1903 JULY 13.

ORIGINAL CIVIL.

30 C. 979=7 C. W. N. 793.

Hossein v. *Monohar Das* (1), which is based on the ground that the order is made after notice on the judgment-debtor to show cause, and after hearing both parties if they desired to be heard. The order made gives a right to execute the decree, and from that fresh starting point the time must run. It thus operates as a revivor of the right to execute the decree.

In the present case the Court has made no order between the parties deciding the question whether there is a right to execute the decree, as the proceedings were dropped before any order was made.

There being no order, there is no revivor.

The applicant has failed to shew that the time to execute the decree has been extended by revivor but he has alleged an acknowledgment in writing which has been denied by the judgment-debtor.

The case will be set down, if the parties so desire it, for the trial of the issue as to whether an acknowledgment sufficient to take the case out of the Limitation Act has or has not been given.

I reserve the costs.

Attorney for the plaintiff: *H. H. Remfry.*

Attorney for the defendant: *Subodh Chunder Mitter.*

30 C. 983 (=7 C. W. N. 808.)

[983] TESTAMENTARY JURISDICTION.

KADAMBINI DASSI *v.* KUMUDINI DASSI.*

[16th July, 1903.]

Evidence—Relevant fact—Evidence Act (X of 1872), s. 10—Conspiracy, evidence of—Statements by an alleged conspirator to a third party, relevancy of.

Statements made by an alleged conspirator to a third party suggesting that there had been a conspiracy between the plaintiff and others in connection with the forgery of an alleged will, are not relevant when such statements are used to prove (*a*) the existence of a conspiracy as to which there is no issue, or (*b*) that the plaintiff was a party to it.

ON the 25th May 1902 Gopal Lal Seal, a wealthy inhabitant of Calcutta, died at Chandernagore, leaving him surviving his two widows, Kumudini Dassi and Nayan Manjari Dassi, and his mother, Kadambini Dassi. Two months after Gopal Lal Seal's death, his mother Kadambini and one Nogendra Nath Mitter applied to the High Court for grant of probate of a will alleged to have been executed by the said Gopal Lal Seal. To this application both the widows of the deceased entered caveats, alleging that the deceased died intestate, and that the will propounded was a forgery. Subsequently, and prior to the hearing of this suit, Kadambini died, and the suit was proceeded with on behalf of the surviving plaintiff, Nogendra Nath Mitter.

At the hearing of this suit, and while one Shoshi Shekhar Banerjee, a witness on behalf of the younger widow Nayan Manjari, was under examination, it was proposed by her counsel to tender in evidence two statements alleged to have been made to the witness, Shoshi Shekhar, by a third party named Satish Chunder Mukerjee.

The Offg. Advocate-General (Mr. *Pugh*), Mr. *J. G. Woodroffe* and Mr. *J. N. Banerjee* for Nayan Manjari. We are entitled to [984] tender

* Original Suit No. 11 of 1902.

(1) (1896) I. L. R. 24 Cal. 244.

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30 C. 983=7 C. W. N. 808.

these two statements in evidence, they being relevant under s. 10 of the Evidence Act. All the authorities are in favour of the view we take.

Mr. *Jackson* (Mr. *Sinha* and Mr. *Falkner* with him) for Kumudini Dassi. I support the contention of the learned Advocate-General and submit that the wording of s. 10 not being " in furtherance " (as in the English law), but " in reference," the statements are relevant under that section of the Evidence Act: Cunningham's Evidence Act, 9th edition, p. 101; Field's Evidence Act, 5th edition, s. 10; and Whitley Stoke's Evidence Act, s. 10, referred to.

Mr. *Chakravarti* (Mr. *Garth*, Mr. *Chaudhuri*, Mr. *Knight* and Mr. *Seal* with him) for the plaintiff, Nogendra Nath Mitter. Whether the wording of s. 10 of the Evidence Act is " in furtherance " or " in reference," that must be in reference to the common intention. It is impossible to suggest, where one or two persons make a statement, that such statement can be said to be either 'in furtherance' or 'in reference' to a common intention: see Ameer Ali and Woodroffe's Evidence Act, 2nd edition, pp. 81, 82; Phipson's Evidence, p. 73; and Taylor on Evidence, p. 593. In effect, s. 10 is a reproduction of the English Law. You cannot rely on a statement that is merely tendered and not proved. There is no tangible evidence to show that Nogendra is a conspirator with Satish. There has been a mere suggestion of conspiracy, but there is no proof; and moreover, the suggestion is denied. There is absolutely no sworn testimony to that effect. The Court will have to be satisfied that Nogendra conspired with others.

The Offg. Advocate-General in reply. The other side have omitted to refer to the Indian Law in Ameer Ali and Woodroffe's Evidence Act. Both Norton's and Cunningham's commentaries on the Evidence Act are in my favour.

STEPHEN AND HENDERSON, JJ. Two statements have been tendered which purport to have been made by Satish Chunder Mukerjee to the last witness Shoshi Shekhar Banerjee and attested by him. They have been tendered in evidence under section 10 **[985]** of the Evidence Act. It appears to us that they ought not to be admitted. Section 10 deals with things said or done or written by one of a number of persons who have conspired together for a particular purpose mentioned (in the section), such things being done with reference to their common object, and the section provides that they are relevant as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to the conspiracy.

In the course of the hearing there have been suggestions of a conspiracy between Satish Chunder Mukerjee and other persons in connection with an alleged will of Gopal Lal Seal. And it may be that as the result of this case we may have to come to the conclusion that Satish Chunder Mukerjee and others have in fact conspired together to put forward a forged will, but as to that it would not be right that we should express any opinion now. There is, moreover, no issue before us as to whether there was a conspiracy, and even if there were, we are not prepared to say on the evidence as it stands, that there is any reasonable ground within the meaning of the section for believing that either the plaintiff Nogendra Nath Mitter or Kadambini, who has died since the institution of these proceedings was a party to the conspiracy.

That being so, we do not consider that the statements are relevant or can be used to prove (i) the existence of the conspiracy as to which,

as has been said, there is no issue, or (ii) that Nogendra Nath Mitter, the surviving plaintiff was a party to the conspiracy.

Under these circumstances the statements will be rejected.

Attorney for the plaintiff : *N. C. Bose.*

Attorneys for Kumudini Dassi : *Kali Nath Mitter and Sarbadhikari.*

Attorneys for Nayan Manjari : *S. D. Dutt and Gupta.*

1903 JULY 16.

TESTAMENTARY JURISDICTION.

30 C. 983=7 C. W. N. 808.

30 C. 986 (=7 C. W. N. 843).

[986] ORIGINAL CIVIL.

SARAT CHANDRA SINGH *v.* BROJO LAL MUKERJI.*

[13th July, 1903.]

Practice—Vakils' right to audience on the Original Side of the High Court—Revisional Jurisdiction of the High Court over the Presidency Small Cause Court—Civil Procedure Code, Act XIV of 1882, *s.* 622.

A vakil is not entitled to audience on the Original Side of the High Court.

Applications for the exercise of the Court's revisional powers over the Presidency Small Cause Court are properly dealt with in the exercise of the Ordinary Original Civil Jurisdiction of the Court, and should be made in the usual way by an advocate of the Court instructed by an attorney.

[Fol. 1914 M. W. N. 368=26 M. L. J. 467=23 I. C. 572 ; 18 M. L. T. 164=29 M. L. J. 353=1915 M. W. N. 728=30 I. C. 353 ; Ref. 37 Cal. 714.]

APPLICATION by a vakil to a Judge sitting on the Original Side of the High Court.

On an application being presented on behalf of one Brojo Lal Mukerji (the defendant in the Presidency Small Cause Court suit No. 16286 of 1902), by Babu Boidya Nath Dutt—a vakil enrolled and practising on the Appellate Side of the High Court,—for the exercise of Revisional Jurisdiction under s. 622 of the Code of Civil Procedure, in respect of the decree of that Court made in the suit, the question arose as to a vakil's right to audience on the Original Side of the High Court.

The Officiating Advocate General (Mr. *L. P. Pugh*) shewed cause, upon notice, against the application being made by a vakil. Vakils have no right to appear on the Original Side. This has always been the practice and never departed from. The application is one within the jurisdiction of the Original Side of the High Court, and following the practice which has been prevailing since the time when the Old Supreme Court was in existence, the vakils should not be allowed to appear and argue on the Original Side.

[The Advocate-General desired to cite authorities, but His Lordship did not think it necessary at that stage.]

Babu *Boidya Nath Dutt.* Under s. 6 of the Presidency Small Cause Courts Act a vakil has a right to appear in this Court which [987] has Appellate Jurisdiction over the Small Cause Court ; see also s. 4, Legal Practitioners Act, and s. 15, Letters Patent and Rule 71 of Belchamber's Rules and Orders.

The Presidency Small Cause Courts Act of 1882, as amended by Act I of 1895, together with s. 15 of the Charter Act, does away with

* Application under s. 622 of the Civil Procedure Code.