

Before Sir W. Comer Petheram, Knight, Chief Justice, and
Mr. Justice Ghose.

MUDDUN MOHUN SIRCAR (OPPOSITE PARTY) v. KALI CHURN DEY
AND ANOTHER (PETITIONERS).*

1893
August 5.

Probate—Person claiming interest in the estate of the deceased—Interest sufficient to support application to revoke probate—Revocation of probate—Probate and Administration Act (V of 1881), s. 69.

Where the heir *ab intestato* of a deceased person has entered into a contract to sell the property of the deceased, and has received the greater part of the consideration money, the purchaser from such heir is a person claiming to have an interest in the estate of the deceased within the meaning of section 69 of the Probate and Administration Act, and is entitled, upon a will being set up and proved at variance with his interest, to apply for revocation of the probate of the will so set up.

Komallockun Dutt v. Nilrutton Mundle (1) followed.

HURRO MOHUN SIRCAR died on the 28th June 1890 (15th Assar 1297), having (as was alleged) on the previous day made and executed his last will. On the 12th July 1890 Muddun Mohun Sircar applied for probate of the will under the provisions of Act V of 1881, stating in his petition that he had been appointed the sole executor under the will on behalf of all the legatees, and that he was willing to act. On the 4th August 1890, Bishtu Charn Sarma Sircar, who was one of the heirs *ab intestato* of the testator, appeared and filed a caveat alleging the will to be a forgery, and prayed for a month's time to put in his objections to the application for probate, and the 4th September was accordingly fixed for the hearing of the suit. On the 25th July 1890, Bishtu Charn had executed in favour of Kali Churn Dey and Srinath Dutt a *byana patra* or deed of earnest money agreeing to sell to them a portion of the property which in the event of an intestacy would come to him, for the sum of Rs. 300, out of which the document recited that Rs. 220 had actually been paid. The *byana patra* also recited the fact that Muddun Mohun Sircar had set up a spurious will which the executant Bishtu Charn being a poor man had no means of opposing, and he had therefore

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Decree No. 46 of 1891, against the decree of
Judge of Dacca, dated the 26th of January

(1) I. L. R., 4 Calc., 360.

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fixed upon selling his share in the properties mentioned in the schedule, promising to execute a kobala on receiving the balance of the purchase money. Bishtu Charn further covenanted not to oppose any steps which the purchasers might take to have the will set aside. On the 29th August, however, Bishtu Charn, without the knowledge of the purchasers, filed a petition of compromise, relinquishing the rights of himself and his heirs in the properties left by Hurro Mohun Sircar, on the ground that he had come to know that the will was genuine, and on the 30th August probate was issued to Muddun Mohun Sircar *ex parte*.

On the 6th September 1890, Kali Churn Dey and Srinath Dutt filed a petition, praying for revocation of the probate on the ground that a fraud had been practised upon them by Bishtu Charn, who had withdrawn his opposition to the will four days before the date originally fixed for the hearing of the suit. They stated that Bishtu Charn had led them to believe that he would urge his objections at the trial, and they alleged that he was acting in collusion with Muddun Mohun. Notice was on the 25th September issued to Muddun Mohun to show cause why the order granting probate should not be revoked, and on the 9th October Muddun Mohun filed an answer alleging that the *byana patra* was not a genuine document, and that the purchasers had no *locus standi* to object to the probate.

The District Judge, without expressly finding whether the *byana patra* was genuine or not, or recording any evidence upon this point, held that a fraud had been practised on the purchasers, who, as covenantees for valuable consideration, were on the authority of *Komollochun Dutt v. Nilrutton Mundle* (1) and *Umanath Mookhopadhya v. Nibmoney Sing* (2) possessed of sufficient interest to enable them to apply for revocation of the probate. He therefore held that the probate must be revoked and a day fixed for rehearing the case in the presence of the parties.

From this decision Muddun Mohun Sircar appealed to the High Court, principally upon the ground that the purchasers Kali Churn Dey and Srinath Dutt were without any *locus standi* in the case.

(1) I. L. R., 4 Calc., 360.

(2) I. L. R., 6 Calc., 429.

Baboo *Hari Mohun Chuckeravarti* and Baboo *Jogesh Chunder Dey* appeared for the appellant.

Baboo *Akshoy Kumar Banerjee* and Baboo *Satish Chandra Ghose* appeared for the respondents.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by—

GHOSE, J.—This is an appeal from an order revoking the probate of a will granted to Muddun Mohun Sircar, the appellant before us. The will is said to have been executed by the deceased Hurro Mohun Sircar on the 14th Assar 1297 B.S. The application for probate was made on the 14th July 1890. On the 25th idem Bishtu Charn Sarma Sircar, alleging that he was one of the heirs of the late Hurro Mohun Sircar, executed a *byana patra* for the sale of the properties left by the deceased; and this document states that Bishtu Charn has received from the respondents before us, Kali Churn Dey and Srinath Dutt, Rs. 220 out of the sum of Rs. 300 which was fixed as the consideration for the sale. On the 4th August following, a caveat was entered by Bishtu Charn; and upon that day he filed a petition asking for a month's time to put in objections to the application for probate. This request was granted, and the 4th of September was fixed for the hearing of the matter. But it appears that on the 29th of August Bishtu Charn presented a petition to the Court, stating that he had learnt upon enquiry that the will propounded by the petitioner was genuine, and that he no longer objected to probate being granted. The Court accordingly ordered that upon formal evidence being given of the execution of the will probate might be granted to Muddun Mohun; and such formal evidence having been given on the following day, the 30th August, an order was made granting probate to the petitioner. Then, on the 6th September, an application was presented by Kali Churn Dey and Srinath Dutt, the respondents before us, setting up the *byana patra* from Bishtu Charn, and stating that they were ready to put in their objections on the 4th September, but that on that day they learnt that the matter had been disposed of on the 30th August, and alleging at the same time that a fraud had been practised upon them both by Bishtu Charn and the applicant for probate. The learned Judge of the

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District Court, however, so far as one can gather from the record, instituted no enquiry as to the genuineness of the *byana patra* transaction, and without any evidence assumed that the *byana patra* was true, and acting upon that assumption and upon such materials as were then before him, he came to the conclusion that a fraud had been practised upon the respondents, and that the probate must therefore be revoked. He accordingly revoked the probate and fixed a day for the hearing of the matter in the presence of both parties. The present appeal is by the applicant for probate, Muddun Mohun Sircar; and the main ground that has been urged before us by the learned vakeel on his behalf is, that the respondents Kali Churn Dey and Srinath Dutt have no *locus standi* in this matter, and that the order made by the District Judge recalling the probate is therefore illegal.

The argument that has been addressed to us turns upon section 69 of the Probate and Administration Act (1), which states that "in all cases it shall be lawful for a District Judge or District Delegate, if he thinks fit, to examine the petitioner in person upon oath, and also to require further evidence of the due execution of the will, or the right of the petitioner to the letters of administration as the case may be, and to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration," and so on.

It has been contended before us that the respondents Kali Churn Dey and Srinath Dutt did not acquire, by reason of this *byana patra*, supposing it to be genuine, any such interest in the estate of the deceased as to entitle them to come in and oppose or apply for revocation of the probate. In the case of *Komollochun Dutt v. Nilrutton Mundle* (2) a Divisional Bench of this Court was of opinion that a purchaser from the heir of a deceased person has an interest within the meaning of this section, entitling him to come in and apply for revocation of the probate of a will said to have been executed by the deceased, and the opinion thus expressed has never been dissented from; and I may say that I agree with it. The principle of this ruling applies to the present case, and it seems to us that if it be found upon enquiry by the District Judge—an

(1) Act V of 1881.

(2) I. L. R., 4 Cal., 360.

enquiry which has not yet taken place—that Bishtu Churn actually entered into a contract to sell the property of the deceased to the respondents, and received the greater part of the consideration money, the respondents have acquired an interest in the estate, such as would entitle them to come in and ask for a revocation of probate, if it were improperly granted. As matters stand at present, there is no evidence on the record to show that this deed of *byana patra* is true, or that any consideration really passed under it.

We think, therefore, that the order of the District Judge must be set aside and the case sent back to him with directions that he should determine upon evidence which the parties may adduce, whether or not this *byana patra* is true, and whether the earnest money mentioned in it passed, before he proceeds to determine the question as to the authenticity of the will propounded by the petitioner. The costs will abide the result.

A. A. C.

Case remanded.

*Before Sir W. Comer Petheram, Knight, Chief Justice, and
Mr. Justice Ghose.*

HURI MOHUN OHUCKERBUTTY (DEFENDANT) v. NAIMUDDIN
MAHOMED (PLAINTIFF).*

1892
August 8.

Limitation—Plaint insufficiently stamped, when deemed to have been presented—Suit, institution of—Civil Procedure Code (Act XIV of 1882), s. 54 (b)—Limitation Act (XV of 1877), s. 4, Sch. II, Art. 23.

A plaint having been filed upon the last day allowed by the law of limitation written upon paper insufficiently stamped, the plaintiff was ordered to supply the requisite stamp paper within seven days. This order was complied with within the time appointed, and the plaint was duly registered. *Held*, that the suit should be taken as instituted on the day when the plaint was first presented to the proper officer, and that the suit was not barred.

Balkaran Rai v. Gobind Nath Tiwari (1) distinguished and doubted.

THE plaintiff sued to recover damages as compensation for malicious prosecution, alleging that the defendant and others had

* Appeal from order No. 285 of 1891, against the order of Babu Rabi Chandra Gangooly, Subordinate Judge of Dacca, dated the 19th of June 1891, reversing the order of Babu Chundi Churn Sen, Mansif of Munshigunge, dated the 9th of January 1891.

(1) I. L. R., 12 All., 129.