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it. The words "personal property" in section 6 seem to be used in the sense of movable property; for as regards Hindus and Mohammedans, there is no distinction between real and personal property, the distinction being between movable and immovable. That the word "personal" is used in section 6 as referring to moveable property, is borne out to some extent by section 19, which gives power to issue execution against the movable property of the debtor; and in the subsequent part of it uses the word "personal" apparently in the sense of movable. The words are "if the warrant be directed against the movable property of the judgment-debtor, it may be general against any personal property of the judgment-debtor wherever it may be found within the local limits of the jurisdiction of the Court, or special against any personal property belonging to the judgment-debtor within the same limits, and which shall be indicated by the judgment-creditor."

There is no more reason why the Small Cause Court should have power to seize in execution a hut erected upon a small piece of land than it should have to seize the land itself.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

IN THE MATTER OF KOKYA DINE, DECEASED.*

1868

Nov. 28.

Will of a Buddhist—Indian Succession Act (X of 1865), s. 331.

Probates may be granted of the will of a Buddhist made after the 1st January 1866. It is not necessary that the will of a Buddhist should be executed according to the formalities required by the Indian Succession Act.

THE following case was stated for the decision of the High Court by the Recorder of Rangoon.

"Mah Mee, Mah Lay, and Moung Yoon, the children of Kokya Dine, deceased, ask for probate of the will of Kokya Dine.

"The deceased was a Buddhist, and the petitioners are Buddhists.

"The deceased died upon the 3rd of September 1868, leaving property, both real and personal, within the jurisdiction of this

* Reference by the Recorder of Rangoon.

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Court, and leaving a will dated the first day of the waning moon of Tandelin 1230 Burmese, corresponding with the 1st of September 1868.

"The applicants contend that they are executors appointed by this will, by implication.

"The application was made on the 14th of September 1868. The usual citations were issued, and the case came on for hearing on the 14th of October 1868, when Mr. Nicolson, advocate, appeared for Moung Lay, the widower of the eldest daughter of the deceased, and objected, among other things, that this Court has no jurisdiction, because the deceased was a Buddhist, and that his will could not be admitted to probate by reason of the 331st section of the Indian Succession Act of 1865. He took a further objection that the will was not signed as required by that Act. These two objections cannot, it seems to me, both be good; if the Indian Succession Act does not permit of the grant of probate to the will of a Buddhist, on the ground that he belonged to a class excepted by the 331st section, it cannot apply to his will, so as to invalidate it for non-compliance with the forms prescribed by the Act itself. And if the will of a Buddhist made after the 1st January 1866, needs to be executed, according to the forms prescribed by Part 5 of the Indian Succession Act, it cannot be objected that the District Court has no jurisdiction to grant probate under Part 31.

"The questions I wish to submit to their Lordships, are:

1.—Can the District Judge grant probate under the Indian Succession Act of 1865 to the will of a Buddhist, the will being made after the 1st January 1866?

2.—Is it necessary that the will of a Buddhist should be executed according to the formalities required by the Indian Succession Act, in order to support an application for a grant of probate under that Act.

"With regard to the first question, it seems to me, that there is nothing in the wording of section 331 of the Indian Succession Act of 1865, expressly taking away, in the case of the will of a Buddhist, the general jurisdiction given to the District Judge by section 235 in granting probates in all cases within his jurisdiction. Section 331 refers in its first part to intestate and testa-

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mentary successions, and exempts Buddhists among others from the operation of the Act so far as those subjects are concerned. By that I understand that, in the case of the will of a Buddhist, it shall not be governed by the rules of law laid down in the Act, that is to say, it shall not require to be executed as prescribed in Part 8, or attested as required in Part 10, and that it shall not be construed by the rules laid down in Part 2 and so on, not that it shall not be admitted to probate.

"The Succession Act consists, it seems to me, of two distinct portions. The first portion relating to substantive law and the last to mere rules of procedure. It may very well be that the part of the Act dealing with substantive law, is not to be applied in the case of a Buddhist, while the part relating to procedure is to be so applied, the object of section 331 being to prevent interference with the rules relating to the devolution of property after death in the cases of certain excepted classes. The same objection does not apply to matters of mere procedure, and, as a matter of fact, probate was constantly granted in the late Supreme Courts and in the High Courts at the Presidency Towns before the Act of 1865 came into operation. In the case of *Kameenee Dasse* v. *Bissonath Ghose* (1) probate was granted to the will of a Hindu, also one of an excepted class, after the Act came into operation, but it may be said, that the will in that case was dated prior to the 1st of January 1866, and so that the case fell within the exception in the second part of section 331 I have been unable to find any reported case of the grant of probate to the will (dated after the 1st of January 1866) of a Hindu, Mahomedan, or Buddhist, after the Indian Succession Act came into operation, but this circumstance is no evidence that such grants are never made. In the case of *Sharo Bibi* v. *Baldeo Das* (2), it was said, that as regards the will of a Hindu, the executor takes nothing from the grant. His title is founded solely and simply on the will of the testator considered as an instrument of gift. Except for the purposes of evidence, the will of a Hindu does not require probate. See also *Tiruvalur* v. *Kirustnappa Mudali* (3). These were both cases of probate

(1) 2 I. J., N. S., C. (2) 1 B. L. R. (O. C.), 24. (3) 1 Mad. H. C. Rep., 59.

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granted under the old law, but Mr. Justice Norman in *Sharo Bibi* v. *Baldeo Das* (1), speaking in 1867, uses the present tense, from which it may be inferred that the will of a Hindu does require probate for the purposes of evidence. My own opinion is, that the District Court has jurisdiction to grant probate to the will of a Buddhist made after the 1st of January 1866. But that it is not necessary that the will should be executed according to the formalities required by the Indian Succession Act."

The judgment of the Court was delivered by

PEACOCK, C. J.—We are of opinion that in this case the view taken by the learned Recorder is correct, and that probate may be granted of the will of a Buddhist made after the 1st of January 1866, but that it is not necessary that the will of a Buddhist should be executed according to the formalities required by the Indian Succession Act.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

1868
Nov. 11

RAJIB LOCHAN (DEFENDANT) *v* BIMALAMANI DASI AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS.)*

Setting aside Sale—Refund of Purchase-money—Act VIII. of 1859, s. 258.

See Act. XIV of 1882, Secs. 313 and 315.

Section 258, Act VIII. of 1859, only applies to cases where a sale of immovable property has been set aside under circumstances which would, under Act VIII. of 1859 authorize such a proceeding. The fact that the party whose right, title, and interest were sold, had no interest at all, or less than was supposed, is no ground for setting aside the sale.

THIS was a suit to set aside a sale, and to recover the purchase-money paid under the sale, which was of the rights and interests of one Radhamohan Das, in execution of a decree obtained against him by one Ramanand Rakhit, on the ground that the rights and interests of Radhamohan Das were not what they had been alleged to be.

The purchaser (the special appellant) and the decreeholder were both parties to this suit. The Principal Sudder Ameen

* Special Appeals, Nos. 1081 and 1077 of 1868, from a decree of the Officiating Judge of Midnapore, reversing a decree of the Principal Sudder Ameen of that district.

(1) 1 B. L. R. (O. C.), 24.