

1878

HEERA LALL
MOOKHO-
PADHYA
v.
DHUNPUT
SINGH.

But we agree with the learned Advocate-General that the principle, which is expressed in s. 25, cl. 3, of the Contract Act of 1872, is not one altogether new to our Courts, and that under it this kistibandi would be valid without any consideration, so that we have no difficulty in affirming the decree of the lower Appellate Court and dismissing this special appeal with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice White.

1879

Jan'y. 21.

SURBOMUNGOLA DABEE v. MOHENDRONATH NATH & ANOTHER.

Hindu Will—Probate—Renunciation by Executor—Proof of Execution in Court—Administration Accounts.

A Hindu testator empowered his executor to lay out such portion of his estate as the executor might think fit towards charitable purposes, and did not dispose of the residue of the estate. The executor renounced, and no probate of the will or letters of administration with the will annexed was granted. In a suit by the testator's sole heiress for construction of the will and for administration, the Court allowed the execution of the will to be proved in Court, declared that it was void for uncertainty, and directed the usual administration accounts to be taken.

NUNDOLALL NATH, by his will dated the 21st day of June 1877, after directing his executor to get in his estate, directed him "to lay out and expend such portion thereof as my said executor may in his discretion think necessary and proper in and towards the construction and erection of a pucca bathing-ghaut at a suitable place in the river Hooghly, to be surmounted by a chadney, and two temples for Seva, for whose daily worship a monthly allowance will be made by my said executor, the amount whereof shall be in his absolute discretion, and I will and direct that my said executor shall hold the rest and residue of my said property, and shall invest the accumulations thereof to the best advantage.' The testator died on the 21st day of June 1877, leaving the plaintiff his sole daughter and heiress. The executor renounced probate, and the present suit was instituted by the plaintiff against

the brother and mother of the testator, alleging that they had possessed themselves of his property and were committing acts of waste. The plaint prayed that the will might be construed; that it might be declared that the plaintiff was entitled to the residue of the testator's estate; and for administration.

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 SURBO-
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 v.
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The defendants filed a joint written statement denying that they had possessed themselves of the testator's property or had committed waste, and stating that no probate of the will or letters of administration of the testator's estate with the will annexed had been granted.

Mr. *Trevelyan* (with him Mr. *Phillips*) for the plaintiff.

Mr. *Agnew* (Mr. *Bonnerjee* and Mr. *Sale* with him) for the defendants.

Mr. *Trevelyan* contended that the will was void for uncertainty.

Mr. *Agnew*—Where a discretion is left to trustees, which would empower them to apply the whole of the gift either to charitable or other indefinite purposes, the whole gift is void, as it does not appear that the chief object was charity, and, on the other hand, the other object is void for uncertainty—*Theobald on Wills*, 186; and, therefore, such a will as this would be void. But this suit ought to be dismissed. There is no will before the Court, as no probate or letters of administration with the will annexed has been granted, and since the passing of the Succession Act, no persons who may be interested under a will (devisees or others to whom property is bequeathed), can make any title or attempt to enforce their right to it unless probate of the will has first been obtained—*Behary Lall Sandyal v. Juggo Mohun Gossain* (1). The defendants are not executors *de son tort*, and are not responsible. They cannot be made to account. The testator's estate cannot be administered, as there is no administrator. [WHITE, J.—In England, no doubt, such a plaint as this would be demurrable.]

(1) *Ante*, 1.

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WHITE, J. (allowed evidence of the execution of the will to be given in Court, and made the following decree):—Declare that the trust for the erection of a bathing-ghaut and temples is void for uncertainty; that the residue of the testator's property is undisposed of; and that the plaintiff, as sole heiress of the testator, is, as such, entitled to the whole of his property after payment of his debts. Usual administration accounts. The Court Receiver to take possession of the testator's property, to convert such as does not consist of money or Government securities into money, and invest the whole in Government securities. Power to dispose of the property by private contract or public sale. Costs of all parties up to decree to be paid out of the estate on scale No. 2. Reserve further directions.

Attorney for the plaintiff: Baboo *Moralby Dhar Sen.*

Attorney for the defendants: Baboo *Gunnesh Chunder Chunder.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1878
June 19.

SHARAT CHUNDER BURMON AND OTHERS (DEFENDANTS) v. HUR-
GOBINDO BURMON AND OTHERS (PLAINTIFFS).*

Co-sharers of Undivided Estate—Assignee of Co-sharer, Rights of—Partition under Regulation XIX of 1814—Jurisdiction.

The plaintiffs and defendants were owners of an undivided estate. Besides their share as part-owners, the plaintiffs held some of the estate as tenants and some as purchasers from some of their co-sharers in the estate. The whole estate was partitioned under Reg. XIX of 1814, and on such partition the lands which the plaintiffs held as tenants and as purchasers were allotted to co-sharers other than those under whom the plaintiffs held or from

* Special Appeal, No. 214 of 1877, against the decree of Baboo Nobin Chunder Ghose, Second Subordinate Judge of Zilla Mymensingh, dated the 16th of November 1876, reversing the decree of Baboo Mohendro Nath Roy, Munsif of Chowkie Bajitpore, dated the 20th of January 1876.