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30 C. 521=7 C. W. N. 121.

is consistent with the cases which were cited before me. In *Ramnath Tolapattro* v. *Durga Sundari Debi* (1) and *Ramananda* v. *Rai Kishori Barmani* (2) the question was [527] one of inheritance from a male and not of *stridhan* property.

A further point, however, arises in the judgment in the Allahabad case (3). It is suggested in the judgment of Mr. Justice Oldfield that the right of succession to *stridhan* is intimately connected in Bengal with the principle that inheritance depends upon spiritual benefit to be conferred upon ancestors, and that the capacity to confer such benefit is lost by unchastity, though a later passage seems to limit this extension of that principle, at all events as far as the present case is concerned.

This matter seems to be explained by certain passages in the *Dayabhaga* to which my attention has been drawn, and which seem to show that the question of spiritual benefit does not apply in the present case. By paragraph 29, Chapter 4, section 3, property goes first to the whole brothers, then to the mother, then to the father, and then to the husband.

By paragraph 31 various persons, whom I need not name, on failure of heirs down to the husband are said to be similar to mothers, and section 37 provides for the inheritance of persons who claim through such mother. Such inheritance, it appears, depends on the principle of spiritual benefit.

The conclusion would seem to be that the characteristic doctrine of the Bengal Law is that, as far as the near relatives are concerned, inheritance depends on consanguinity ; but in the case of remoter relations the law falls back on the principle of spiritual benefit.

Under these circumstances, it is plain that the doctrine of spiritual benefit does not apply in the present case. The alleged unchastity of the mother therefore discloses no bar to her inheritance.

Judgment for plaintiff.

Attorney for the plaintiff : *P. N. Sen.*

Attorneys for the defendant : *Morgan & Co.*

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30 C. 528 (=7 C. W. N. 450.)

[528] APPEAL FROM ORIGINAL CIVIL.

ELOKESHI DASSI *v.* HARI PROSAD SOOR. * [23rd January, 1903.

Practice—Probate, application to recall—Citation—Proof of will—Genuineness of will.

On an application by a Hindu widow for an order that the probate obtained by her husband's brother of a will alleged to have been made by her husband be recalled, she not receiving any intimation of the application for probate ; and that the will be proved in her presence :—

Held, that such an application ought to be granted, and that the probate of the will must be recalled and kept in the record until the case is decided.

[Ref. 10 C. L. J. 263=3 I. C. 178.]

APPEAL by the petitioner, Elokeshi Dassi, from an order of AMEER ALI, J.

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* Appeal from Original Order No. 24 of 1902.

Appellate Bench : Sir Francis W. Maclean K. C. I. E., Chief Justice, Mr. Justice Hill and Mr. Justice Stevens.

(1) (1878) I. L. R. 4 Cal. 550.
(2) (1894) I. L. R. 22 Cal. 847.
(3) (1875) I. L. R. 1 All. 46.

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30 C. 528=7 C. W. N. 450.

One Jugannath Prosad Soor, an inhabitant of Calcutta, and governed by the Bengal school of Hindu law, died without issue on the 25th July 1901, leaving him surviving his sole widow Elokeshi Dassi, and his brother Hari Prosad Soor. Some time after, in the month of January 1902, Elokeshi heard for the first time that a will had been propounded by the said Hari Prosad Soor, purporting to have been executed by her deceased husband, and that probate had already been obtained thereof from the High Court in her absence. Whereupon Elokeshi filed a petition, on the 26th April 1902, stating the above facts, and praying for an order that the probate of the alleged will granted to Hari Prosad Soor be recalled and revoked, and that the will be proved in her presence. This application came on for hearing before AMEER ALI J. who in his judgment dated the 20th June 1902, after going into the question of the genuineness of the will, dismissed the application, observing as follows :—

"In this Court, when an application is made for probate of a will which is in accordance with the law and is supported by affidavits of the attesting [529] witnesses it has not been the practice, excepting under special circumstances to issue citations. Ordinarily the will is allowed to be proved in what is called common form, leaving it to any person, who has had no notice of the application, to apply to have the grant revoked. If the Court is satisfied that there is any just cause, it calls upon the propounder to prove the will in solemn form. The sufficiency of the cause is dealt with usually upon affidavits."

From this judgment and order Elokeshi appealed.

Mr. *Sinha* (Mr. *B. C. Mitter* with him) for the appellant. When probate of a will is obtained in common form without notice to the widow, she has a right to have the will proved in solemn form. No distinction can be made between the case of *Walter Rebells* v. *Maria Rebells* (1) and the present case. The widow is entitled to have citation served on her, and if that had been done she could have entered a caveat.

The lower Court could not exercise any discretion in a case like this, inasmuch as Hari Prosad Soor, who applied for probate, had not stated in his petition the existence of the widow.

The case of *Kamona Soondury Dassee* v. *Hurro Lall Shaha* (2) deals with this question. The appellant is the heiress of her late husband ; and in the case of a will practically disinheriting the heir, I submit special citation should be issued to all interested parties : *Komollochun Dutt* v. *Nilruttun Mundle* (3) and *Dintarini Dabi* v. *Doibo Chunder Roy* (4).

The law in this country under the Probate and Administration Act is the same as in England, and persons who are next of heir or heirs at law, can come in and have the will proved in solemn form : see Williams on Executors, p, 370, and *Bell* v. *Armstrong* (5). Even persons who take under a will can, if not cited, come in and have the will proved in solemn form. The Lower Court was not justified in going into the question of the genuineness of this will on the affidavit of the petitioner for probate, and I submit the order of the Lower Court is not correct.

Mr. *Dunne* (Mr. *Avetoom* with him) for the respondent. On applications for probate citations are not issued. That is the practice on the Original Side. Power is given under section 69 of the Probate and

(1) (1897) 2 C. W. N. 100.
(2) (1862) I. L. R. 8 Cal. 570.
(3) (1878) I. L. R. 4 Cal. 360.
(4) (1882) I. L. R. 8 Cal. 880.
(5) (1822) 1 Add. 365.

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30 C. 528=7 C. W. N. 460.

Administration Act, but that is discretionary. [530] The question here is whether there is just cause shown. Section 62 provides what is to be included in a petition, and there it is not stated that the representatives of the deceased should be mentioned. A petitioner for probate never has to state the heirs of the testator as in a petition for administration. That being so, there is no ground for suggesting that there was a defect in substance in the order passed by the Court below. If the Court held that the relatives of the deceased ought to be named in a petition for probate, then it would alter the practice on the Original Side, and that would have to be added to s. 62 of the Probate and Administration Act. The fact that the widow was not served with a citation does not show a defect at all under s. 50 of that Act.

The cases cited by the other side are all mofussil cases, and the practice there does not prevent a citation from being issued to the interested parties. I submit the order of the lower Court should stand.

Mr. *Sinha* in reply. The practice as to citation is the same in the mofussil as on the Original Side of the High Court, and I refer to the case of *Amrita Lall Mullick* (1) on this point. The question of the genuineness of the will cannot be tried on affidavits. The Court could not, upon mere affidavits, hold whether a will was forged or not. I submit I can contest it, and that it must be done on evidence.

MACLEAN, C. J. This appeal must succeed.

It is an application by the widow of her deceased husband for an order that probate of the alleged will, which was granted by the Court below to the respondent, be recalled, and that it may be ordered that the said alleged will be proved in the presence of the petitioner.

The facts are as follows:—

Assuming there is no will, the appellant is the heiress of her late husband. The respondent sets up a will of which there were four or five executors: he alone proved the will, and in the application for probate, the present appellant was not cited, and apparently knew nothing whatever about it, until after probate was granted. She says, rightly or wrongly,—I do not enter [531] into that,—that the will is not a genuine will, and all she asks is that she should have an opportunity of showing that it is not a genuine will. That argument ought to prevail.

Assuming that what she states in her petition is correct,—and her story is supported by evidence on affidavit, though denied by the other side,—she makes out at any rate a *prima facie* case for enquiry. In making this observation I do not desire to be understood as expressing any opinion, one way or the other, as to the genuineness of the will in dispute. She was not cited, and she substantiated a case for having the probate of the will recalled, and of having an opportunity given her of showing that the will is not a genuine one.

If I may say so, with respect, the error into which the learned Judge in the Court below seems to me to have fallen is that on this application, he has decided the question as to the genuineness of the will. This was premature.

The application was one asking in effect only that the will be proved in the applicant's presence, and this ought to be done, on evidence given, in the way usual in probate cases, and not on this application.

(1) (1900) I. L. R. 27 Cal. 350.

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30 C. 528=7 C. W. N. 450.

On these grounds, the appeal must succeed with costs, and the probate granted must be recalled and kept in the record of this Court until the case is decided.

HILL, J. I am of the same opinion.

STEVENS, J. I am also of the same opinion.

Appeal allowed.

Attorney for the appellant; *Atul Chunder Ghose.*

Attorney for the respondent: *H. C. Ghose.*

30 C. 532 (=7 C. W. N. 550).

[532] APPELLATE CIVIL.

ABDUL HAKIM *v.* LATIFUNNESSA KHATUN.* [31st March, 1903].

Limitation—Registration—Suit to enforce registration—Limitation Act (XV of 1877) ss. 6, 14—Period of Limitation, computation of—Registration Act (III of 1877) s. 77.

An executant of a document not admitting execution, the Sub-Registrar refused to register it. There was an appeal to the Registrar, who also refused to register. Within thirty days of the dismissal of the appeal, an application for review was filed to the Registrar, which was also dismissed. On a suit brought in the Civil Court to enforce the registration of the document, after the dismissal of the said application for review :—

Held, that s. 14 of the Limitation Act had no application to the present case; and that the suit not having been brought within thirty days from the date of the dismissal of the appeal by the Registrar, it was barred by limitation.

Nogendra Nath Mullick v. *Mathura Mohun Parhi* (1) followed in principle; *Veeramma* v. *Abbiah* (2), *Girija Nath Roy* v. *Patani Bibee* (3) referred to; and *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (4) discussed.

[Ref. 34 All. 496; Appr. 47 Cal. 300.]

SECOND APPEAL by the plaintiff, Abdul Hakim.

This appeal arose out of an action brought by the plaintiff under s. 77 of the Registration Act to obtain an order for the registration of a deed of which registration was refused by the District Registrar. The plaintiff applied for the registration of a deed of gift by the legal heirs of a deceased Mahomedan lady who had executed the said deed. The heirs did not appear to admit execution, and the Sub-Registrar refused to register. There was an appeal to the Registrar, under s. 76 of the Registration Act, but the Registrar also, on the 4th May 1899, refused to register. [533] The plaintiff then applied to the Registrar for a review, and on the dismissal of that application on the 24th June 1899, instituted the present suit on the 20th July 1899. The defence mainly was that the suit was barred by limitation. The Court of first instance dismissed the plaintiff's suit, having held that it was barred by limitation. On appeal, the additional Subordinate Judge of Dacca affirmed the decree of the first Court.

* Appeal from Appellate Decree No. 1857 of 1900, against the decree of Girish Chunder Chatterjee, Additional Subordinate Judge of Dacca, dated June 12, 1900, affirming the decree of Harrish Chunder Sen, Munsif of that district, dated Nov. 14, 1899.

(1) (1891) I. L. R. 18 Cal. 368.
(2) (1894) I. L. R. 18 Mad. 99.
(3) (1889) I. L. R. 17 Cal. 268.
(4) (1883) I. L. R. 10 Cal. 265.