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VASANJI KALIANJI v. ERACHSHA DOSSABHAI

Rangnekar J.

and I venture to think that that perhaps was in the mind of the learned Judge.

I must, therefore, hold that the suit is not barred by the law of limitation.

After I delivered my judgment the parties have agreed as to the amount due and payable by the defendant to the plaintiff, and my finding on issue No. 2 is : Rs. 31,000 with further interest from January 1, 1934, at twelve annas per cent. per Gujarati month, calculated as provided in the indenture of mortgage dated March 19, 1927, costs and interest on judgment at six per cent.

Decree accordingly.

Attorneys for plaintiff : Messrs. *Madhavji & Co.*

Attorneys for defendants : Messrs. *Minocheher, Mancher-shaw, Hiralal & Co.*

B. K. D.

ORIGINAL CIVIL.

Before Mr. Justice Kania.

1934
October 10

BAI UJAMBAI GOVINDJI, PLAINTIFF *v.* HARAKCHAND GOVINDJI, DEFENDANT.*

Bombay High Court Rules (Original Side), 1930, rule 620[1]—Indian Succession Act (XXXIX of 1925), sections 211, 250, 255, 256, 257—Joint Hindu family—Claim to property by a Hindu as surviving coparcener—Application for grant of Letters of Administration on behalf of a minor limited to period of minority—Will by last holder of property in a joint Hindu family—Whether a will can operate on joint family property after birth of a son.

A Hindu died making a will of his ancestral as well as self-acquired property appointing his wife as executrix. After the date of the will a son was born to the

*Testamentary Suit No. 3 of 1934.

[1] Rule 620 runs as follows :—"No person, who renounces probate of a will or letters of administration of the property of a deceased person in one character, shall, without the leave of the Judge, take out representation to the same deceased in another character."

testator. This son was a minor at the date of the testator's death. On the death of the testator, the widow applied for letters of administration to the estate of the deceased being granted to her on behalf of her minor son limited to the period of his minority. She alleged in her petition that the will was revoked on the birth of the son and, in the alternative, she submitted that the will became inoperative so far as regards the ancestral joint family property belonging to the deceased, inasmuch as the same passed wholly to the son by survivorship. It was objected that the widow being an executrix under the will was not competent to make such an application under rule 620 of the Bombay High Court (Original Side) Rules:

Held (1) that rule 620 had no application to the facts of the case as the widow did not make the application on the footing that she had renounced executorship. She had made the application only on behalf of her minor son;

(2) that the Indian Succession Act, 1925, does not expressly provide for the case of a person who under Hindu law obtains title to an estate by survivorship. But it is open to a person to whom such property passes by survivorship, to apply for letters of administration with exception as provided in sections 255 to 257 of that Act;

(3) that under the express terms of section 211 of the Indian Succession Act, the title of an executor or administrator of the estate of a Hindu coparcener in a joint Hindu family would not cover the property which passes to the other members of that family by survivorship.

PETITION for letters of administration to the estate of a deceased Hindu coparcener in a joint Hindu family.

One Govindji Khushal, a Hindu, was the owner of ancestral and self-acquired properties. He made a will of his properties on May 1, 1922, under which he appointed his wife Ujambai as executrix. At the date of the will he had a son named Harakchand, and a wife named Ujambai. Ujambai gave birth to a son named Amratlal in the year 1925. On March 21, 1929, Harakchand separated from Govindji. Govindji died on July 18, 1931.

On November 6, 1933, Ujambai obtained a Judge's order authorising her to apply for letters of administration to the estate of Govindji, on behalf of her minor son Amratlal. On November 13, 1933, she applied for "Letters of Administration of the joint family property and credits standing in name of Govindji . . . for use and benefit of his minor son Amratlal Govindji and limited to the period of his minority." She alleged in that petition that the will

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had been revoked, and in the alternative, that it became inoperative and ineffective in law on the birth of Amratlal, as Govindji and Amratlal were members of a joint and undivided Hindu family.

Harakchand filed one caveat to Ujambai's petition. Another caveat was filed by Harakchand's daughter Jaya, who was a legatee under the will, on the ground that as Govindji died leaving a will, Ujambai was not entitled to a grant of letters of administration to the estate of Govindji.

C. K. Daphtary, with *V. F. Taraporewala*, for the plaintiff.

M. C. Setalvad, with *M. J. Mehta*, for caveators.

KANIA J. This petition for the letters of administration of the joint family properties and credits standing in the name of Govindji Khushal is filed by his widow Ujambai for the use and benefit of her minor son Amratlal and limited to the period of his minority. In the petition it is alleged that the deceased left a writing dated May 1, 1922, purporting to be his will, but the same was revoked, and he died intestate. In the alternative it is stated that on the birth of Amritlal, which took place after the date of the alleged will, the deceased and his minor son Amritlal constituted a joint and undivided Hindu family and the said will was, therefore, void and inoperative in law. In paragraph 5 of the petition it is stated that Harakchand, the first caveator, who is the other son of the deceased, separated from his father before his death and the release passed by Harakchand is put in as exhibit A. It is contended that on the death of the deceased Amritlal became absolutely entitled to the joint family properties and credits as the sole surviving coparcener. In paragraph 6 the petitioner says that all the properties and credits which the deceased died possessed of or was entitled to were mentioned in the schedule to the petition and the petitioner expected to realise the same.

For making a petition in this form the petitioner relies on the language of sections 211, 250, 255, 256 and 257 of the Indian Succession Act. It is pointed out that under section 211 although there may be an executor or an administrator, to whom a grant may be issued by the Court, the joint family property which would pass by survivorship to some other person would not be vested in the executor or administrator. It is also contended that under section 250, on the death of the deceased, no beneficial interest remained in him and, therefore, the Court is competent to grant a representation relating to such property. In the alternative it is pointed out that under sections 256 and 257 there is no objection to the Court granting letters of administration to the estate of the deceased with the exception of his separate property which may pass, if at all, to the executor or administrator who may choose to apply for representation on the footing of the alleged will. The application is made in this form because the applicant Ujambai is the mother of Amritlal and is named an executor in the alleged will. Harakchand filed the first caveat. On realising that he had no interest in the estate at a later stage, his daughter Jaya, who is a legatee under the will, filed the second caveat.

The first objection taken on behalf of the caveators is that under rule 620 of the High Court Rules (O. S.), 1930, the application is not in order. Rule 620 runs as follows :—

"No person, who renounces probate of a will or letters of administration of the property of a deceased person in one character, shall, without the leave of the Judge, take out representation to the same deceased in another character."

The simple answer to this contention is that the application is not made by Ujambai and is not made on the footing that she has renounced the executorship. Rule 620, therefore, does not come into operation at all.

The next contention urged on behalf of the caveators is that if a will is admitted to exist, there is no case for grant of letters of administration without the will. In my opinion

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this contention must fail because the express words of section 211 of the Indian Succession Act do not make the executor or administrator who obtains the grant the representative of the deceased for the joint family estate which has passed to a different person by survivorship. Under the circumstances when a member of a joint Hindu family dies and the property has passed by survivorship to a third person, even if the Court issues probate of a will proved to have been properly executed by the deceased, the title to such joint family property will not pass to the executor and he will not represent the estate by reason of the express words of section 211. The point which arises for consideration is how the title in respect of the property which has thus passed by survivorship to a third person to be completed. Ordinarily in the petition made for probate or letters of administration the petitioner specifies all the properties standing in the name of the deceased, i.e., either his own, or of which he was a trustee, or which stood in his name and the title to which passed by survivorship to someone else, the petitioner claiming exemption from probate duty in respect of the last-named two kinds of properties. Although this course is adopted in practice, the question to be considered is, when a will is left under such circumstances, could the executor named in the will be compelled to make such an application. The further question which arises for consideration is, whether a person named as an executor under such a will applied for representation or not, is it not competent to the person to whom the property has passed by survivorship to make an application for representation, as has been done in this case, on the ground that will or no will the person to whom representation may be granted under section 211 will not represent this part of the estate? In my opinion, the case of a person who obtains property

by survivorship is not expressly provided under the Indian Succession Act and by reason of the express words of section 211, as the title in the executor or administrator ordinarily appointed under the Indian Succession Act would not cover the property which has passed to a third person by survivorship, it is open to the person to whom such property has so passed to come to Court and apply for letters of administration with exception as mentioned in sections 255 to 257 of the Indian Succession Act. Just as a beneficiary is entitled to come to Court and apply for a limited grant under section 250 of the Act, whether there is a will or not, a person to whom coparcenary property has passed by survivorship has the right to apply for representation under section 255 or 256, as the case may be. In this view of the case it is not necessary to decide the disputed question whether the deceased was a trustee or was a person who had no beneficial interest in the joint family properties, on his own account, within the meaning of section 250. It is pointed out that there is no precedent for an order for the issue of letters of administration with exception, as asked for, when it is admitted that a will is in existence. I do not think that is a sufficient argument to dissuade the Court from making an order if the words of sections 255–257 are applicable to the case. For a member of a joint family to have separate property of his own, which would pass under his will to the executor named in the will, and for the joint family estate to pass to another person by survivorship, is not a case of rare occurrence. In the event of the title to the two sets of properties being vested after some time in the same person, without the property being actually transferred from the name of the original holder in the interval, I do not see any reason why the person acquiring title under the will should be compelled to apply for representation on the footing of the will alone. Indeed it may not be

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possible for him to make such an application if the will is limited and confined only to the separate property expressly named in the will. In such a case, if the defendant's contention is upheld, the person will have no remedy to obtain representation to the rest of the estate because the will is limited to the property named in the will and the rest of the property has not passed on intestacy but by survivorship. I, therefore, think that there is nothing in the provisions of the Indian Succession Act to prevent an application of this nature being made.

It is next urged that the present petition is not for a grant with an exception. Having regard to the fact that ordinarily petitions for representation are desired to be made only in the prescribed forms, I am unable to attach importance to this contention. From the opening words of the petition it is clear that the application is for letters of administration of the joint family properties and credits, and paragraphs 5 and 6 of the petition set out what has been done during the lifetime of the deceased in respect of certain property followed by a submission that the rest of the property, according to the information of the petitioner, is joint family property. That does not, however, prevent the petitioner from submitting to the Court that the grant should be in terms of section 256 of the Indian Succession Act.

It is next contended that Ujambai had agreed to apply for the probate of the will and the letter alleged to be signed by her and dated May 23, 1932, was tendered to prove this. On behalf of the petitioner it was alleged that Ujambai was made to sign this letter under circumstances which do not make it binding on her. I am not concerned with that dispute and pronounce no opinion on the binding nature of that letter on Ujambai. Having regard to the fact that the present petition is on behalf of Amritlal, a minor, and not by Ujambai, no admission or agreement made by Ujambai in her individual right and capacity can be binding on

Amritlal. For that reason the letter was not admitted in evidence.

It was lastly pointed out that by the order proposed to be made difficulty may arise in respect of the administration of the estate because if a claim is made in respect of a debt, the debtor may still contend that he is not liable to pay the amount to the applicant because the amount was not specified in the grant. As a part of the same argument it is urged that the grant contemplated by sections 255–256 must mention specifically the properties in respect of which the grant is made. I do not think this contention is sound. As regards the first part I realise that the applicant will be faced with the difficulty of proving to each debtor that the applicant was entitled to recover the money on the ground that the property was joint family property. That, however, is no concern of the Probate Court. If the application is permissible, and is made, I do not see any reason why the Court should consider the difficulty of actually administering the estate. That is solely the concern of the applicant. For the other part of this contention (that specific property should be mentioned in the grant), I find no support for that in the words of the section. The section on the other hand contemplates in the first instance a grant with an exception. Ordinarily that would mean that a grant should issue in respect of all properties and the exception should be specified. It would not ordinarily mean that the grant should specify expressly the property in respect of which it is to operate. Section 257 deals with the grant in respect of property exempted from the first grant.

Letters of administration are ordered to be issued to Ujambai for the use and benefit of her minor son Amritlal Govindji Khushal and limited to the period of his minority with the exception of the separate property of the deceased, on the petitioner fulfilling the usual requirements of the

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Testamentary Registrar. The caveat of Harakchand is dismissed with costs. The caveat of Bai Jaya is dismissed. She is to bear her own costs. The petitioner's costs taxed as between attorney and client, except such as are recovered from Harakchand, to come out of the estate recovered or to be recovered by the petitioner.

Attorneys for plaintiff: Messrs. *Mulla & Mulla.*

Attorneys for caveators: Messrs. *Motichand & Devidas; Malvi, Ranchhoddas & Co.*

Petition granted.

B. K. D.

ORIGINAL CRIMINAL.

Before Mr. Justice Divatia and a common Jury.

1934
November 28

EMPEROR *v.* LAXMAN BALA KAVLYA.*

Indian Penal Code (Act XLV of 1860), section 366—Kidnapping—Seduced to illicit intercourse—Meaning of "seduce"—Not limited to committing first act of illicit intercourse.

The term "seduce" in section 366 of the Indian Penal Code, 1860, is used in the general sense of "enticing or tempting", and not in the limited sense of committing the first act of illicit intercourse. The substantial offence under the section is the act of kidnapping or abduction. The illicit nature of the intercourse for which the kidnapping or abduction takes place constitutes an aggravation of the offence. Hence a person can be guilty of an offence under this section even where the girl kidnapped had illicit intercourse with him before the kidnapping took place.

Prafullakumar Basu v. *The Emperor*,[1] *Krishna Maharana* v. *King-Emperor*,[2] *Suppiah* v. *Emperor*,[3] and *King-Emperor* v. *Nga Ni Ta*,[4] followed.

Emperor v. *Baijnath*[5] and *Nura* v. *Emperor*,[6] dissented from.

Rex. v. *Frederick Moon*,[7] distinguished.

*Case No. 20; V Criminal Sessions, 1934.

[1] (1929) 57 Cal. 1074.
[2] (1929) 9 Pat. 647.
[3] [1930] A. I. R. Mad. 980 s. c. [1930] Mad. W. N. 905.
[4] (1904) 10 Burma L. R. 196.
[5] (1932) 33 Cr. L. J. 669, s. c. [1932] A. L. J. 483.
[6] (1933) 35 Cr. L. J. 1386.
[7] [1910] 1 K. B. 818.