

Before Mr. Justice Loch, and Mr. Justice Mitter,

1869
April 26.

MIRZA DAUD ALI (OBJECTOR) v. SYED NADIR HOSSEIN
(PETITIONER).*

Act XXVII. of 1860—Certificate for Administration—Executor and
Legal Representative.

A person was trustee of "waqf" or trust property. He had also some other property (how much was not clear) of his own. He made a will relating only to the trust property, and appointed an executor. Held, that the executor, mentioned in the will, was entitled to a certificate under Act XXVII. of 1860, with regard to the trust property; and the legal personal representative of the deceased was entitled to a certificate under the same Act, with respect to any other property of which he died possessed.

SYED NADIR HOSSEIN applied by petition dated 27th June 1868, for a certificate, under Act XXVII. of 1860, as executor to the estate of one Khyrunnissa Khanum of Rajabagaun, within the division of Shahanpore, in the district of Moorshedabad, under the following circumstances, viz. : that Khyrunnissa Khanum had appointed one Mirza Mohammed Ali Beg, maternal uncle of the petitioner, as executor to her estate, under a certain wasiatnama, executed by her on the 1st Baisakh 1266; that Mirza Mohammed Ali, on the death of Khyrunnissa, accordingly took possession of the estates under the wasiatnama; subsequently Mirza Mohammed Ali, wishing to go a pilgrimage on 8th Bhadra 1271, executed a wasiatnama in favor of the petitioner, Syed Nadir Hossein, appointing him executor for three years for some cause or other. Mirza Mohammed Ali gave up the idea of a pilgrimage; and on 8th Jaisti 1275, executed another wasiatnama in favor of Syed Nadir Hossein, and appointed him executor to the estate of Khyrunnissa.

Mirza Mohammed Ali then died, and Syed Nadir Hossein took possession of the properties.

On the 15th July 1868, Mirza Daud Ali Beg, for self and as manager of Sukea Khanum, mother and guardian of Mirza

* Miscellaneous Regular Appeals, Nos. 547 of 1868, and 50 of 1869, from the decrees of the Officiating Judge of Moorshedabad, dated the 4th November and 30th December 1868, respectively.

Mohammed Ali, minor, of Rajabagaun, filed a petition of objections to the petitioner for certificate previously filed by Syed Nadir Hossein, stating, *inter alia*, that the properties referred to in the wasiatnama, executed by Khyrunnissa in favor of Mirza Mohammed Beg, belonged to the petitioner's ancestor, Mirza Daul Ali, and to the minor son of Sukea Khanum, and Khyrunnissa, therefore, had no right to make such a wasiatnama; that the profits of the estate were not applied to the purposes specified in the wasiatnama, but were applied to the maintenance of the family, and spent in other family affairs that Mirza Mohammed Ali Beg had never executed any wasiatnama, nor had he any authority to execute such a wasiatnama. Other grounds were stated, generally reflecting on the character of Syed Nadir Hossein.

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A certificate was granted to Syed Nadir Hossein on the 4th November 1868 as executor.

Subsequently, another Judge of the same Court granted a joint certificate to Daud Ali Beg as the heir with Syed Nadir Hossein as the executor to the estate of Mohammed Mirza Ali Beg, quoting *Waselun Hak v. Gowhuran Nissa Bibi* (1), and thereupon Mirza Daud Ali appealed to the High Court against the certificate to Syed Nadir Hossein.

The two appeals were taken together. Syed Nadir Hossein appealed against the certificate granted to Daud Ali with himself. This was appeal No. 50 of 1869.

Baboo *Srinath Das* (Baboo *Rasbehari Ghose* with him) for the appellant.

Mr. *Money* (Baboos *Ashutosh Chatterjee* and *Khettranath Bose* with him) for the respondent.

The judgment of the Court was delivered by

LOCH, J.—We see no grounds for interfering with the order passed by the Judge in case No. 547. Nadir Hossein applied for a certificate, under Act XXVII. of 1860, to collect the debts due to the estate of Mohammed Ali, deceased, who held certain pro-

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erty derived from one Khyrunnissa, subject to certain trusts Mohammed Ali left this property by will to the petitioner, Nadir Hossein, and it is by virtue of that will, he prays to have the certificate granted to him.

The application has been opposed by the appellant, Daud Ali, on various grounds. He claims to be the legal heir of the deceased, and alleges that the will of Mohammad Ali is spurious. He also alleges that the deed under which Mohammed Ali held from Khyrunnissa is also spurious. The Judge took evidence as to the validity of Mohammed Ali's will, which was satisfactorily proved, and gave Nadir Hossein the certificate prayed for. We think that this is the only point to be determined; and that, for the purpose of determining to whom the certificate is to be granted, it is unnecessary to go into the other questions raised by the appellant. We are satisfied with the proof given of the genuineness of Mahommed Ali's will, and reject appeal No. 547 with costs.

The other case relates to other property alleged to have belonged to Mohammed Ali. It is said the property left by his will to Nadir Ali, was wuqf property derived by him from Khyrunnissa, but that he had other private property. Looking at the terms of Mohammed Ali's will, it is quite clear that it relates only to the property derived by him from Khyrunnissa, and limits the powers of Nadir Hossein as executor to that property. It is quite possible that a man may be the trustee of wuqf property, and at the same time have property of his own. He may, by will, appoint a stranger to succeed him in the trust, while his legal heirs would succeed to the private property. The party appointed trustee, would be entitled to collect debts due to the deceased as trustee, and his legal heirs would be entitled to recover debts due to him in his private capacity; and there appears to be no sufficient reason why each party should not have a certificate granted to them to collect their respective debts. But it is said that the object of the law, Act XXVII. of 1860, would be defeated, and there would be no protection for honest debtors, nor would the parties be able to collect; for the debtors, finding themselves not to be properly protected, would refuse to pay till compelled to do so by a decree of Court, and

that the proper course is to permit the executor named in the will to collect all outstanding debts, and the legal heirs may, if so advised, require an account from him. It is not shewn us what the alleged private property of Mohammed Ali consists of; but supposing him, for argument's sake, to have died possessed of a large zemindari, it is clear that the will appointing Nadir Hossein his executor with regard to certain wuqf property would not prevent his legal heirs from entering upon possession of the zemindari and collecting debts due to the deceased as zemindar. Confusion may arise but not necessarily. If Mohammed Ali has left accounts, these will shew in what capacity the money is due to him. Of course, if the debtor do not like to take the receipt of either one or other of the parties holding the certificates, the latter have their usual remedy by suit. The order of the Judge, however, appears to be erroneous in that he has directed the certificate regarding the private property of Mohammed Ali to be given jointly to the appellant and Nadir Hossein; for the latter did not apply for it, and is not entitled to it under the will, and that portion of the order is, accordingly, set aside with costs. The appellant is entitled to obtain an exclusive certificate to collect the debts due to the deceased on account of his own estate, and such a certificate should be, therefore, given to him.

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SAMIRADDI KHALIFA (ONE OF THE DEFENDANTS) v. HARIS-
CHANDRA alias HARI MOHAN KURMOKAR AND OTHER
(PLAINTIFFS.*)

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Sale in Execution of Decrees—Fraud.

The plaintiff purchased the right, title, and interest of a judgment-debtor in a certain jumma sold in execution of a Small Cause Court decree. Subsequently, the same land was sold by the same creditor, in execution of another decree obtained in the Collector's Court, and the defendant purchased. In a suit to set aside this second sale, held that, when a tenure has once been sold in execution of a decree of a Civil Court, the Collector's Court has no power to put it up again as the property of the former tenant.

* Special Appeal, No. 1282 of 1868, from a decree of the Principal Sudder Ameen of Jessore, dated the 26th March 1868, reversing a decree of the Moonsiff of Magura, dated the 21st December 1866.