

1879 Court below are right, and they will humbly advise Her Majesty
 to affirm them, and to dismiss the appeal with costs.

Appeal dismissed.

Agent for the Appellants: Mr. T. L. Wilson.

Agents for the Respondents: Messrs. Watkins and Lattey.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

IN THE MATTER OF MONOHUR MOOKERJEE (PETITIONER).*

1880
 May 7.

Executor by Implication—Probate—Reference—High Court a Court of Concurrent Jurisdiction—Indian Succession Act (X of 1865), ss. 182, 264—Code of Civil Procedure (Act X of 1877), s. 617.

Where A, under the terms of a will, although not expressly appointed an executor, was directed to receive and pay the testator's debts, and to get in and distribute his personal estate,—

Held, that A must be taken to have been appointed under the will an executor by implication.

In the goods of Baylis (1) followed.

The order made by a District Judge on an application for probate not being a final order, cannot be referred for the opinion of the High Court under s. 617 of the Code of Civil Procedure. But the Court will, under certain circumstances, entertain such an application, as a Court of concurrent jurisdiction, under s. 264 of the Indian Succession Act.

AN application was made in this case by one Monohur Mookerjee for probate of the will of his father Rajkissen Mookerjee, deceased. The petitioner contended he was entitled to such probate under the terms of the will, which appointed him an executor by implication under s. 182 of the Indian Succession Act. The 4th, 5th, and 8th paragraphs of the will were as follows:—

“That whatever amount shall remain due to me under the terms of the deed of gift from my eldest discarded son Hurry Hari Mookerjee, on account of family expenses, religious expenses, and building expenses, or whatever amount that shall

* Reference No. 8 of 1880 by J. P. Grant, Esq., the District Judge of Hooghly, under s. 617 of the Civil Procedure Code; referred on the 16th April 1880.

Note.—The Sections quoted from the Indian Succession Act will be found in the Hindu Wills Act (XXI of 1870), ss. 182, 264.

(1) L. R., 1 P. & M., 21.

remain due under decree from him, shall be realized and received either amicably or through Court by my second son Monohur Mookerjee.

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“That whatever amount is receivable by me under khattabooks, the amount I have in cash in *tahvil*, or treasury, whatever amount shall be realized by law-suits, &c., within nine years after my demise, and the amount that shall remain unrealized, which became receivable within the said nine years, and which shall be received at any time either amicably or through Court of justice, shall be received and obtained by Monohur Mookerjee.

“That Monohur Mookerjee shall receive the profits of the entire properties specified in Schedules, Nos. 1, 2, and 3, annexed to this my will, for nine years from the date of my death, after paying Government revenue, law charges, and establishment expenses, &c.; that he shall therefrom pay my debts and legacies made by me under this will; that my other sons shall not be able to lay any claim whatever at any time to the said nine years' profits and arrears of rent, and they shall not be able to call for any account thereof; and that he, Monohur Mookerjee, shall, after the expiry of the said nine years, make over the properties specified in the schedules annexed, to the different parties to whom they have been disposed by this will.”

The District Court, before whom the application was made, being in doubt whether, under the terms of the will, the petitioner could be taken to be an executor by implication under the will, referred the case for the opinion of the High Court. In his letter of reference the Judge observed: “According to s. 182 of the Succession Act and its illustrations, it would appear that a necessary implication of appointment of any person as executor can only be in cases where an express appointment of some other person as executor has been made by the testator.” The learned Judge also referred to the following cases:—*In the goods of Jones* (1) and *In the goods of Toomy* (2).

The *Advocate-General* (Mr. G. C. Paul) for the petitioner.
—The District Judge was in error in making this reference

(1) 2 Sw. & Tr., 155.

(2) 3 Sw. & Tr., 562.

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under s. 617 of the Code of Civil Procedure. The order granting or refusing probate would not be a "final order" as contemplated by that section, therefore no reference could be made to the High Court. By the last clause of s. 264 of the Indian Succession Act, the High Court can exercise concurrent jurisdiction with the District Judge in the exercise of all the powers granted under that Act. The High Court may, therefore, take cognizance of this matter, although not under the reference.

The terms of the will afford ample evidence on which the Court may come to the conclusion, that the petitioner was appointed an executor by implication under the will. See *In the goods of Baylis* (1), where the cases quoted by the Court below are noticed and explained. A direction under a will to pay debts, funeral charges, and the expenses of proving the will, is sufficient to constitute the person so directed an executor by implication; see 1 Williams on Executors (8th Ed.), 244.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.), was delivered by

JACKSON, J.—This reference was not properly made by the District Judge. It is not a case in which s. 617 authorised a reference to the High Court, as the Judge's order, if made, would not be final; but the learned Advocate-General has asked the Court to take this case up as a Court of concurrent jurisdiction, and, under the circumstances, we have consented to do so. The point appears to us clear enough. The clauses of the will which have been read to us indicate, without doubt, that Monohur Mookerjee is a person—to use the words of Wilde, J., *In the goods of Baylis* (1)—who was authorised "to receive and pay the debts of the testator and to get in all the personal estate," and he has been given full powers for that purpose to collect and receive all debts and manage the estate for the period of nine years, after the expiry of which he is to distribute it to the various legatees in the manner directed. We think he is entitled to probate.

Application granted.