

Subordinate Judge of Gya, but as an appeal to amend and limit the decree of that Court became in their opinion necessary, they think that the parties ought to pay their own costs respectively in the High Court, and they will advise Her Majesty accordingly.

The appellant will have the costs of the appeal to Her Majesty.

*Appeal allowed.*

Agent for the appellant: Mr. *T. L. Wilson.*

Agents for the respondents: Messrs. *Watkins and Lattey.*

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## APPELLATE CIVIL.

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*Before Mr. Justice Morris and Mr. Justice Prinsep.*

SHODONE MOHALDAR AND ANOTHER (DEFENDANTS) v. HALALKHORE  
MOHALDAR (PLAINTIFF).\*

1878  
Dec. 13.

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*Assignee of Debt—Devise—Title—Probate—Certificate to Collect Debts—  
Act XXVII of 1860.*

The representative of an assignee by devise of a debt, cannot sue to recover the debt without having either taken out probate of the will of the testator, or having obtained a certificate under Act XXVII of 1860 to realize the debts belonging to his estate.

The facts of this case appear sufficiently from the judgment.

Baboo *Saroda Prosonno Roy* for the appellants.

Baboo *Hurry Mohun Chuckerbutty* for the respondent.

MORRIS, J. (PRINSEP, J., concurring).—This special appeal raises an important question as to the right of the representa-

\* Appeal from Appellate Decree, No. 760 of 1878, against the decree of L. B. B. King, Esq., Subordinate Judge of Zilla Dinagepore, dated the 9th of March 1878, reversing the decree of Baboo Uma Churn Dutt, Munsif of Maldah, dated the 21st of September 1877.

1878  
 SHODONE  
 MOHALDAR  
 v.  
 HALALKHORE  
 MOHALDAR.

tive of an assignee by devise of a debt to sue to recover the debt without having first taken out probate of the will of the deceased testator or having obtained a certificate under Act XXVII of 1860 to realize the debts belonging to his estate.

The plaintiff, in virtue of a certificate under Act XL of 1858, represents his minor son, to whom he says one Bachoo Mahaldar has bequeathed certain properties by will, amongst others a certain mortgage-bond alleged to have been executed by the defendant, and he sues to recover the money due upon this bond.

The defendant resisted the suit on various grounds, amongst others, that no probate had been taken of the will of Bachoo Mahaldar, and that without such probate or a certificate under Act XXVII of 1860, the plaintiff could not, under the terms of s. 2 of the Act, compel him to pay the debt.

The first Court dismissed the plaintiff's suit. But the Subordinate Judge on appeal gave the plaintiff a decree. He held that, as the will was the will of a Mahomedan, probate need not under the law be taken of it. Then as to the objection under s. 2, Act XXVII of 1860, he says, that the plaintiff, by holding a certificate under Act XL of 1858, is entitled to sue to recover property on behalf of his son, and that therefore he is entitled to obtain a decree in this suit; but that he cannot recover the money due under the decree without first obtaining a certificate under Act XXVII of 1860.

We think that the Subordinate Judge is wrong in giving the plaintiff a decree such as this. He cannot give a decree which in its terms authorises the recovery of a sum of money due on a debt and at the same time saddle it with the condition that it cannot be enforced until a certificate under Act XXVII of 1860 has been obtained. He overlooks the fact that no certificate could be granted until the plaintiff had proved his title to it, and this would involve the opening up of questions similar to those raised in the present suit as to the validity of the will and the status of the plaintiff's son under it.

The terms of s. 2, Act XXVII of 1860, are clear. It provides: "No debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person or any part thereof, except

on the production of a certificate to be obtained in manner hereinafter mentioned or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives and not from any reasonable doubt as to the party entitled." Here there is no ground for saying that payment of the debt is withheld from fraudulent or vexatious motives. On the contrary, as shown by the Munsif in his judgment, reasonable doubt exists as to the validity of the bequest under the will. The debtor is placed by this suit in a false position, inasmuch as he cannot be expected to know anything of the circumstances attending the execution of the will of Bachoo Mohaldar. It is only, after notice has been served, upon the application of the plaintiff under Act XXVII of 1860, that the heirs of Bachoo Mohaldar or others interested in his estate can properly contest the title of the plaintiff to collect this debt as a debt due to the estate of the deceased which he devised to the plaintiff's son.

We set aside the judgment of the Subordinate Judge and for the reasons stated dismiss the suit. We express no opinion on the merits of the case.

The suit is dismissed with costs in all the Courts.

*Appeal allowed.*

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## APPELLATE CRIMINAL.

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*Before Mr. Justice Ainslie and Mr. Justice Broughton.*

IN THE MATTER OF THE PETITION OF DIJAIHUR DUTT AND OTHERS.\*

1879  
Jan. 21.

*Order of Discharge—Subsequent Order remanding Case to be retried—  
Criminal Procedure Code (Act X of 1872), ss. 295, 297—Procedure.*

A Magistrate has no power to remand a criminal case to a Subordinate Magistrate for retrial after the case has once been dismissed; the courses open to him are—(1) to accept a fresh complaint supported by fresh evidence which was not before the Court when the case was dismissed; or (2) if there be no

\* Criminal Motion, No. 231 of 1878, against the order of W. V. G. Taylor, Esq., Magistrate of Nuddea, dated the 8th November 1878.