

**(1906) 09 BOM CK 0006**

**Bombay High Court**

**Case No:** Appeal No. 1434. Suit No. 382 of 1905

Hafizaboo

APPELLANT

Vs

Mahomed Casam Moorad

RESPONDENT

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**Date of Decision:** Sept. 3, 1906

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 44(b)

**Citation:** (1906) 8 BOMLR 734

**Hon'ble Judges:** Lawrence Jenkins, J; Beaman, J

**Bench:** Division Bench

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### **Judgement**

Lawrence Jenkins, K.C.I.E., C.J.

The only question on this appeal is as to the meaning of Section 44(b) of the Civil Procedure Code. The suit is brought against the executors of Issub Esmail and in it two causes of action have been united. One is in respect of property in the possession of the defendants to which the plaintiff lays claim by right of inheritance to Ebrahim Suleman and of Amaboo the wife of Mahomed Suleman. The other is in respect of moneys alleged to have been paid by the plaintiff to issue and invested by him on her behalf.

2. The defendants object that there is thus a misjoinder of causes of action having regard to the provisions of Section 44(b) of the Civil Procedure Code.

3. The objection came before Batty J. who rightly considered himself bound by the decision in Ashabai v. Haji Tyeb Haji Rahimtulla ILR (1882) 6 Bom. 390 to hold in the defendants' favour.

4. But as that was the decision of a single Judge we are not so bound.

5. The argument for the defendants is that in respect of the first of the two causes of action the plaintiffs' claim is by an heir as such.

6. But for the decision in Ashabai's case I should have thought this clearly was not so, and after giving that decision the most careful consideration I still remain unconvinced by it.

7. Those to whom Rule (6) of Section 44 relates have the common characteristic that they owe their legal condition to the death of another. But there are others-of whom this can be predicated as for instance legatees or next-of-kin, and yet they are not named in Rule (6).

8. It is therefore safe to assume that it is something beyond devolution on death that induced the legislature to single out executors, administrators and heirs for special treatment.

9. Have these executors, administrators and heirs any common characteristic not shared by legatees and next-of-kin? Undoubtedly they have for not only do they acquire title from the deceased but they may represent him. In this, I think, is to be found the clue to the meaning of the rule. Thus a claim may be made by or against the heir of a deceased Hindu as his representative, and again this same person may claim for his own benefit and in his own personal right property of which the beneficial ownership has devolved on him by inheritance from, that is to say as heir to, this deceased Hindu. His legal capacity in the two cases is absolutely distinct, and in my opinion it is only in reference to his representative capacity that it can be said a claim has been made by or against an heir as such.

10. This view (in my opinion) not only is in harmony with principle, but is sanctioned by the concluding words of the rule where it is expressly said that he represents the deceased.

11. This conclusion too is supported by the decision of the Allahabad High Court in Ahmad-ud-din v. Sikandar ILR (1896) All. 256 , and also by the tenor of the English Rule (Order XVIII, Rule 5, formerly Order XVII, Rule 5) on which Rule (b) of Section 44 is obviously based.

12. The order therefore of Batty J. must be set aside. It is said, that the suit is obnoxious to Rule (a) of Section 44. With that we have no concern on this present appeal, and any objection on this score must be taken (if at all) in the ordinary course and on proper materials.

13. Having regard to the fact that the respondents had in their favour a previous decision we direct that the costs of the summons, of the trial of the preliminary issue, and of the appeal be costs in the suit.