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under section 75(3), is to apply to the Court for leave under section 10(2) to file another insolvency petition. In such a case, therefore, the time cannot be extended under section 27(2). But it has occasionally occurred (generally owing to inconversance with the new Act) that the order annulling the adjudication is delayed. In such circumstances, since there is no annulment till an order of annulment is passed, the order of adjudication stands and the proceeding remains pending on the file of the insolvency court with the result that section 27(2) is still applicable and enables the Court to enlarge the period within which the debtor may apply for his discharge.

S. A. K.

Appeal allowed.
Case remanded.

APPELLATE CIVIL.

Before Ross and Wort, JJ.

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LAL GOVIND NATH SAHI DEO
v.
LAL MAHESAR NATH SAHI DEO.*

Chota Nagpur Tenancy Act, 1908 (Bengal Act VI of 1908), sections 89 and 258, scope of—"directly or indirectly," meaning of the words—Record-of-Rights, entries in, showing plaintiffs as khorposhdars—suit for declaration that they are jointly interested in the property as members of joint family, whether maintainable.

Section 258, Chota Nagpur Tenancy Act, 1908, provides:

"No suit shall be entertained in any court to vary, modify or set aside, either directly or indirectly any decision, order or decree of any Deputy Commissioner or Revenue Officer in any suit, application or proceeding under section 89 and every such decision, order or decree shall have the force and effect of a decree of a Civil Court in a suit between the parties and, subject to the provisions of this Act relating to appeal, shall be final."

Where, therefore, the Settlement Officer made an order under section 89 that the previous entries in the record-of-rights showing the plaintiffs as khorposhdars would remain unaltered, and the plaintiffs subsequently brought a suit for a

*Appeal from Original Decree no. 93 of 1924, from a decision of Babu Phanindra Lal Sen, Subordinate Judge of Chota Nagpur, dated the 24th March, 1924.

declaration that they were members of a joint Hindu family governed by the Mitakshara school of law and that the properties were joint,

Held, that the words " directly or indirectly " in section 258 apply to the machinery used for the purpose of altering the decision and not to the result, and that as the plaintiffs were not seeking directly or indirectly to vary the decision of the Settlement Officer, the suit was maintainable.

Held, further, that a civil court having jurisdiction is not, by reason of section 258, incompetent to entertain a suit between the parties which may question by inference the correctness of the record-of-rights.

Maharaja Pratap Udainath Sahi Deo v. *Ganesh Narain Sahai* (1), followed.

Appeal by the defendant.

On the 17th of June, 1918, the tenure known as Kairo Lot was sold in an execution sale for Rs 3,15,000, the tenure having got into arrears for rent. After payment of the decretal amount due to the landlord there remained a surplus of Rs. 2,43,000, in the hands of the Deputy Commissioner of Ranchi. The plaintiffs in this suit claimed to be entitled in the sale-proceeds of the tenure to a proportionate sum of this surplus amounting, as they alleged, to Rs. 37,771-9-7 but in their plaint they limited their claim to Rs. 25,000 being unable to pay the excess court-fees.

It appeared that some centuries ago the then Maharaja of Chota Nagpur granted this tenure known as Kairo Lot to the common ancestors of the parties and the name of one only of the members of the family being the eldest was entered in the sarishta of the Maharaja who looked to that member of the family, who was styled a Thakur, for the rent and cesses.

The first person mentioned in the genealogical table was Thakur Harnath Sahi. After his death it was held by Gagannath Sahi: he relinquished it in favour of his nephew Udainath. Upon his death Kapilnath, his son, held the office. Kapilnath was the

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holder of the office at the time of certain partition proceedings in 1866, the records of which formed part of the evidence in this case. After his death Radhanath, his son, held the office and after Radhanath it descended through his eldest son to Madan Mohan who was the Thakur at the time of the rent proceedings referred to and in this suit he was represented by his widow Nirmal Kuer, who was defendant no. 3, and Gobind Nath, his uncle, who was defendant no. 1, and another uncle Hiranath, who was defendant no. 2, who claimed the entire surplus of this sale. As regards plaintiffs' share it descended through Bisnath Sahi, the youngest son of Harnath Sahi, before mentioned. On the death of Bisnath Sahi the whole tenure was enjoyed in the manner indicated above by his three sons Thakur Udainath, Raghubarnath and Lokenath. On their death their sons were in joint possession being Kapilnath, Samsundernath and Sirinath. Disputes arose which gave rise to the proceedings before mentioned of 1866. Sirinath brought a suit against Kapilnath; his cousin Samsundernath also brought a suit against Kapilnath Sahi. All the three brothers joined in these suits. These suits were compromised as a result of which Sirinath Sahi, the grand-father of the plaintiffs, got eight villages as his share being the eight villages that were mentioned in the plaint. On the death of Sirinath his two sons Jagatnath and Haraknath went into possession. Jagatnath was the father of plaintiffs nos. 1 and 2 and Haraknath was represented in this case by Taluk Raj Kuer being the widow of Haraknath who was plaintiff no. 3. It was in respect of these villages that the plaintiffs claimed a proportionate amount of the surplus proceeds. There was a further partition suit, being suit no. 203 of 1907, between the sons of Jagatnath, defendant being Haraknath. As a result the plaintiff no. 1, in this suit being the elder branch of the family descended from Lokenath, obtained 10 annas share and Haraknath being the younger branch obtained 6 annas share.

One of the defendants to this suit being Shibnath died without issue in a state of jointness with his two brothers and so by a reversion plaintiffs nos. 1 and 2 got the 10 annas share and the cousin Haraknath dying issueless his widow, being plaintiff no. 3 in this suit, obtained the 6 annas share. The case of the plaintiffs in this suit was that they being entitled to an interest in the tenure in relation to which the defendants were entered in the landlord's sarishta, they were also entitled to the proportionate amount of the proceeds of sale deposited in the Government Treasury. The defendants' case was that the rule of primogeniture applied in this family. Madan Mohan alone was entitled to the property at the time of the sale and, therefore, the defendants who were reversioners were entitled now to the exclusion of all other parties. The interest of the defendants' ancestors was that of khorposhdars and that interest being for maintenance only, no right to the surplus proceeds or any portion thereof accrued to them. Further, that as the Thakur alone was entered in the sarishta and as he (in the rent proceedings Madan Mohan) was the judgment-debtor, the right, title and interest of the judgment-debtor alone passed and that the plaintiffs' right, title and interest, if any, did not pass and their proper remedy, if any, was against the auction-purchaser. There was a further argument that under the Chota Nagpur Tenancy Act the judgment-debtor alone was entitled to the proceeds of sale and the plaintiffs, if they had any right against Madan Mohan, had a claim in damages for allowing the tenure to fall in arrears of rent. As a result of the auction-sale the plaintiffs were entirely dispossessed of their portion of the property. A part of the defendants' case was that under the custom that ruled in this family the Thakur alone was liable for rent and that the rent relating to these eight villages granted to the ancestors of the plaintiffs for maintenance was paid by the khorposhdars to the Thakur who paid the rent to the Maharaja. No oral evidence was adduced

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in the case. The plaintiffs relied upon the records of the partition proceedings referred to above. The defendants relied upon the finally published record-of-rights and some proceedings in 1910 before the Settlement Officer in which he refused to make any alteration in the entries in the record-of-rights. The plaintiffs' case was that these partition proceedings showed that the family which was admittedly a joint Hindu family governed by the Mitakshara school of law had no custom of primogeniture as alleged by the defendants. The defendants on the other hand stated that the finally published record-of-rights recorded the defendants' predecessors as khorposhdars and that that record could not now be questioned.

A. K. Ray (with him *S. N. Palit* and *J. M. Ghosh*), for the appellant.

Susil Madhab Mullick (with him *Rai Guru Saran Prasad* and *Anand Prasad*), for the respondents.

WORT, J. (after holding that the defendants had failed to prove the rule of primogeniture and that the plaintiffs were entitled to the division of the property as joint owners, proceeded as follows): It remains to be determined whether the record-of-rights prevents this Court from recognizing the right which I have held the plaintiffs establish. The argument of the defendants is substantially this:—First, the record-of-rights describes the plaintiffs' predecessors-in-title as khorposhdars and that the Court cannot go behind that record and for the following reasons:—In 1910 the parties sought to have the record altered. The Settlement Officer of Chota Nagpur stated in the commencement of his judgment that although the proceedings had been referred back to him by the Commissioner for taking further evidence and hearing the parties their proper course in his judgment would have been to have commenced a suit under section 87 as any decision which he (the Settlement Officer) came to would be liable to be upset by a Revenue Officer's decision under section 87. From his judgment it

would appear that he took into consideration the partition suits to which I have referred but he bases his decision in coming to a conclusion that he would not alter the entries as made in the finally published record-of-rights upon certain rent proceedings from which it appears the junior members of the family failed to pay their rent to the Thakur and they were sued in the revenue courts of the district; whereas if they had been co-sharers they ought to have been sued for their contribution to the rent for which the Thakur was liable in the civil court. In my opinion these rent proceedings by no means dispose of the effect of the partition suits of 1866. Their answer appears to be that as between the Thakur and the grantor of the tenure the Thakur alone was liable and he was by no means bound to recognize any rights which the younger branch of the family had in respect of the tenure. That was a matter between the Thakur and the younger branches of the family alone and it in no way concerns the Maharaja. But the main argument upon this decision of the Settlement Officer is based upon section 258 of the Chota Nagpur Tenancy Act. That section is to the effect that no suit shall be entertained to vary, modify or set aside either directly or indirectly any decision, order or decree of any Deputy Commissioner or Revenue Officer in any suit, application or proceeding under certain sections therein named. Amongst these sections section 89 appears to be the proceeding under which the application of 1910 was made. Section 258 by a clause which was added to the section by the amending Act of 1920 provides

> "and every such decision, order or decree shall have the force and effect of a decree of a civil court in a suit between the parties and, subject to the provisions of this Act relating to appeal, shall be final."

The argument of the learned Advocate for the defendants is that by reason of this section the plaintiffs are not entitled to show that they were jointly entitled to this property. The argument amounts to this that as the Settlement Officer did not alter the entries

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in the record in which they are recorded as khorposhdars that decision of his is final and that it has the effect of a civil court decree and that the plaintiffs in putting forward this claim seek to indirectly modify or set aside the decision of the Settlement Officer.

We have first to see, therefore, what the Settlement Officer decided. He decided that the records should remain unaltered. The question would appear, therefore, to be: are the plaintiffs seeking to alter that decision? It is obvious they are not: the decision remains as also does record-of-rights entry: it remains as evidence of the facts therein stated but as a piece of evidence which may be rebutted.

It is clear, therefore, that the plaintiffs in this action are not seeking directly or indirectly to vary the decision of 1910. The words "directly or indirectly" in the section, in my judgment, apply to the machinery used for the purpose of altering the decision and not to the result, that is to say assuming for the moment that the plaintiffs succeed in this suit, they will have a declaration which in its effect contradicts the record; but that does not directly or indirectly alter the decision of 1910. No proceedings can be brought other than those allowed by the Act to change that decision directly or indirectly. But the record remains there and in my judgment they have not directly or indirectly altered it. But the argument of the appellant goes deeper than this. In effect he says that the result of this section is that there having been a proceeding under section 89 the question of the status of the plaintiffs is res judicata. And in support of this, they point to the words "shall have the force and effect of a decree of a civil court." A decree of the civil court stands unchallenged unless by appeal or otherwise it is set aside. But a decree does not go beyond the limits by which it is confined by the question which is in dispute and is thereby decided and by the words in which that matter is decided. Under section 89, the Settlement Officer has ordered

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that the record shall remain unaltered. He might have ordered in other circumstances that it shall be altered in the manner in which he directed it. Now, according to the section that order has the characteristics of a civil court decree but it by no means states that a civil court having jurisdiction shall not entertain a suit between the parties which may question by inference the correctness of the record. In other words the decision of the Settlement Officer under section 89 has the effect of a civil court decree within the scope of the Settlement Officer's jurisdiction. We have in this case an illustration of the absurd effect which might result from holding otherwise. A civil court of competent jurisdiction (it is true as a result of the compromise that does not affect the matter) has decided in effect that this is a joint Hindu property and shall be partitioned accordingly. I, of course, refer to the partition suits of 1866. It is to be said that by reason of the decision of the Settlement Officer that he will not alter the record, by reason of section 258, the decree before mentioned is null and void and that the property is still joint. In my judgment, as I have indicated, that would be reducing the interpretation of the section to an absurdity. I am supported in this view by the decision of this Court in *Maharaja Pratap Udainath Sahi Deo* v. *Ganesh Narain Sahai*(1) which in words not dissimilar to those which I have used in this judgment has come to the same conclusion. I, therefore, hold that the argument addressed to us under the section fails and the plaintiffs are not precluded from proving that they were a joint Hindu family governed by the Mitakshara school of law and that the property was joint. The point may be stated in another way. The defendants here desire to set up the rule of primogeniture as a bar to the plaintiffs' claim. The plaintiffs state that no such rule existed in this family. Can it be stated that the Settlement Officer decided this question so that no civil court can thereafter enter

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upon the determination of the matter? I am clearly of the opinion that this could not be successfully contended. The plaintiffs further alleged that the words, which I have noticed were added to section 258 by the amending Act of 1920, are not retrospective and do not apply to this decision. In my judgment this argument cannot be sustained but it is unnecessary to say more on this point by reason of my decision on the main argument. I have already decided that the proceedings and decrees in the partition suit prove that fact and it therefore follows that subject to the question of amount, plaintiffs were entitled to succeed in the suit.

WORT, J.

* * * *

I would, therefore, hold that the plaintiffs are entitled to a proportion of the surplus proceeds which was allowed by the trial Court and I would, therefore, dismiss the appeal with costs.

Ross, J.—I entirely agree.

S. A. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Ross and Wort, JJ.

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Jan., 26.

NANDKISHORE LAL

v.

PASUPATI NATH SAHU.*

Probate, court of, whether is a court of construction—functions of the court—executors in possession of the estate after administration—functus officio—legatee, remedy of.

A court of probate is not in practice a court of construction, and should generally construe testamentary documents only in so far as it is necessary to decide what testamentary documents should be admitted to probate.

*Appeal from Original Decree no. 51 of 1926, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 6th of February, 1926.