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summary process in execution, and I can see nothing in the terms of the order of the 31st March, 1926, from which it can be gathered that the court purported or even intended to do so. In *Bijoy Kumar Addya* v. *Rama Nath Burman*(1), referred to by the learned Subordinate Judge also, it was pointed out that "a refund of this sort might be enforced by process in execution."

I would, therefore, give effect to the contentions of the appellant and decree this appeal with costs.

DHAVLE, J.

MACPHERSON, J.—I agree. As usual with orders of Babu N. N. Chakravarti, Subordinate Judge, the order of 31st March, 1926, is difficult to interpret. Apparently by the second sentence he merely meant to put pressure upon the Banaili Raj to pay the present appellant without compelling him to resort to his ordinary remedy of execution of the order already made for rateable distribution. It is just conceivable, though not probable, that he contemplated that the Raj should pay nothing if it decided not to take out a sale certificate at all. That may indeed have been in the minds of the representatives of the Raj, with their greater knowledge of the position, when they accepted or possibly even suggested or pressed for an order in such terms, but one prefers to hold that it was not the intention of the Judge or the contemporaneous interpretation of the appellant.

Appeal decreed.

APPELLATE CIVIL.

Before Dhavle and Macpherson, JJ.

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April, 22.

CHITRAREKHA DAI

v.

BABU BANSMAN RAI.*

Succession Act, 1925 (*Act XXXIX of* 1925), *section* 384 *—Order granting succession certificate on condition of furnishing security—order, whether appealable.*

* Appeal from Original Order no. 248 of 1929, from an order of Rai Bahadur Radha Kanta Ghosh, District Judge of Purnea, dated the 12th June, 1929.

(1) (1917) 43 Ind. Cas. 715.

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Section 384 of the Succession Act, 1925, provides :

"(1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate....."

Where the court granted a succession certificate on condition of security being furnished, *held*, that the party aggrieved by the grant had a right of appeal but the order requiring security was not appealable.

Bhagwani v. *Manni Lal*(1), *Nanhu Mal* v. *Gulabo*(2), *Gauri Dutt* v. *Musammat Maika*(3), *Venkata Sami Naik* v. *Chinna Naraina*(4), *Ariya Pillai* v. *Thangammal*(5), *Radha Rani Dassi* v. *Brindabun Chundra Basack*(6), *Bai Devkore* v. *Lalchand Jivandas*(7), *Bai Nandkore* v. *Sha Maganlal Varajbhukhandas*(8) and *Srimati Paddo Sundari Dasi, in the matter of*(9), reviewed.

Appeal by the applicant.

The facts of the case material to this report are stated in the judgment of Dhavle, J.

L. K. Jha and *P. Jha*, for the appellant.

R. Chowdhury, for the respondents.

DHAVLE, J.—This is an appeal from an order of the District Judge of Purnea directing that the appellant Srimati Chitrarekha Dai, who had applied to him for a succession certificate, do get the certificate on furnishing security to the extent of the amount for which the certificate would be taken. Chitrarekha had applied for a succession certificate in respect of Rs. 8,739-2-6 being the total of a Savings Bank account and a deposit in the Imperial Bank of India and nine bonds and one decree, left by her deceased father, Babu Udit Nath Ray. She claimed that her

(1) (1891) I. L. R. 13 All. 214.
(2) (1903) I. L. R. 26 All. 173.
(3) (1905) 2 All. L. J. 606.
(4) (1895) 5 Mad. L. J. 28.
(5) (1896) I. L. R. 20 Mad. 442.
(6) (1897) I. L. R. 25 Cal. 820.
(7) (1894) I. L. R. 19 Bom. 790.
(8) (1911) I. L. R. 36 Bom. 272.
(9) (1880) I. L. R. 3 All. 304.

father not having left any widow or son surviving him, she was entitled to a succession certificate as the only daughter of her father. The application was opposed by one Bansman Ray claiming to be the nephew of the deceased and to have been adopted by him as karta putra and saying that as legal heir of the deceased he had filed an application for letters of administration to the estate of Udit Nath. When the application of Chitrarekha came on for hearing on the 12th June, 1929, Bansman did not appear and the learned District Judge heard one witness for the applicant, held that she was the daughter and only heir of the deceased and directed that she was to get the certificate but that as she had only a life interest in the assets and as there was a case for grant of letters of administration pending, it was necessary to take an indemnity bond from her, ordering accordingly that she get a succession certificate on furnishing security to the extent of Rs. 20,000. The next day Chitrarekha applied to the District Judge for a reconsideration of the order as to the amount of the security and asked that it be reduced. On the 5th June 1929 a compromise petition was put in signed by Chitrarekha on one hand and by Bansman and his brother Bankhandi on the other. In this application it was stated that Bansman had given up his claim as karta putra and that it was agreed between the parties that Bansman was to have Rs. 1,000 with interest thereon and Bankhandi a similar amount, out of the assets, that Chitrarekha was to perform the Ekodista Sradh of the deceased at a cost of Rs. 1,000 and repair the Thakurbari and Shivalaya buildings at a cost of Rs. 1,000 and that she was to get the balance, namely, Rs. 4,035 with interest thereon with absolute power of disposal over the same. There was a prayer also that as there was no longer any dispute regarding title between the parties, Chitrarekha may be exempted from furnishing security under section 375 of the Succession Act of 1925. The learned District Judge held that the certificate had been granted under clause (*3*) of section

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373 of the Act and that in spite of the compromise it was necessary to take some security, particularly in view of the fact that the petitioner had only a limited interest. He, however, reduced the amount of the security to the amount for which the certificate was to issue. Against this order Chitrarekha has appealed on three grounds: the first is that no security should have been demanded on the decisions that Chitrarekha was entitled to get a certificate of heirship. The second is that hers is not a limited interest but that under the Mithila School of Hindu Law she has an absolute right to the moveables left by her father. The third is that the District Judge should have held that he decided the matter not under clause (*3*) but under clause (*2*) of section 373 of the Act.

As an alternative to the appeal Chitrarekha has also filed a revisional application in which it is urged that the District Judge has acted illegally and with material irregularity in calling upon her to furnish security although there is no provision for it in section 373, and that the District Judge should not have called upon her to furnish security to the extent of Rs. 8,739-2-6 but only of Rs. 4,739-2-6 the amount to which she was entitled under the terms of the compromise.

The first question that arises is whether an appeal lies in the case at all. Under section 384 of the Act, which corresponds to section 19 of Act VII of 1889, an appeal lies to the High Court from an order of a District Judge "granting, refusing or revoking" a succession certificate. It has, however, been held in several cases of the Allahabad High Court—*Bhagwani* v. *Manni Lal*(1), *Nannhu Mal* v. *Gulabo*(2), *Gauri Dutt* v. *Musammat Maikia*(3)—that an order allowing the grant of a succession certificate on condition of

(1) (1891) I. L. R. 13 All. 214.
(2) (1903) I. L. R. 26 All 173.
(3) (1905) 2 All. L. J. 606.

security being furnished is an interlocutory order and is not appealable. *Bhagwani's*(1) case was, however, not followed in two cases in the Madras High Court—*Venkata Sami* v. *Chinna Narain*(2), and *Ariya Pillai* v. *Thanogammal*(3). It was also not followed in *Radha Rani Dassi* v. *Brindabun Chundra Basak*(4). And although it was followed in the Bombay High Court in *Bai Devkore* v. *Lalchand Jivandas*(5), this last decision was explained in *Bai Nandkore* v. *Sha Maganlal Varajbhukhandas*(6), where it was held that an order granting the certificate upon the applicant furnishing security is appealable in those cases where the question that has been decided is the rights of the respective parties to the grant of a certificate. The question that was agitated in appeal in *Bai Devkore's*(5) case, it was pointed out, was the propriety of the order requiring security.

The cases to which I have referred seem (with one or two exceptions from Allahabad which will be presently dealt with) reconcilable on the footing that the party aggrieved by the grant has a right of appeal but not either party aggrieved by the order requiring security. It will be seen at once that the order for the grant of a succession certificate cannot by itself afford a grievance to the party to whom the certificate is to issue, and in the present case the appellant's grievance is not the order of the grant but the order for furnishing security. We have not been referred to any case in which it was held that the party whom I might for the sake of brevity call the grantee is entitled to appeal against the order that security must be furnished before the issue of the certificate. Under Act XXVII of 1860 which was replaced by Act VII of 1889 (the predecessor for present purposes of the

(1) (1891) I. L. R. 13 All. 214.
(2) (1895) 5 Mad. L. J. 28.
(3) (1896) I .L. R. 20 Mad. 442.
(4) (1897) I. L. R. 25 Cal. 320.
(5) (1894) I. L. R. 19 Bom. 790.
(6) (1911) I. L. R. 36 Bom. 272.

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Indian Succession Act) it was held that no appeal lay for impugning the order of a district court requiring security from the person to whom it has granted the certificate—*see In the matter of Srimati Paddo Sundari Dasi*(1). In the case of *Gauri Dutt* v. *Musammat Maikia*(2), where the apeal was by the party that had resisted the grant, Banerji, J., followed the previous decisions of the Allahabad High Court but Richards, J., who considered the rulings binding upon him, observed that the order which the legislature intended to be appealable was the decision of the Court as to who was or was not the proper person to be granted the certificate and not the question whether or not that person should furnish security. The decision in *Bhagwani's*(3) case, proceeded entirely on the ground that the order for granting the certificate conditionally on the applicant's furnishing security was not an order "granting, refusing or revoking certificate" within the meaning of section 19 of the Act, but it can also be supported on the ground indicated in *Bai Nandkore's*(4) case in explaining the decision in *Bai Devkore's*(5) case; the appellants in *Bhagwani's*(3) case were the persons in whose favour the order for a grant had been made, subject to security being furnished as a condition precedent. The decision in *Nannhu Mal's*(6) case cannot, however, be so explained for the appellant in that case was the party that had resisted the conditional grant of a certificate to the other side. But the learned Judges, Blair and Banerji, JJ., whose attention was drawn to the two cases from Madras and the case of *Radha Rani Dasi* v. *Brindabun*(7) observed that the learned Judges of the Madras and of the Calcutta Courts had not had their attention called to the dilemma that if such an

(1) (1880) I. L. R. 3 All. 304.
(2) (1905) 2 All. L. J. 606.
(3) (1891) I. L. R. 13 All. 214.
(4) (1911) I. L. R. 36 Bom. 272.
(5) (1894) I. L. R. 19 Bom. 790.
(6) (1903) I. L. R. 26 All. 173.
(7) (1897) I. L. R. 25 Cal. 320.

order was an order granting a certificate on security being furnished, it was also by implication an order refusing a certificate if the security was not furnished and that a bifurcated order of this kind, would, if an appeal lay, be open to appeal by both sides. It seems to me that the dilemma completely disappars if it is held that it is not open to either party to appeal against that part of the order which deals with the furnishing of security. I agree with Richards, J., that the order which the legislature intended to be appealable is not the order regarding the furnishing of security. In my opinion, therefore, it is not open to Chitrarekha to appeal on the grounds she has taken, grounds dealing entirely with the question of the security to be furnished by her.

Coming now to the revisional application, the learned District Judge himself says that he dealt with the matter under sub-section (*3*) of section 373. That he did so is clear from the fact that he referred among other things to the case that was pending in his court for the grant of letters of administration. There cannot, therefore, be any question that under section 375 of the Act he was not merely empowered but even bound to require security. It has been urged that under the Mithila Law the daughter has an absolute right to the moveables left by her father, but this ground was not taken even in the applicant's petition of the 13th June for a reconsideration of the amount of security. It has also been urged that the compromise gave the petitioner absolute power of disposal over the balance of the assets and that, therefore, no security should have been taken from her. There is, however, nothing to prevent other reversioners, if any, from coming forward and assailing the compromise, and even under the compromise there are certain things that the petitioner is required to do. I do not think that in these circumstances the learned District Judge can be said to have acted illegally or with material irregularity in the exercise of his jurisdiction.

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I would, therefore, dismiss both the appeal and the application in revision with costs.

MACPHERSON, J.—I agree.

Appeal and application dismissed.

APPELLATE CIVIL.

Before Wort, J.

1931.

May, 1.

MOHAMMAD HAROON

v.

ASGHAR HUSSAIN.*

Malicious prosecution, action for—plaintiff to prove malice and want of reasonable and probable cause—acquittal in the Criminal case, whether want of reasonable and probable cause can be inferred from—question of law—matter to be determined on the evidence before the court and not on the evidence before the Criminal Court.

In an action for malicious prosecution the plaintiff has to prove, first, that the prosecution was started by the defendant without reasonable and probable cause and, secondly, that the prosecution was malicious.

Balbhaddar Singh v. *Badri Sah*(1), referred to.

The onus of proving want of reasonable and probable cause cannot be discharged merely by proof of the plaintiff's acquittal in the Criminal case.

The question has to be determined by the court on the evidence before it and not on the evidence in the criminal court.

Brown v. *Hawkes*(2), referred to.

Questions of malice and reasonable and probable cause are questions of law, but facts upon which those questions of law are to be determined are questions of fact.

* Appeal from Appellate Decree no. 586 of 1929, from a decision of Babu Brajendra Prasad, Subordinate Judge of Saran, dated the 17th December, 1928, setting aside a decision of Babu Hargobind Prasad Sinha, Munsif of Chapra, dated the 4th January, 1928.

(1) (1926) 30 Cal. W. N. 866, P. C.

(2) (1891) 2 Q. B. D. 718.