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that case, and there is only a stray observation in the judgment of White, J., that " revenue and cesses constitute a standing encumbrance and first charge on the land subject to them." Cesses were then levied under Bengal Acts X of 1871 and II of 1877, and these Acts have now been replaced by Bengal Act IX of 1880. The defendants in that case were exonerated from liability to pay the amount deposited by the plaintiff as revenue and cesses on the main ground that they had become due after the purchase by the plaintiff, and the decision of the question whether cesses constitute a charge was not necessary and was not shared in by Field, J.

In the present case the amount of cesses levied by the Collector was payable by the defendants as a personal debt, and the plaintiff was compelled to pay it on account of the proceedings taken under section 99 of the Cess Act. We think the plaintiff is entitled to be reimbursed ; and this appeal is, therefore, decreed with costs in all Courts.

Appeal allowed.

30 C. 783.

[783] APPELLATE CIVIL.

KALI CHARAN GHOSAL *v.* RAM CHANDRA MANDAL.*

[11th May, 1903.]

Evidence—Secret trust—Will—Unregistered agreement—Registration Act (III of 1879) s. 17, sub-ss. (b), (h)—Non-testamentary document—Admissibility of Evidence.

A party setting up a secret trust must adduce evidence to prove that it was communicated by the testator to the universal legatee, and that the legatee agreed to accept the property bequeathed on the terms of the trust.

Jones v. *Badley* (1) referred to.

In proceedings for obtaining Letters of Administration, the parties having settled their disputes presented a petition to the Court to the following effect :—" That I, Gyanoda Sundari Dassi, will get 10-anna share of all the moveable and immoveable properties left by Kristomoni, deceased, and I, Ishwar Chandra Sarkar, will get the remaining 6-anna share." . . . . " Be it explicity expressed that after taking out the Letters of Administration I, Gyanoda Sundari Dassi, shall amicably take 10-anna share, and I, Ishwar Chandra Sarkar, shall take 6-anna share of the moveable and immoveable properties after dividing the shares by demarcation." No order was made on this petition. The properties were of the value of over hundred rupees :—

Held, that the petition, unless registered, would be inadmissible in evidence.

Pranal Anni v. *Lakshmi Anni* (2) referred to.

[(1) Registration Act, s. 17, sub ss. (b), (h). Ref. 34 Cal. 193=5 C. L. J. 611; 35 Cal. 1010=12 C. W. N. 854=8 C. L. J. 90. Foll. 36 Mad. 46. Dist. 27 P. R. 1906= 11 P. L. R. 1906.

(2) Party setting up a secret trust—Evidence. Ref. 1. C. L. J. 388; 31 Mad. 187= 18 M. L. J. 158. Appr. 21 M. L. J. 870=12 I. C. 317.]

SECOND APPEALS by the defendants, Kali Charan Ghosal and another.

These two appeals arose out of an action brought by the plaintiffs to recover possession of 25 bighas of land on establishment of their title thereto. The allegation of the plaintiffs was, that one Kristomoni Dassi on the 17th Chait 1287 B. S. (29th March 1881) executed a will in

* Appeals from Appellate Decrees Nos. 2286 and 2478 of 1900, against the decree of W. Knox, District Judge of Murshidabad, dated Aug. 29, 1900, reversing the decree of Saroda Prosad Bose, Munsif of Jangipore, dated Oct. 3, 1899.

(1) (1868) L. R. 3 Ch. A. C. 362.

(2) (1899) I. L. R. 22 Mad. 508 ; L. R. 26 I. A. 101.

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favour of her two brothers, Ishwar and Sridhar; that Sridhar died, leaving a son, Lalit Mohun, and a daughter, Gyanoda Sundari; that on the 30th Sraban [784] 1300 B. S. (14th August 1893) Kristomoni executed a second will revoking the first, and bequeathing all her property to Gyanoda Sundari; that after Kristomoni's death both Ishwar and Gyanoda Sundari applied for Letters of Administation; that on the 3rd February 1894, Ishwar and Gyanoda filed a petition of compromise, and in this they stated that they arranged to divide the property, Gyanoda taking a 10-anna share and Ishwar a 6-anna share of the property; that the opposition to the second will and to Gyanoda's application was withdrawn, and after evidence had been taken, Letters of Administration with a copy of the will of the 30th Sraban 1300 (14th August 1893) annexed, were granted to her on the 2nd March 1894; that on the 22nd August 1894, by a registered deed of sale, Gyanoda sold the lands in dispute to them, the plaintiffs; that they were dispossessed by the defendants in Aughrayan 1301 B. S.; and hence the suit.

The defence, *inter alia*, was that in the will of the 30th Sraban 1300 (14th August 1893) Gyanoda Sundari was only a *benamdar* for her brother, Lalit Mohun, who was, and was intended to be, the real beneficiary; and that by virtue of the will and of the compromise of the 3rd February 1894 Lalit Mohun became owner of the 10-anna share and Ishwar of the remaining 6-annas, both of whom by a deed dated the 13th Bhadro 1301 B. S. (28th August 1894) sold their properties to the defendants, and within which the lands in dispute were included.

The Court of First Instance, having held that no evidence could be given to show that Lalit Mohun was the real beneficiary under the will, and that by virtue of the compromise dated the 3rd February 1894 Gyanoda Sundari was only entitled to a 10-anna share of the property, gave the plaintiffs a modified decree. Against this decision both the plaintiffs and the defendants appealed to the District Judge of Murshidabad, who decreed the appeal of the plaintiffs, but dismissed that of the defendants.

Dr. *Rash Behary Ghose* and Babu *Shoshi Shekhar Bose* for the appellants. Evidence may be given to shew that the will was really intended for the benefit of a person other than the one mentioned therein, in the same way as oral evidence is admissible [785] to prove the *benami* nature of a transaction in the case of sale or gift: see *Jones* v. *Badley* (1).

The document purports to be a petition of compromise; it is a joint-petition in which they recite the agreement arrived at between the parties. That being so, it is not a written instrument conveying, or purporting to convey, immoveable property. The provisions of s. 17 of the Registration Act do not apply to oral transactions. This document does not fall under the Registration Act at all. The provisions of s. 17 of the Registration Act do not apply to judicial proceedings, whether pleadings of parties or orders of Court: see *Bindesri Naik* v. *Ganga Saran Sahu* (2). Pleading referred to in this case was a *sulehnama*. By the *sulehnama* there was only a written admission before the Judge, but the agreement was oral. If the two parties go to the Judge and say, as in this case the parties did, that "we have entered into an agreement, give us Letters of Administration jointly," it cannot be said that the

(1) (1868) L. R. 3 Ch. A. C. 362
(2) (1897) I. L. R. 20 All. 171; L. R. 25 I. A. 9.

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effect of this would be giving any interest in immoveable property within the meaning of the Registration Act ; so the *sulehnama* did not require to be registered. In this case equitable title ought to prevail against the plaintiffs.

Dr. *Ashutosh Mookerjee* and Babu *Charu Chandra Ghose* for the respondents. By the *sulehnama* the parties actually divided the properties amongst themselves. This is a document which declares a title in immoveable property, so it requires to be registered. Assuming that the document was admissible in evidence, no suit could be brought to enforce specific performance, as it was barred by limitation. I rely upon the case of *Pranal Anni* v. *Lakshmi Anni* (1). There is no authority for the proposition that evidence can be given to shew that the will was not intended for the legatee mentioned therein, but for some other object. The principle laid down in s. 92 of the Evidence Act covers this case.

Dr. *Rash Behari Ghose* in reply. No question of limitation can arise in this case, as limitation could run from the date when [786] specific performance is demanded and refused : see Article 113 of the Limitation Act.

MACLEAN, C. J. The first question which arises on this appeal is whether it is open to the defendants to shew that one Gyanoda Sundari, who was the predecessor in title of the plaintiffs, and under the will of Kristomoni Dassi, dated the 14th of August 1893, her universal legatee, was really a trustee for the testatrix's nephew, Lalit Mohun Sarcar, through whom the defendants claim the property given by the will.

There is no authority in India upon the subject, statutory or otherwise ; and, in the absence of any such authority, I doubt if it be open to the defendants to adduce such evidence, unless we act in India upon the principle which, in cases of this class, is acted upon in the English Courts. In the English Courts it is open to those who claim the benefit of a secret trust to show that a gift by will, say to A, is really given to A on a secret trust for B. But it is an undoubted element in that class of cases that the party setting up such a secret trust must show that the trust was communicated to A by the testator, and that A agreed to accept the property on those terms. If then we were to apply this English doctrine to Indian cases, we must apply the whole ; and in the present case it is admitted that there was no evidence to shew that any such trust was communicated to Gyanoda Sundari, or that she accepted the property upon the terms of her being a trustee. I, therefore, decide the first point against the appellant ; the view taken in England is stated with great lucidity by Lord Cairns in the case of *Jones* v. *Badley* (2).

I now pass to the second point. It is of an entirely different description. The second point is that what has been spoken of throughout the discussion as in the *sulehnama* of the 3rd of February 1894 was not admissible in evidence because it was not registered. The facts as to that are these : Kristomoni Dassi had made a will previous to that of the 14th of August 1893, and by that will, which is dated the 17th of Chaitra 1287, she gave her property to her two brothers, Ishwara and Sridhara ; Sridhara died leaving a son, Lalit Mohun, to whom I have already [787] referred, and his sister, Gyanoda Sundari. After Kristomoni's death Ishwara propounded the first will and Gyanoda propounded the

(1) (1899) I. L. R. 22 Mad. 508 ; L. R. 26 I. A. 101.
(2) (1868) L. R. 3 Ch. A. C. 362.

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second will. Each applied for Letters of Administration. They then presented this document of the 3rd of February 1894 by way of a petition to the Court. It was signed both by Gyanoda and Ishwara. No order was made on the petition: on the contrary, the Court said it could not act upon it, and Letters of Administration with the will annexed were granted to Gyanoda. The question is whether this document falls within sub-section (*b*) or sub-section (*h*) of section 17 of the Indian Registration Act. It recited the facts I have stated, as well as the two applications for probate, and then it said: "The above two cases have been amicably settled amongst us on the terms following:—that I, Gyanoda Sundari Dassi, will get a ten-anna share of all moveable and immoveable properties left by the said Kristomoni, deceased, and I, Ishwara Chandra Sarkar, will get the remaining six-anna share." After these allegations, the prayer was that Letters of Administration might be granted to the two. Then it says: "Be it explicitly expressed that, after taking out the Letters of Administration, I, Gyanoda Sundari Dassi, shall amicably take ten-anna share, and I, Ishwara Chandra Sarkar, shall take six-anna share of the moveable and immoveable properties after dividing the shares by demarcation." No order was made upon this application. This instrument is a non-testamentary instrument: the question is whether it purports or operates to create or declare any right, title or interest in any immoveable property of the value of over 100 rupees. It is conceded that the property here is over that amount. I think it clearly purports or operates to create or declare the rights and interests of the brothers and sister in the property in dispute, and consequently that it required to be registered. I do not see how we can fairly bring this document within sub-section (*h*), and say that it creates a right to obtain another document, which will when executed "create, declare, assign or extinguish any such right, title or interest." There is no reference to the execution of any other document. The case is governed in principle by the Privy Council decision in the case of *Pranal Anni* v. *Lakshmi Anni* (1).

[788] Lastly, it was said that the plaintiffs had notice of this agreement. I do not think that helps the defendant. There is no finding upon that, one way or the other. If they had, they would only have notice of an agreement which required registration, and which without registration would be inadmissible in evidence against them.

Those are the only points argued, and, in my opinion, they fail, and the appeals must be dismissed with costs.

GEIDT, J. I concur.

Appeals dismissed.

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30 C. 788.

APPELLATE CIVIL.

ZINNATUNNESSA KHATUN *v.* GIRINDRA NATH MUKERJEE.*

[11th June, 1903.]

Declaratory decree—Consequential relief—Court-fees Act (VII of 1870), Sch. II, Art. 17, cl. (iii) and s. 7, cl. iv (c).

* Appeals from Original Decrees Nos. 1 and 2 of 1901, against the decrees of Kali Dhan Chatterjee, Additional Subordinate Judge of Faridpore, dated Sept. 10, 1900.

(1) (1899) I. L. R. 22 Mad. 508; L. R. 26 I. A. 101.