Raichand Dhanji Vs Jivraj Bhavanji

Court: Bombay High Court

Date of Decision: Dec. 3, 1930

Acts Referred: Succession Act, 1925 â€" Section 213

Citation: (1931) 33 BOMLR 1372 : (1932) ILR (Bom) 65

Hon'ble Judges: Wadia, J

Bench: Single Bench

Judgement

Wadia, J.
One Ratansi Velji died in Bombay in or about the year 1910 leaving him surviving Champubai, the widow of his predeceased

son Bhawanji, Jivraj, son of Bhawanji, being defendant No. 1 herein, and one Khetbai daughter of Bhawanji, who has been sometimes referred to

as Benbai. Champubai died on or about July 17, 1912. Khetbai was married to the plaintiff in or about the year 1920 and she died childless in the

year 1922. Defendant No. 3 is the wife of defendant No. 1 in suit. Ratansi left a will dated July 30, 1910, of which he appointed one Devraj

Tokersey, defendant No. 2, and the said Champubai as the executor and executrix thereof. Devraj Tokersey died in or about the year 191-2. On

the death of Ratansi his daughter-in-law Champubai entered into possession and management of Ratansi"s estate without obtaining probate of the

will or any representation to the said estate. On the death of Champubai in the year 1912 defendant No. 2 as the sole surviving executor of the will

of Ratansi entered into possession and management of the estate, and on or about July 16, 1923, he handed over all the estate which had come

into and remained in his possession to defendant No. 1, and obtained from him a release and indemnity

2. On July 28, 1924, the plaintiff as the heir of his deceased wife Khetbai filed this suit for the administration of the estate of Ratansi and to have

the share and interest of Khetbai under the sail will in her own right and also as the heir of her mother Champubai ascertained and determined. He

further prays for a declaration that he is entitled to certain ornaments which he says Khetbai was entitled to both in her own right and as the heir of

Champubai. It is alleged by the plaintiff that some of the ornaments belonging to Champubai are at present deposited in a cubicle in the Bombay

Safe Deposit Company Ltd. in the joint names of defendants Nos. 4 and 5, and these defendants have been impleaded in the suit as the key of the

cubicle was lying with them, and they had at first declined to hand over the same to the receiver. Since then under a consent order dated March

30, 1925, the key of the cubicle was handed over to the attorneys for defendant No. 4 with liberty to the parties to have an inventory made of its

contents.

3. Defendant No. 1 contends that the suit is not maintainable without representation to the estate of Ratansi Velji, and that Ratansi had in the first

place no right to make the will as the property dealt with by him was ancestral. Defendant No. 1 further says that he was a minor at the date of the

death of his grandfather, but had attained majority in the year 1920, and that in the year 1923 defendant No. 2 as executor handed over the whole

of the estate consisting of a sum of Rs. 18,000 in cash, Government Promissory Notes of the face value of Rs. 9,000, and certain ornaments to

him as the sole residuary legatee under the said will. Defendant No. 1 contends that whatever ornaments have been handed over to him belong to

him absolutely. Defendant No. 2 has also put in a written statement in which, apart from his primary submission to the orders of the Court as

executor, he says that he came into possession of the estate of Ratansi on the death of Champubai. As such he came into possession of certain

ornaments which he believed belonged to the estate of Ratansi. Some of the ornaments were given to Bai Khetbai at the time of her marriage with

the plaintiff, and the rest of the ornaments were handed over to defendant No. 1 at the date of the release, as admittedly no claim had been made

either by Bai Khetbai or any one on her behalf to any of the remaining ornaments until about the time when this suit was filed. Defendant No. 2 has

further stated in his written statement that he never came into possession of any ornaments presented or gifted either to Khetbai or Champubai in

the lifetime of Ratansi or handed over to Champubai on any trust as alleged by the plaintiff. Defendant No. 8 is the wife of defendant No. 1 and

she supports all the allegations and contentions of defendant No. 1 except in so far as they or any of them may be contrary to or inconsistent with

her claim against her husband in suit No, 2437 of 1924. Defendant No. 4 submits to the orders of the Court, Defendant No. 5 is dead and her

name has been struck off.

4. Several issues have been raised by counsel for the parties, but there are certain preliminary issues which have got to be dealt with, and I

propose to take up issue No. 3 first, viz., whether the plaintiff is entitled to the reliefÃ¯Â¿Â½s claimed without probate of the will of Ratansi Velji, or any

representation to the estate of Ratansi Velji. The plaintiff claims as the heir of his deceased wife Khetbai. He says that he is entitled to the share and

interest of Khetbai under Ratansi''s will, and also to the moneys and ornaments which Khetbai was entitled to in her own right under the will and as

the heir of Champubai. u/s 213 of the Indian Succession Act no right as executor or legatee can be established in any Court of justice unless a

competent Court has granted probate of the will under which the right is claimed or has granted letters of administration with the will annexed, This

section applies in the case of wills made by a Hindu if the will is of the class specified in Section 57. The will in suit is of the specified class. The

plaintiff is of course not a legatee under the will, but as he claims under such a legatee, he can have no higher rights than the legatee herself. It has

been held by the Privy Council in Chandra Kishore Roy v. Prasanna Kumari (1910) ILR 38 I. A. 7, 13 Bom. L.R. 67, which was decided in the

year 1910, that the grant of probate of a will is not a condition precedent to the institution of the suit, and the executor or legatee may institute a suit

without obtaining probate, but that he will not be entitled to a decree unless probate is granted to him before the passing of the decree. It is

immaterial, therefore, if the grant of the probate follows the institution of the suit, so long as it is granted before the date of the decree. In the year

1912 the same point came up for decision before our appeal Court in Jamsetji Nassarwanji v. Hirjibhai Naoroji ILR (1912) 37 Bom. 158, 15

Bom. L.R. 192. In that case it was held that an executor can institute a suit without obtaining probate, though he might not be able to proceed so

far as the decree without obtaining probate. On the strength of this decision and the words in the judgment, viz., that the executor cannot proceed

so far as the decree without grant of probate, it appears that a practice had grown up under which the Court passed a decree in a suit by an

executor or legatee, but gave a direction that the decree was not to be sealed until probate was granted or representation taken out. The point

again came up before the Privy Council in the year 1916 in Meyappa Chetty v. Supramanian Chetty (1916) ILR 43 I. A. 113, 18 Bom. L.R. 642.

That was an appeal from the Supreme Court of Straits Settlement (Singapore), and in it the same principle was confirmed, namely, that the

personal property of the testator including all rights of action vests in the executor after the testator''s, death, and he can institute a suit without

obtaining probate, but that he cannot obtain a decree in the suit before the grant of probate. Later in the year 1922 the appeal Court of Calcutta in

Charu Chandra Pramanik v. Nahush Chandra Kundu ILR (1922) Cal. 49, following the Privy Council ruling in Chandra Kishore Roy v. Prasanna

Kumari held that if an order for letters of administration with the will annexed was made subsequent to the institution of the suit, it would not affect

the suit, provided the order was made and the letters of administration obtained before the decree. It hag been pointed out to me that the sealing of

the decree is merely a ministerial work of the office, and that the decree when sealed is antedated to the date of judgment. In my opinion the

practice that has been followed is not strictly in consonance with the decisions of the Privy Council, and is not justified by any words used in the

case of Jamsetji v. Hirjibhai which I have referred to above. I would, therefore, hold that it is necessary for the plaintiff to take out representation

to the estate of Ratansi Velji before he can get a decree in respect of the reliefÃ¯Â¿Â½s mentioned in his plaint. I, therefore, answer issue No. 3 in the

negative.

5. [The rest of the judgment is not material to this report.]