

of the will; and, *secondly*, that the maintenance allowed is in accordance with the custom of the family, as is proved by certain records in the case of a brother and an uncle in the same family.

When we first heard the case, we considered the evidence very carefully, and weighed, on the one hand, the direct evidence as to the execution of the will, and on the other, the probabilities and surrounding circumstances of the case, and thought it immaterial and improbable that the widow and the daughter should be left without those ordinary provisions generally made to such nearest of kin.

After a full rehearing of the whole case to-day, I still adhere to the opinion that I formerly entertained. I think that the special title, that is, the will set forth by Dino Bundhoo, is not sufficiently proved, and that thus, for the purposes of the certificate, we are justified to look to the natural heir as the party entitled to it.

As to the other wills that have been filed to show that Rupees 25 was the ordinary maintenance allowed for next heirs, widows and daughters, in other cases in the family of the testator, we have to observe, in the first place, that those wills are not proved; and, *secondly*, we must not come to any conclusion in this case simply on the acts of the other members of the family in other cases, and each case must depend on its own peculiar circumstances. It may be that some special reasons exist in relation to one member of the family which do not hold good in the case of another. But be that as it may, the result of a careful consideration of the whole evidence and circumstances of this case is that the will propounded by Dino Bundhoo is not sufficiently proved to divest the natural heir of her right to the certificate. The petitioner is, no doubt, entitled to bring a regular suit if he is so advised. This order will not prejudice his so doing, if advised.

The application is rejected with costs.

Mitter, J.—I concur in rejecting this application. The new documents ought not to be admitted. The petitioner had ample opportunity to produce them at the first trial, particularly after the order of remand.

Upon the other arguments, I have already expressed my opinion in the judgment formerly delivered by me, and I adhere to that opinion now.

The 24th January 1871.

Present:

The Hon'ble G. Loch and Onoookool Chunder Mookerjee, *Judges*.

Execution—Refund—Interest.

Case No. 389 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 30th August 1870, modifying a decision of the Subordinate Judge of that District, dated the 14th May 1870.

Wooma Soonduree Burmonia (Judgment-debtor), *Appellant*,

versus

Gooroo Pershad Roy and others (Decree-holders), *Respondents*.

Baboo Mohinee Mohun Roy for Appellant.

Baboos Anund Chunder Ghossal and Mohendro Lall Seal for Respondents.

While a special appeal was pending, the decree-holder took out execution, and realized a sum in satisfaction of his whole decree. The decree having been modified, and the amount decreed reduced, the judgment-debtor applied for a refund of the excess payment, and this was awarded to him with interest.

HELD that interest was rightly awarded.

Loch, J.—It appears that in this case a decree was passed by the Judge of Moorshedabad in alteration of a decree of the Subordinate Judge. By that decree, the Judge awarded to the plaintiff wassilat for five years on account of one mouzah Dhurumpore, and for two years on account of the other two mehals Tehatee and Baboopore, with interest thereon. A special appeal was preferred to this Court when the decree of the Judge was modified on the 14th May 1869, and the plaintiff was declared entitled to mesne-profits only for two years on account of mouzah Dhurumpore as well as of the two other villages. It appears also that, while the special appeal was pending, the plaintiff took out execution in August 1868, and realized from the defendant the sum of Rupees 1,967-10-3 in satisfaction of the whole of his decree. On that decree being modified by an order of the High Court, the defendant applied for a refund of the excess payment, and the Judge has awarded him the sum of Rupees 1,607-14-4

being the principal, interest, and costs which he had paid in excess of the amount decreed by the High Court.

Now, it is contended before us that the Judge should not have awarded interest on the principal sum which was ordered to be refunded to the debtor. But we do not see that this objection is of any weight. The case is a simple one. In liquidation of the decree which was then outstanding against him, the defendant paid down the sum of Rupees 1,967-10-9, and when that decree was modified, he asked that so much of the sum which he had paid in excess of the amount decreed by the High Court might be refunded to him with interest; and we think that the Judge was perfectly right in awarding interest. The decree-holder had taken out the money, and had made use of it; and when he was obliged to refund the money, the debtor was entitled to receive interest upon that money, which properly ought never to have found its way into the hands of the decree-holder.

We think, therefore, that the objection now taken before us must be disallowed, and the appeal dismissed with costs, sixteen rupees being allowed as pleader's fee.

Mookerjee, J.—I concur.

The 23rd January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Transfer of a decree—Sections 2 and 5, Act III. of 1870.

In the Matter of

Sreemutty Jugodumba Dossee, *Petitioner*.

Mr. R. T. Allan for Petitioner.

Where, by the operation of Act VIII. (B. C.) of 1869 and Act III. of 1870, a decree is transferred (*e. g.*, from the Court of a Deputy Collector to that of a Subordinate Judge), any application as to a matter prior to, or which may affect, the decree (*e. g.*, an application for a review), must be made to the Court which passed the decree.

Norman, C. J.—It appears to us that there is no ground for our interference in this case. By the conjoint operation of Act VIII. of 1869 and Act III. of 1870, B. C., the decree against the applicant, Sreemutty Jugodumba Dossee, was transferred from the Court of the Deputy Collector to that of the

Subordinate Judge of the 24-Pergunnahs. The Subordinate Judge who was executing that decree made a certain order. The applicant then presented a petition to the Subordinate Judge to review the judgment of the Deputy Collector which was passed so long ago as the 16th June 1869. The Judge refused that application, considering that he had no jurisdiction to entertain; and that, if the petitioner desired to have that decree reviewed, her proper course was to apply to the Deputy Collector.

We think that the Judge was perfectly right. Under Section 3; Act III. of 1870, the decree alone was transferred, that is, transferred for the purpose of execution. If there had been any doubt as to the transfer of the suit by the transfer of the decree, that doubt would have been set at rest by the 2nd and 5th Sections of Act III. of 1870, which show clearly that any application in the suit as to a matter prior to, or which might affect, a decree must be made, not to the Court to which the decree was transferred, but to the Court by which the decree was made. The application is refused.

The 23rd January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Endowments (wuqf)—Execution—Attachment—Leases.

Case No. 152 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 21st September 1869, modifying a decision of the Subordinate Judge of that District, dated the 24th June 1869.

Mr. James Fegredo (Defendant), *Appellant*,

versus

Mahomed Mudessur and others (Plaintiffs), *Respondents*.

Messrs. C. Gregory and J. S. Rochfort and Baboo Taruck Nath Sein for Appellant.

Baboos Chunder Madhub Ghose and Romesh Chunder Mitter for Respondent.

Where property is endowed (made wuqf) by the proprietor, and as such devolves to his widow as trustee (Mutwallie), it cannot be sold in satisfaction of a claim against him.