 but the applicant is concerned with only one of the survey numbers out of it valued at about Rs. 1,600 and so far as the applicant is concerned the value which he can put on the probate is the sum to the extent of which his interest is affected by the grant of the probate. Section 299 of the Indian Succession Act should therefore be read subject to the High Court Notification 10A above referred to which is issued under section 28A of the Bombay Civil Courts Act and according to that notification an appeal will lie to the District Court. The fact that only one appeal is provided by section 299 of the Indian Succession Act does not affect the question (see I.L.R. 17 Mad., p. 167).”

On merits the Judge came to the conclusion that the will was a forged one and therefore set aside the order of the Subordinate Judge and directed that the probate already granted should be cancelled.

The opponents appealed to the High Court.

H. C. Coyajee, with *J. G. Rele*, for the opponents, submitted that the appeal to the Assistant Judge was not competent and that it ought to have been preferred to the High Court. The application was made under section 263 of the Indian Succession Act to revoke the grant of probate. Admittedly the value of the property in respect of which probate was

1932

KANGOPAL
HAMARIMAL
P.
JATUNBAI
YASINBHAI

1932

RAMGOPAL
HAJAREMAL
C.JATUNBAI
YASINBHAI

granted was worth more than Rs. 5,000. The question is what is the value of the subject-matter of the application? We submit that in the case of an application for grant of probate the subject-matter is the entire property for which the probate was granted and that an application to revoke the grant must bear the same valuation. If the value is over Rs. 5,000 the appeal would lie to the High Court, under section 28 (a) of the Bombay Civil Courts Act. See *Laxmi v. Aba*,⁽¹⁾ and *Esoof Hasshim Dooply v. Fatima Bibi*.⁽²⁾

Section 273 of the Indian Succession Act points out the effect of a grant of probate and states that it affects the entire property. Therefore if the probate already granted is to be revoked the entire property for which it was granted will be affected and as it is more than Rs. 5,000 the appeal would lie to the High Court. The Court cannot cancel the grant piecemeal since it affects the entire property.

K. A. Padhye, for the respondents. I submit that the subject-matter is the specific property which is stated in the application for revocation of the grant of probate and not the entire property for which the probate was granted. The application is only concerned with the piece of land conveyed. Under section 248 of the Indian Succession Act limited grants are allowed and I submit that probate might be revoked if necessary to the extent of the property conveyed to the petitioner. The character of the will does not rest upon the property mentioned under the will. The Court must look into the nature of the forgery; that is a question which is independent of the subject-matter under the will. I rely upon *Lakshman Bhatkar v. Babaji Bhatkar*,⁽³⁾ *Shet Kavaji v. Dinshaji*⁽⁴⁾ and *Vachhani v. Vachhani*.⁽⁵⁾

PATKAR J. In this case a probate was granted on January 15, 1920, to the appellants in respect of property worth Rs. 6,680. The appellants were appointed executors

⁽¹⁾ (1908) 32 Bom. 634.⁽²⁾ (1896) 24 Cal. 30.⁽³⁾ (1883) 8 Bom. 31.⁽⁴⁾ (1897) 22 Bom. 963.⁽⁵⁾ (1908) 33 Bom. 307.

of the deceased testator by his will dated April 17, 1918. The present application was made by the respondent for revocation of the probate under section 263 of the Indian Succession Act, XXXIX of 1925, on the allegation that the will was a forgery. The learned First Class Subordinate Judge, acting under the powers conferred by section 28A of the Bombay Civil Courts Act, dismissed the application on the ground that in his opinion he was not satisfied that the will was a forgery.

On appeal, the learned Assistant Judge came to the conclusion that the will, Exhibit 141, was not a genuine will of the deceased Narsingdas, and, therefore, allowed the application and cancelled the probate already granted.

A preliminary point was raised before the learned Assistant Judge that the appeal did not lie to the Assistant Judge under section 28A of the Bombay Civil Courts Act, 1869. Sub-section (2) of section 28A makes a provision with regard to appeals as follows :—

“ Every order made by a Subordinate Judge by virtue of the powers conferred upon him under sub-section (1) shall be subject to appeal to the High Court or the District Court according as the amount or value of the subject-matter exceeds or does not exceed five thousand rupees.”

The learned Assistant Judge held that the property covered by the will was worth more than Rs. 5,000, as in the probate granted by the Court the property was valued at Rs. 6,680. But the learned Assistant Judge was of opinion that as the appellant was concerned with only one of the survey numbers out of the property covered by the will, which was worth Rs. 1,600, she was entitled to put the valuation on the property to the extent to which her interest was affected by the grant of the probate. The value of the subject-matter of a probate application is the estate which is the subject of the probate application. In *Laxmi v. Aba*,⁽¹⁾ where the precise point decided was that in so far as the provisions of the Probate and Administration Act are

1932

RAMGOPAL

HAJARIMAL

v.

JATUNBAI

YASINDBAI

Patkar J.

⁽¹⁾ (1908) 32 Bom 634.

1932

RAMGOPAL
HAJARIMAL
c.
JATUNBAI
YASTNBHAI

Patkar J.

inconsistent with the amendments introduced into the Bombay Civil Courts Act, the provisions of the first mentioned Act must be taken to have been impliedly repealed, it was also incidentally remarked that the value of the subject-matter represented the value of the estate which was the subject of the probate application. Under section 273 of the Indian Succession Act of 1925, probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the Province in which the same is or are granted. If the probate has the effect over all the property comprised in the probate, the subject-matter of an application to revoke the probate would extend to the whole property covered by the probate. It is difficult to divide the subject-matter of such an application in proportion to the interest acquired by the applicant. There is no provision for a limited revocation of the probate especially when it is sought on the ground that the will is forged. Though according to the decision in *Lakshman Bhatkar v. Babaji Bhatkar*⁽¹⁾ the subject-matter of a claim within the meaning of section 25 of the Bombay Civil Courts Act, XIV of 1869, is the specific thing sought by the plaintiff, it is clear that in an application for cancellation of the probate on the ground that the will is forged the specific thing sought by the plaintiff is not divisible as in a partition suit.

We think, therefore, that the subject-matter of the application, which aimed at and would result in the cancellation of the whole probate, extended over the whole property comprised in the probate which was of the value of Rs. 6,680, and therefore, exceeded Rs. 5,000, and the appeal would lie not to the District Court but to the High Court. No other point was raised in this appeal.

⁽¹⁾ (1883) 8 Bom. 31.

We think, therefore, that the decree of the lower Court must be set aside on the ground that it had no jurisdiction to hear the appeal, and we must direct the District Judge to return the appeal for presentation to the proper Court. The appellants to get the costs of this appeal from the respondent.

MURPHY J. The only question we have to decide is the value of the subject-matter of an application to revoke the probate of a will, for on this depends the answer to the question whether the Assistant Judge, who revoked the probate, had jurisdiction to do so, and to hear the appeal from the decision of the First Class Subordinate Judge, who refused the application.

The estate was that of a religious mendicant, the executors had applied for probate, and it was originally granted them to the value of Rs. 6,680. The applicant, now respondent, was a purchaser of one of the properties covered by the will, from one Raghunathdas, who claiming to be the deceased's "chela" and heir sold it to her husband for Rs. 1,600. Under the will, the property was not vested in this person, and the applicant valued her claim at Rs. 1,600, which was the price paid for the land. But it is evident that the probate was granted as a whole, and there is no provision for a limited revocation in the Act, and can hardly be one in the case of a revocation on the ground of forgery. If the probate was to be revoked, it would have so to be as a whole, and the subject-matter in such an application must, therefore, be decided by the value for which the probate was granted.

I agree that the learned Assistant Judge had no jurisdiction to hear the appeal, and that he should return the memorandum of appeal for presentation to the proper Court.

Decree set aside.

J. G. R.

1932

RAMGOPAL
HAJARNAL
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JATUNBAI
YASINBHAI

Patkar J.