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recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed. I think the expressions "wrongful dispossession" in clause (*m*) and "wrongfully dispossessed" must be read in the same sense, and in my opinion no application could be entertained under clause (*n*) to recover possession of land from which a tenant had been dispossessed by order of Court. Another consideration which leads me to the same view is the short period of limitation provided by clause (*e*) of section 96, for applications under clauses (*m*) and (*n*) of section 95. Clause (*e*) of section 96 declares that such applications shall not be brought after six months from the date of the wrongful dispossession. In the present instance, the plaintiff was dispossessed on the 24th September, 1892, and it was not until upwards of a year afterwards that the Board of Revenue declared that he ought not to have been ousted from his holding. If his remedy therefore was by an application under clause (*m*) and not by a suit in the civil Court, he would in the present case have no redress. For the above reasons I am of opinion that the decision of the lower appellate Court was wrong. I allow this appeal, and, setting aside the decree of the lower appellate Court, remand the case under the provisions of section 562 of the Code of Civil Procedure with directions to the District Judge to restore the appeal to his file of pending appeals and proceed to dispose of it on the merits, as raised in the other grounds in the memorandum of appeal to his Court. The appellant will have his costs in this Court in any event.

Appeal decreed and cause remanded.

1897
May 4.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

BIRJ NATH DE AND ANOTHER (DEFENDANTS) *v.* CHANDAR MOHAN BANERJI (PLAINTIFF).*

Will—Application for probate—Issue raised as to testator's title to property purporting to be dealt with by the will—Practice.

It is not the duty of a Court entertaining an application for grant of probate to consider any issue as to the title of the testator to the property with

* Appeal No. 2 of 1895 under section 10 of the Letters Patent.

which the will propounded purports to deal, or as to what disposing power the testator may have possessed over such property. *Behary Lall Sandyal* v. *Juggo Mohun Gossain* (1), *Hormusji Navroji* v. *Bai Dhanbaiji, Jamsetji Dosabhai* (2), *Arunamoyi Dasi* v. *Mohendra Nath Wadadar* (3), *Barot Parshotam Kallu* v. *Bai Muli* (4), *Tharp* v. *Macdonald* (5), and *Annoda Sundari Dasi* v. *Jugutmani Dabi* referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerji*, for the appellants.

Babu *Durga Charan Banerji* and Babu *Sarat Chandar* for the respondent.

EDGE, C. J. and BLAIR, J.—This appeal is filed under the Letters Patent from the decree of our brother Knox granting probate of the will of Musammat Saudamani Dasi, who died on the 14th of July, 1890. The application for probate was filed in the Court of the District Judge of Benares. Two persons—Birj Nath De and Hem Chandar De—appeared and opposed. They opposed, according to their written statement, on the ground that the will in question had not been executed by Musammat Saudamani Dasi and that she had no disposing power over the property, or some of it, dealt with by the will. The District Judge found that the execution of the will was not proved. On appeal to this Court our brother Knox found that execution was proved. The appellants before us are the objectors. The questions raised before us here are, first, whether the will was actually executed, and, secondly, as to whether Musammat Saudamani Dasi had power to dispose of the property mentioned in the will.

In our opinion the due execution of the will is clearly proved. It is true that the will is not before us, but that is not the fault of the applicant for probate. The will has been made away with by other parties for whose action the applicant for probate is not responsible. The original will was registered in the Sub-Registrar's office at Benares. A commissioner was duly appointed to

(1) I. L. R. 4 Calc. 1.
(2) I. L. R. 12 Bom. 164.
(3) I. L. R. 20 Calc. 888.
(4) I. L. R. 18 Bom. 749.
(5) L. R. 3 P. D. 76.
(6) 6 C. L. R., 176.

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obtain an acknowledgment of execution from Musammat Saudamani Dasi, and she, having been identified, admitted execution of the will, and on that the will was registered. It is not suggested here that the officer in question did not act strictly in accordance with law. It is not suggested that on the occasion of his going to Musammat Saudamani Dasi's house that lady was personated by some one else. However, the execution of the will does not rest there. Two ladies were called, and we believe their evidence on this point, and they say that they were present when the will was executed by Musammat Saudamani Dasi. Another person was called; he witnessed the will. He apparently makes a living by letting himself out as a witness to the execution of documents. We see no reason to disbelieve him. Although the District Judge of Benares found that the execution of the will was not proved, he found that some such will had been executed. We find that the will was duly executed by Saudamani Dasi. The other witness to the will is dead. There was no issue before us of undue influence, or want of testamentary capacity or fraud or revocation.

As to the second point. It has been contended by Mr. *Dwarka Nath Banerji* for the appellants that where an application for probate of a will is contested and it is alleged that the property dealt with by the will was not the testator's or was not property over which the testator had a power of testamentary disposal, it is the duty of the Court to try an issue raising this question. All we can say is that it would be exceedingly inconvenient if Courts in this country had to try such issues. A Court could never be quite sure that it had got the proper parties before it. It would be difficult always to be sure that there was not collusion in the case. It is much safer in the interests of the public that issues as to the title to property should be decided when the issues are raised in a regular suit, and not on an application for a grant of probate.

Mr. *Banerji* contends that, according to the practice in England and the practice in India, we should try these questions

as to title. In support of his contention as to the practice in England he relies on the decision in *Tharp* v. *Macdonald. In the goods of Tharp* (1). That was a case in which the probate of the will of a married woman was opposed by her husband; and the case turned on this, that a married woman had in England no testamentary power unless she was possessed of separate property. Accordingly it was necessary to ascertain whether the testatrix in that case was possessed of any separate property so as to give her a title to make a will. It is obvious from the judgment of Sir George Jessel that the inquiry was merely one to ascertain the testmentary capacity of the lady, that is, whether she had any property which gave her the right to make a will. It was the possession of separate property which removed the legal incapacity under which she would have been so far as the making of a will was concerned. Sir George Jessel pointed out that it was not necessary to ascertain whether all the personal property mentioned in the will was property over which she had a power of disposal by will. It is obvious that if Mr. *Banerji's* proposition were well founded in law, a Court in India would have to go on and find as to the title to every bit of property dealt with by the will, the title to which was questioned by the objector.

Mr. *Banerji* has also relied for the practice in this country on *Annoda Sundari Dasi* v. *Jugutmani Dabi* (2). Where Sir Louis Jackson in that case said:—"It appears to me that every consideration which ought to induce the Court to refuse probate of such a will must be taken into account,"—he had not in his mind any such question as a dispute as to the right to the property mentioned in the will. The illustration which he gives of what he means puts that beyond all doubt. The illustration was a case of undue influence.

That it is not the practice of the Courts in India, so far as we are aware, to try questions of title and finally decide them on applications for grant of probate or letters of administration, may be inferred from the following cases:—*Behary Lall Sandyal*

(1) L. R. 3 P. D. 76. (2) 6 C. L. R. 176.

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v. *Juggo Mohun Gossain* (1), *Hormusji Navroji* v. *Bai Dhanbaiji*, *Jamsetji Dosabhai*, (2), *Arunamoyi Dasi* v. *Mohendra Nath Wadadar* (3) and *Barot Parshotam Kallu* v. *Bai Muli* (4). In our opinion the view of the law expressed in those cases is correct. In this Court our brother Burkitt in an unreported case has decided that questions of the title of the testator or intestate to property are not to be dealt with in applications for probate or letters of administration.

We accordingly decline to express any opinion as to whether the testatrix had a disposing power over the property, or any of it, mentioned in her will. The contention in the first Court could hardly have been seriously put forward, as the objectors called no evidence to support it. We dismiss this appeal with costs.

Appeal dismissed.

1897
May 5.

Before Sir John Edge, Kt., Chief Justice and Mr Justice Blair.

FAKIRE AND OTHERS (PLAINTIFFS) *v.* TASADDUQ HUSAIN AND OTHERS (DEFENDANTS).*

Costs—Joint decree for costs against defendants having separate defences, defendants being also wrong-doers—Suit for contribution—Suit not maintainable.

In a suit against one defendant for possession of certain property, which was claimed as his by the original defendant, certain third persons got themselves added to the array of parties as defendants and put in a defence in opposition to and exclusive of that of the first defendant. The plaintiff in that suit obtained a decree, the claims of both sets of defendants being found to be unsupported, and the decree gave costs jointly against all the defendants. The decree having been executed for costs against the first defendant, he sued the other defendants for contribution. *Held* that the suit would not lie. *Kristo Chunder Chatterjee* v. *Wise*, (5); *Sreeputty Roy* v. *Loharam Roy* (6); *Abdul Wahid Khan* v. *Shaluka Bibi* (7) and *Suput Singh* v. *Imrit Tewari* (8) referred to.

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* Second Appeal No. 22 of 1895 from a decree of W. Blennerhassett, Esq., District Judge of Allahabad, dated the 25th September 1894, confirming a decree of H. David, Esq., Munsif of Allahabad, dated the 3rd August 1894.

(1) I. L. R. 4 Calc. 1.
(2) I. L. R. 12 Bom. 164.
(3) I. L. R. 20 Calc. 888.
(4) I. L. R. 18 Bom. 749.
(5) 14 W. R. 10.
(6) 7 W. R. 384.
(7) I. L. R. 21 Calc. 498, at p. 503.
(8) I. L. R. 5 Calc. 720.