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September 24.

SURINDER KUMAR AND OTHERS

v.

GIAN CHAND AND OTHERS

(B. P. SINHA, GOVINDA MENON AND J. L. KAPUR, JJ).

Supreme Court, Inherent Power of—Admission of additional evidence—Supreme Court Rules, 0.45, r. 5.

Under a registered will, mortgagee rights in certain property were bequeathed to the appellants. They filed a suit to recover the money on the basis of the mortgage without obtaining probate of the will. The respondents challenged the *locus standi* of the appellants to sue. The trial Court decreed the suit holding that the will being registered there was a presumption of due execution. On appeal the High Court dismissed the suit on the ground that attestation of the will by two witnesses had not been proved. Thereafter probate of the will was obtained in favour of the appellants and their mother. In appeal before the Supreme Court appellants made an application for the admission of the probate as additional evidence and for making their mother a party. The respondents opposed the application.

Held, that the Supreme Court has the power to admit additional evidence in appeal. In deciding an appeal the Supreme Court has to take the circumstances as they are at the time when the appeal is being decided, and the probate being a judgment *in rem* must be taken into consideration. The objection that the respondents were not parties to the probate proceedings is unsustainable because of the nature of the judgment itself.

Inderjit Partap Sahi *v.* Amar Singh, L.R. (1923) 50 I.A. 183.

Lachmeshwar Prasad Shukul *v.* Kishwar Lal Chaudhuri, (1940) F.C.R. 84, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 49 of 1954.

Appeal by special leave from the judgment and order dated the 16th August, 1949, of the Punjab High Court in Regular First Appeal No. 57 of 1949 arising out of the Judgment and order dated the 30th November 1945, of the Court of Senior Sub-Judge, Gurdaspur, in Suit No. 298 of 1944.

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H. J. Umrigar and *K. L. Mehta*, for the appellants.

R. S. Narula, for the respondents.

1957. September 24. The following Judgment of the Court was delivered by

KAPUR J.—This appeal by Special Leave is brought from the judgment and decree of the High Court of the Punjab, dated August 16, 1949, reversing the decree of the trial court which had decreed the plaintiffs' suit on a mortgage.

The plaintiffs who are the appellants in this appeal claim to be the legatees under a registered will of their mother's father Lala Guranditta Mal executed on September 6, 1944. One of the items bequeathed to them was the rights in a mortgage executed by the defendants in favour of the testator on October 24, 1932, for Rs. 6,000. On October 25, 1944, they brought a suit in the court of the Senior Subordinate Judge, Gurdaspur for the recovery of Rs. 5,392-2-0 on the basis of the mortgage. They alleged that they were the "representatives and heirs" of Lala Guranditta Mal under the will and in their replication they just stated:

"We are heirs and representatives of Lala Guranditta Mal mortgagee deceased."

Inter alia the defendants pleaded that they had no knowledge of the will alleged to have been made by Guranditta Mal and they denied that the plaintiffs were heirs and representatives of the mortgagee and therefore had no *locus standi* to sue. Five issues were stated by the learned trial judge out of which the issue now relevant for the purpose of this appeal is the first one:

(1) Have the plaintiffs a *locus standi* to maintain the present suit as successors-in-interest of Guranditta deceased?

The learned Subordinate Judge held that the will "had the presumption of its correct execution" because it was registered and also that not obtaining the probate of the will was no bar to the plaintiffs obtaining a decree and passed a preliminary mortgage decree. On the matter being taken in appeal to the High Court the decree of the trial court was reversed and the suit

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of the plaintiffs dismissed but the parties were left to bear their own costs. The High Court held;

"It is thus clear that attestation by two witnesses was necessary in order to validate the will not before us. As this requirement of law has not been satisfied the plaintiffs had no *locus standi* to maintain the suit."

A prayer made for the admission of additional evidence under O.41, r. 27 of the Civil Procedure Code was rejected. The High Court refused leave to appeal under Art. 133 but Special Leave was granted on October 21, 1952. In the meanwhile the probate of the will of Lala Guranditta Mal was granted by the District Judge of Gurdaspur on July 11, 1951, in favour of the present appellants and their mother Mussammat Har Devi. The appellants made an application in this court for the admission of additional evidence and prayed that the "probate be placed on the record" as the "probate of the will operated as a judgment *in rem*". They also applied to add Mussammat Har Devi as a respondent in the appeal.

An objection to the admission of additional evidence at this stage is taken by the respondents on the ground that the probat was obtained without their knowledge and that the application was made at a late stage, it deprived the respondents of the valuable right which vests in them because the claim has become statute barred and that there is no provision in the Rules of this court for the admission of additional evidence. It is clear that the probate was applied for and obtained after the judgment of the High Court and therefore could not have been produced in that court. The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment *in rem.* The objection that the respondents were not parties to it is thus unsustainable because of the nature of the judgment itself.

As to the power of this court, there is no specific provision for the admission of additional evidence but r. 5 of O.45 of the Supreme Court Rules recognises the inherent power of the court to make such orders as

may be necessary for the ends of justice or to prevent an abuse of process of the court. The Privy Council in *Indrajit Pratap Sahi* v. *Amar Singh* (1) said:

"that there is no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out."

The powers of this Court in regard to the admission of additional evidence are in no way less than that of the Privy Council. Moreover in deciding the appeal we have to take the circumstances as they are at the time when the appeal is being decided and a judgment *in rem* having been passed in favour of the appellants it is necessary to take that additional fact into consideration. It was so held by the Federal Court in *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri* (2) where Gwyer C. J. quoted with approval the following observation of Chief Justice Hughes in *Patterson* v. *State of Alabama* (3) :

"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

Varadachari J. was of the opinion that the hearing of an appeal is under the processual law of this country in the nature of a rehearing and therefore in moulding the relief to be granted in appeal an appellate court is entitled to take into account even facts and events which have come into existence since the decree appealed from was passed. He referred to many Indian cases and to the practice of the Judicial Committee of the Privy Council and to some English cases.

In our opinion the fact of the grant of the probate which has supervened since the decision under appeal was given and which has been placed before this court must be taken into consideration in deciding the

(1) L.R. (1923) 50 I.A. 183, 191.
(2) [1940] F.C.R. 84.
(3) (1934) 294 U.S. 600, 607.

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appeal. In that event the infirmity in the appellant's case due to the want of proper attestation of the will under s. 63(1)(*c*) of the Indian Succession Act would be removed. Because of the view we have taken the other objection raised by the respondents becomes wholly inefficacious. The finding of the High Court on this point is therefore reversed.

We, therefore, allow this appeal, set aside the judgment and decree of the Punjab High Court and remit the case to the High Court for decision of the other issues which had not been decided.

As the appellants did not obtain the probate till after the appeal was filed in this court and made the application for the admission of additional evidence at such a late stage, they will pay Rs. 500 as costs of this court to the respondents within two months. In default of such payment the appeal shall stand dismissed with costs, *i.e.*, Rs. 500.

Appeal allowed.

KHUSHAL RAO

v.

THE STATE OF BOMBAY

1957

September 25.

(B. P. SINHA, GOVINDA MENON and J. L. KAPUR JJ).

Supreme Court, Criminal Appellate Jurisdiction of—Certificate of fitness, if can be granted by High Court on a question of fact—Dying declaration, evidentiary value of—If must be corroborated in order to sustain conviction—Constitution of India, Art. 134(1)(*c*)—*Indian Evidence Act* (1 *of* 1872), *s.* 32 (1).

The Supreme Court does not ordinarily function as a Court of criminal appeal, and it is not competent for a High Court under Art, 134(1)(c) of the Constitution to grant a certificate of fitness for appeal to this Court on a ground which is essentially one of fact.

Haripada Dey v. *The State of West Bengal*, (1956) S.C.R. 639, followed.

There is no absolute rule of law, not even a rule of prudence that has ripened into a rule of law, that a dying declaration in order that it may sustain an order of conviction must be corroborated by other independent evidence. The observations made