

**Fatma and ors. Vs. Shaik Essa BIn Khaliffa and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/328878](http://sooperkanoon.com/328878)

**Court :** Mumbai

**Decided On :** May-01-1883

**Reported in :** (1883)ILR7Bom266

**Judge :** West, J.

**Appellant :** Fatma and ors.

**Respondent :** Shaik Essa BIn Khaliffa and ors.

**Judgement :**

**West, J.**

1. The point that now arises on the construction of Act V of 1881 is by no means free from doubt. The difficulty is created by the way in which the Act is drawn with reference to the previous Acts X of 1865 and XXI of 1870. Section 2 of Act XXI of 1870, the Hindu Wills Act, incorporates, amongst others, Section 187 of the Indian Succession Act X of 1865, thereby making probate necessary in the case of Hindus, Jains, &c.; Act V of 1881, by Section 154, amends in some respects, but not in this, Section 2 of the Hindu Wills Act. The result is that Section 187 of Act X of 1865 is incorporated in Act V of 1881; but that still leaves untouched the case of a Mahomedan will. Prima facie, one would conclude from such inclusion and omission that the omission was intentional. But if we look at the history of this legislation, and see by what steps it has come to the point it has now reached, we must come, I think, to a different conclusion. In 1865 the first Act on this branch of

the law was passed, following the lines of English law, but this Act was expressly made inapplicable to the case of the wills of Hindus, Mahomedans and Buddhists (see Section 331). In 1870, however, the Legislature felt that it might go further, and, accordingly, it passed an Act (XXI of 1870), extending to Hindus, Jains, Sikhs and Buddhists the main provisions of Act X of 1865, but still excepting Mahomedans. In 1881 the Legislature felt it was safe to go further still, and proceeded, accordingly, to remove this last exception, and to enact Act V of 1881, which was made as applicable to Mahomedans as to other classes. But what was the state of things when this new Act came to be drawn? There was then no previous Act affecting Mahomedans, but there was one affecting Hindus. If the Legislature had repealed Section 2 of the Act of 1870, which made many sections of the Act of 1865 applicable to the case of Hindus, and had set about to re-embody the substance of the latter in the new Act, it would have opened the door to all sorts of ingenious arguments to the effect that, by such repeal, a change in the law was intended: so it repealed and re-embodied but little, and left intact that part of Section 2 which incorporated Section 187 of Act X of 1865. The inference I am asked to draw from that is that it evidences an intention, not only to keep alive the applicability of Section 187 of Act X of 1865 to Hindus, but at the same time, on the principle that *expressio unius est exclusio alterius*, to exclude its applicability to the case of Mahomedans. Certain it is that there exists nowhere in the Act any express provision making that Section 187 applicable to the case of Mahomedans; but, looking to the tenor and object of this last Act, it would be dangerous, I think, and undesirable, to draw a distinction in this respect between Mahomedans and Hindus, unless this were absolutely necessary.

2. Act V of 1881 must be looked at, I think, for this purpose, and, as regards Mahomedans, just as if the Act of 1870 had never existed.

3. Now, if one looks at the provisions of the Act itself, I think they imply that all classes of executors, with regard to the necessity of taking out probate, are on the same footing. Section 12 shows clearly that the idea at the bottom of the scheme of the Act was that a will was not to be considered established until probate had been taken out. If any one disputed an executor's title, probate would be necessary. Till probate there was no will 'established'; that is, there was no 'will' at

all, exacting recognition of the, dispositions made and the authority conferred by it. If that is not the meaning of it, there will often arise the practical difficulties I referred to in the course of the argument; and a debtor will be bound to pay, and yet have no safety in paying, an executor who for some reason or other prefers not to take out probate. A construction which will work such results is certainly one to be avoided, if possible; the Act as a whole should, if possible, be made to work harmoniously, and should be construed so as to agree, as far as may be, with the principles of English law on which it is admittedly based. This Section 12 of itself is enough, I think, to justify the construction I have put on the Act, and the rest of the Act I think supports that view. The Act, read as a whole, does, I think, say clearly enough that probate in all cases is necessary. It follows that a Mahomedan executor cannot now claim to represent the estate until he has taken out probate.

4. Nor on the other point argued do I think that there has been any such recognition of the executors, as, such, that the parties must not be permitted now to deny their representative character. There has been no contract, nor anything in the nature of an estoppel: the defendants are better advised as to their rights now, and there is no reason why they should not assert them. I see no reason why Moosa should be allowed time to take out probate, or how any of the parties would benefit by the suit being kept alive. I, therefore, direct that Moosa's name be removed from the record as plaintiff. Costs of the motion to be paid by Moosa.