written agreement, and as more than three years have passed between the furnishing of this account and the institution of this suit the claim is barred.

[Items Nos. 17, 18, and 19 were disallowed on grounds not material to this report.]

The result, therefore, is that in addition to the sum allowed by the lower Court the plaintiff will receive a decree for item No. 10, *viz.*, Rs 4,655, with interest at 12 per cent. calculated from the date on which this sum was received by Rochfort up to the date of this order, and thereafter at 6 per cent. to the date of realization. Under the special terms of the Administrator-General's Act, plaintiff will be entitled to no costs from Rochfort's estate, (1) but will be liable to pay costs calculated on the amount disallowed.

P. O'K. *Decree varied.*

Before Mr. Justice Norris and Mr. Justice Ghose.

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RANJIT SINGH (MINOR UNDER THE COURT OF WARDS, BY HIS GUARDIAN NOBIN KRISHNA BANERJEE, MANAGER OF HIS ESTATE) *v.* JAGANNATH PROSAD GUPTA (ONE OF THE OBJECTORS).

GANGADHUR DASS RAE AND ANOTHER (OBJECTORS) *v.* JAGANNATH PROSAD GUPTA (PETITIONER).*

Probate and Administration (Act V of 1881) ss. 18 to 23, 37, 44, 45, 46, 83, and 86—Debutter property, Administration in respect of—Idol—"Beneficiary"—Trustee with power of appointment—Administration, Grant of letters of, to idols property where probate has been previously granted of will dedicating the property.

A testatrix by her will dedicated certain immoveable property to the *sheba* of an idol, and appointed an executrix, whom she also constituted *shebait*, and to whom she gave power to appoint the next *shebait*. The executrix died without having made any such appointment, and thereupon an application was made by the sister's son of the testatrix for letters of administration, with a copy of the will annexed, to be granted to him with respect to the *debutter* property.

Held, that s. 45 of the Probate and Administration Act authorised such a grant to be made, inasmuch as no *shebait* having been appointed, there still remained some portion of the estate of the testatrix to be administered.

* Appeals from Original Decrees Nos. 293 and 249 of 1884, against the decrees of T. M. Kirkwood, Esq., Officiating District Judge of Moorshedabad, dated the 13th and 27th of June 1884.

(1) See Act II of 1874, s. 34.

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Held, also, that the idol, being the *cestui que trust*, was a "beneficiary" within the meaning of that term as used in s. 37 of the Act, and that as it could not undertake the management of the estate, under that section administration might be granted to some person on its behalf.

Held, further, that the applicant, the sister's son of the testatrix, being the heir in the absence of other nearer heirs, as such was entitled to letters of administration, as the original grant in respect of the *debutter* property might have been made to him.

THESE were two appeals preferred against an order of the District Judge of Purneah granting to the respondent Jagannath Prosad, letters of administration with a copy of the will annexed, of one Ranee Annapurna.

The will was dated the 6th of July 1877, and the testatrix (Ranee Annapurna) died in January 1878. By her will she dedicated certain properties to *Deb Shiva*, constituted her daughter-in-law Sreemutty Anundmoyee *shebait*, and authorized her to appoint a *shebait* in her place.

Anundmoyee in due course took out probate of the said will in May 1878, and subsequently died in September 1883 without, as contended by the applicant Jagannath Prosad, appointing any *shebait* as enjoined by the will.

Jagannath Prosad thereupon applied for a grant of probate to be made to him, alleging that he was the adopted son of Annapurna's sister, and therefore her heir, and also alleging that he was an executor of the will according to the intent thereof; he subsequently presented a petition asking the Court, in the event of its holding him not entitled to probate, to grant him letters of administration.

The application was opposed by several persons—1*st*, the Court of Wards on behalf of one Ranjit Singh, a minor; 2*nd*, Gunga Dass and Honooman Dass; 3*rd*, Lutchmee Bibi. The objections of the last mentioned person were disallowed by the District Judge upon the ground that she had no *locus standi*; and she did not appeal to the High Court against the order of the Judge.

The main contention of the Court of Wards on behalf of Ranjit Singh, the minor, was that the latter being the adopted son of Kirti Chandra, the grandson of Ranee Annapurna's husband's brother, was the preferential heir to the Ranee, and that they were in possession of the estate on his behalf.

Gunga Dass and Honooman Dass resisted the application upon the following grounds: 1*st*, that the applicant was not executor according to the intent and purport of the will; 2*nd*, that they had been duly appointed *shebaits* by Anundmoyee under a deed of *neog-puttro* dated the 19th Choitro 1287 (31st March 1881) in accordance with the directions of the will of the Ranee; 3*rd*, that the plaintiff was not the lawfully adopted son of the Ranee's sister; and, 4*th*, that as one of the properties mentioned in the applicant's petition, *viz.*, the dwelling-house, was not property left by the Ranee but by Anundmoyee, the applicant, not being the heir of Anundmoyee, could not obtain letters of administration in respect to that property.

The District Judge found that the applicant was the legally adopted son of the Ranee's sister; that the legal heirs of the Ranee, and not of Anundmoyee, were entitled to the administration; that the Court of Wards had not proved that Ranjit Singh was the lawfully adopted son of Kirti Chandra, and that therefore he had no *locus standi*; that Gunga Dass and Honooman Dass had also no *locus standi*, they not having been appointed *shebaits* by Anundmoyee; and that the applicant, as the Ranee's sister's son, was the heir and entitled to administration. The District Judge accordingly ordered letters of administration to be granted to Jagannath Prosad.

These two appeals were now preferred against the order of the Judge—one by the Court of Wards (No. 293 of 1884), and the other by Gunga Dass and Honooman Dass (No. 249.)

Baboo *Annoda Prosad Banerjee (Senior Government Pleader)*, for Ranjit Singh, minor under the Court of Wards, the appellant in appeal No. 293.

Baboo *Girja Sunker Mozumdar*, for Gungadhur Dass and Honooman Dass, objectors and appellants in appeal No. 249.

Baboo *Sree Nath Dass* and Baboo *Lall Mohun Dass*, for Jagannath Prosad Gupta, the respondent in both appeals.

The nature of the arguments appears sufficiently from the judgment of the High Court (NORRIS and GHOSE, JJ.) which, after setting out the above facts, continued as follows:—

The learned Government Pleader, who appeared for the Court of Wards, did not, as we understood him, question in the course

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of his argument, the conclusion of the Court below that it was not proved that the minor was the adopted son of Kirti Chandra.

As regards the appellants in the other appeal, we are clearly of opinion upon a consideration of the *neog-puttro* that they were not by that instrument appointed *shebaits* as directed by the will executed by Ranee Annapurna, and so they also have no *locus standi*, and on this ground, which is common to both appellants, we should have felt inclined to dismiss both these appeals. But considering the importance of the points raised by the learned Government Pleader, and having in view the provisions of ss. 83 and 86 of the Probate and Administration Act (V of 1881), we think it proper to deal with them.

Baboo Annoda Prosad Banerjee's main contentions were that the application of Jagannath did not properly fall within the scope of the Probate and Administration Act, and that therefore the District Judge had no jurisdiction to deal with the matter and grant letters of administration; and the applicant's proper course was to bring a regular suit to establish his right, and for the appointment of a *shebait*.

These contentions were not raised in the Court below, but we allowed them to be argued at the bar, as they involved important questions deserving careful consideration.

As already observed, Ranee Annapurna by her will dedicated certain immoveable properties to the *sheba* of certain idols, constituting Anundmoyee as *shebait*, and empowering her to appoint the next *shebait*. The will also by implication appointed Anundmoyee an executor, and as such executor she took out probate. During her lifetime, she fully represented the estate, both as a trustee for the idols, and also as an executor under the will; but she died without appointing in her place a *shebait* who could administer the estate in accordance with the directions of the will.

Now, looking at the scope and policy of the Probate Act, it is apparent that it was the intention of the Legislature that an estate should not be left unrepresented; and to this end provisions are made for the grant of a probate and letters of administration in a variety of cases.

In the present case, there being an endowment created by the

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. . in favour of the idol, the trust is of a perpetual character, and therefore the necessity of administration of the endowed property did not and could not cease with the death of the *shebait* Anundmoyee. So long as an administrator is not appointed, the estate would be wholly unrepresented, and the idol would run the risk of its *sheba* being not properly performed, and its properties being wasted or mismanaged.

Bearing these considerations in view, let us now consider whether the Probate Act has provided for an administration being granted in a case like the present. Section 45 of the Act provides: "If the executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate."

In the present case what has happened is, that the executor appointed by the will has died; and the estate of the testator, for reasons already explained, has yet to be administered. In this view it would seem that administration might well be applied for and granted under the Act. We may also refer to s. 37 of the Act as bearing upon this matter.

That section runs as follows:—

"When a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf."

Upon the death of Ranee Annapurna, the properties mentioned in the will became the idols,' and Anundmoyee became the sole trustee for the idols. But she died, as already observed, without appointing another trustee, and leaving, as far as we are aware, no general representative, who, by virtue of his or her being such representative, could take charge of the idols' estate. That being so, the administration, according to the wordings of the above section, devolves upon the idol, the *cestuique trust;* but it being impossible for the idol to take the management, somebody else on its behalf may apply for administration.

It may be doubtful whether in using the word "beneficiary" in

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the above section the Legislature ever contemplated the case of an idol. But regard being had to what has for a number of years been understood in our Courts to be the true position of an idol in regard to dedicated properties, we do not see why, as a *cestuique trust*, an idol may not be a "beneficiary" within the meaning of that section.

It has also been contended that it was never the intention of the Legislature that letters of administration should be granted on the death of each trustee to the next succeeding trustee, and that if that were so, the trust estate might be swallowed up by the Court fees that would have to be paid for the taking out of letters of administration. We are unable to accept these contentions; for, as already observed, if no administration is granted, the estate would be wholly unrepresented until the decision of a regular suit, which might take a considerable time, and in the second place the Court Fees Act, s. 19c (chapter IIIA) provides that "if a probate or letters of administration has been granted in respect of an estate or part of an estate, and the fee chargeable under the Act has once been paid, no fee shall be chargeable when a like grant is made in respect of the same estate."

Upon these considerations, we are of opinion that the case now before us falls within the scope of the Probate Act, and the learned Judge had ample authority to deal with it.

This disposes of the other question raised by the learned Government Pleader that the applicant ought to have recourse to a regular suit for the declaration of his right, for, if the Judge had authority to deal with the case under the Probate Act, he would equally have the power to deal with such questions as might arise as to the relative rights of the several claimants before him for administration, either as heirs of Ranee Annapurna, or otherwise.

The next question that arises is, whether the applicant is entitled to the administration. With reference to this question, we desire to say, in the first place, that upon the death of Anundmoyee without appointing a *shebait* or manager, the said office reverted to the heirs of Ranee Annapurna, who made the endowment [see *Jai Bansi Kunwar* v. *Chattar Dhari Sing* (1).]

(1) 5 B. L. R., 181.

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The Probate Act, after laying down in s. 45 that in cases where the whole of the estate has not been administered by the executor, a new representative may be appointed for administration, provides in section 46 that in such cases the Court, in granting letters of administration, shall be guided by the same rules as apply to original grants, and shall grant administration to such persons only to whom the original grants might have been made.

Now, it has been found by the learned District Judge that the applicant is the adopted son of the Ranee Annapurna's sister; and against this finding no question has been raised before us in appeal. The only contention in connection with this matter was that the Judge was wrong to suppose that in the Nosipoor family, the Asura form of marriage prevailed, and to presume that the Ranee was married according to that form, and to hold that *therefore* the applicant being the Ranee's sister's son was the preferential heir to her *stridhan*. We are of opinion that it is not material to consider whether the Ranee was married in the Asura form or not; because, whether she was married in that form or in any of the approved forms of marriage, the applicant as sister's son would seem to be an heir according to the Hindu law, and be entitled to inherit the Ranee's *stridhan* property, in default of any other preferential heirs; and in this case it does not appear that there are any such heirs. The Ranee was governed by the Benares school of law; and although the Mitakshara is silent as to the class of heirs to whom the *stridhan* of a woman married according to one of the approved forms devolves in default of issue, her husband, and his kinsmen, yet we have authority for saying that the sister's son, as one of her kinsmen on the father's side, is an heir. The Vira Mitrodaya, which as the Privy Council has said in the two cases of *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1), and *Girdhari Lall Roy* v. *The Bengal Government* (2), is a treatise of special authority in the Benares school, and is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares school,—distinctly

(1) 12 Moore's I. A., 397; 1 B. L. R. P. C. 1.
(2) 12 Moore's I. A., 448; 1 B. L. R. P. C. 44.

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lays it down, following a text of Vrihusputty, that the woman stands in the position of a secondary mother to her sister's son, and that the latter is an heir to her. That seems also to be the case in the other schools of law (see Vira Mitrodaya, p. 243; Dayabhaga, chapter IV, section 3, verses 35 to 37; Smriti Chandrika, chapter IX, section 3, verse 36; Vavahara Mayukha, chapter IV, section 10, para. 30; West and Buhler, volume I, pp. 242-245; and Vivada Ratnakara, chapter on the Property of a Childless Woman.) It is not necessary in this case to examine what may be the true position of the sister's son as an heir of a woman; for, as already observed, the persons who contested the heirship of the applicant have been found to have no *locus standi* at all, and it does not appear that there are any heirs of the Ranee, save and except the applicant.

If then the applicant is heir of the Ranee, he is entitled to hold the office of a *shebait* of the idol, and it seems to us clear, looking at the language of section 46, read in connection with sections 18 to 23, that he is entitled to administration; for, as heir, the original grant in respect to the *debutter* property might have been made to him.

We are also of opinion that if the case falls withen s. 37 of the Act referred to above, the applicant is a fit and proper person to obtain letters of administration; for, as already observed, the office of manager has reverted to him, as heir of Ranee Annapurna who made the endowment, and also because he is one of those persons who was authorized in the will of the Ranee to supervise the acts and conduct of the *shebait* appointed by her.

There is only one other matter which we need notice, *viz.* as to whether the dwelling-house mentioned in the will of the Ranee was by that instrument dedicated to the idol. The Judge has held that it was given to Anundmoyee as a life estate. We are not prepared to accept that view; we are rather inclined to hold, reading the document as a whole, and bearing in mind that the house is the same where the idol was lodged, that it could not have been the intention of the testator to give it to Anundmoyee, even if only for life, in any other capacity than that of a *shebait* of the idol. But it is perhaps immaterial to express any decided opinion on this point, because, even if it was bequeathed

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to Anundmoyee for her life, it reverted on her death to the legal heirs of the testator, and therefore the applicant being an heir of the testator under the Hindu law, and there being nobody else who is shown to have a better claim, the applicant is entitled to administration.

Upon all these considerations, we are of opinion that the order passed by the District Judge is right, and ought to be affirmed with costs.

H. T. H. *Appeals dismissed.*

CIVIL REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter and Mr. Justice Cunningham.

In re THE MENGLAS TEA ESTATE.*

1885 *June* 19.

Stamp Act, I of 1879, *Arts.* 21, 60, *(cl. b.)—Transfer of lease—Transfer of a share of a partnership.*

Where a transaction is in substance a sale of a share in a partnership, and the transfer of a share in a lease only forms part of the subject-matter of the sale, as being a part of the partnership assets, the transaction should be regarded not as the transfer of a lease, but as the sale of a share in a partnership, and the duty payable in respect thereof should be that falling under Sch. I, Art. 21 of Act I of 1879.

THIS was a reference under s. 46 of the Stamp Act.

It appeared that one G. W. Hewitt had entered into partnership with five other persons for the purpose of working a certain Tea Estate, called the "Menglas Tea Garden," and that under the deed of partnership, dated the 1st January 1885, it was open to any one of the partners to sell his share in the estate. The share of G. W. Hewitt in the abovementioned estate was a 3-16th share; the land composing the Menglas Tea Estate was leased to the members of the partnership by Government under three separate leases, each lease being for a term of six years, with option of renewal on certain terms. G. W. Hewitt had, in accordance with certain powers given under this deed of partnership, entered into an arrangement with one A. T. Paterson for the sale

* Civil Reference No. 835 of 1885, made by C. A. Samuells, Esq., Officiating Secretary to the Board of Revenue, L. P., dated the 4th of May 1885.