

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878
July 4.

PROSUNNO CHUNDER BHUTTACHARJEE (DEFENDANT)
v. KRISTO CHYTUNNO PAL (PLAINTIFF).*

Estate of deceased Hindu—Debt—Representative—Creditor's Decree—Probate granted subsequent to Decree—Creditor's Suit against Executor to satisfy the Decree out of the property of Deceased.

The person taking possession of the estate of a deceased Hindu (who has left a will, of which, however no probate has been granted), must, in the present state of the law, be treated for some purposes as his representative, until some other claimant comes forward.

A judgment obtained against such a person, even if it cannot be executed against the estate in the hands of an executor, when he has taken out probate, is at any rate sufficient to enable a plaintiff to bring a suit against the executor in order to have the decree satisfied.

THE plaintiff, in the year 1871, lent to one Prankristo Chuckerbutty the sum of Rs. 32, on a bond, and after the death of Prankristo, which took place in 1872, brought a suit to recover the sum lent from the person in possession of the property left by the deceased,—namely against one Bibuty Blusun Dayi, who had during the lifetime of Prankristo, been living with him as his wife, and after his death had performed his funeral ceremonies, remaining in possession and living on his property for a short time after his decease, after which she removed to the house of the defendant, her brother. The plaintiff obtained a decree *ex parte* against Bibuty, whom he sued as the widow of Prankristo, and taking out execution, attached the property which formerly belonged to Prankristo.

The defendant, Prosunno Chunder Bhattacharjee, the brother of Bibuty, objected to the attachment, and put in a claim to the property under s. 246 of Act VIII of 1859, stating that the property under attachment had been left to him under a will of Prankristo, bearing date 1st October 1872, for the maintenance

* Special Appeal, No. 117 of 1877, against the decree of Baboo Amrito Lall Chatterjee, Subordinate Judge of Zilla Moorshedabad, dated the 31st of August 1876, affirming the decree of Baboo Gopal Chunder Bose, Second Munsif of Berhampore, dated the 11th of February 1876.

of Bibuty and the performance of other religious ceremonies. It appeared that he had taken out probate of this will subsequent to the *ex parte* decree against Bibuty, but prior to the date of his claim, and that as Bibuty was living with him at the time, he must have been fully aware of the decree obtained against Bibuty. The Munsif of Hurharpara, on the 12th August 1874, admitted the defendant's objections, and released the property from attachment.

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Thereupon the plaintiff, on the 9th of August 1875, instituted the present suit in the Court of the Munsif of Berhampore to set aside the order passed by the Munsif of Hurharpara, and to have it declared that the property of Prankristo in the hands of Prosunno Chunder was liable to satisfy the decree which he had obtained against Bibuty as the representative of the deceased. The defendant contended that he was not bound by the decree passed against Bibuty.

The Munsif found that the defendant was liable to satisfy the decree from the assets of Prankristo's estate which had come to his hands, and set aside the order of the Munsif of Hurharpara, dated 15th August 1874, releasing the property from attachment.

The defendant appealed to the Subordinate Judge of Moorshe-
 dabad, but his appeal was dismissed and the decision of the
 Munsif affirmed. The defendant thereupon appealed to the
 High Court.

Baboo *Georoodass Banerjee* for the appellant.

Baboo *Omeshkally Mookerjee* for the respondent.

The judgment of the Court was delivered by

MARKBY, J. (PRINSEP, J., concurring).—In the year 1872 one Prankristo Chuckerbutty died leaving no child or near relation. Prior to his death he had been living with one Bibuty Bhusun Dayi as his wife, and at his death this woman managed the ceremonies of his funeral, no other relative having then come forward, and she continued to live in Prankristo's house and took possession of his property. About a year before his death, Prankristo had obtained a loan from the pre-

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sent plaintiff for a small amount. After Prankristo's death, the plaintiff sued Bibuty as representative of Prankristo, describing her as his widow, for the amount of the loan. She did not defend the suit, and the plaintiff obtained a decree for Rs. 71-3-9.

When, however, the plaintiff went to execute his decree against the property of Prankristo, he found that it had all been transferred to the possession of the present defendant, Prosunno Chunder Bhuttacharjee, the brother of Bibuty, with whom she had gone to reside. Prosunno Chunder was a distant relative of Prankristo, but he made no claim to the property on that account. He claimed under a will, by which he alleged that Prankristo had made him devisee of his whole property for the maintenance of Bibuty and the performance of certain religious ceremonies, and subject thereto for his own benefit.

The value of the estate is not mentioned, but it is very small. There were some other debts due by the estate.

Prosunno Chunder Bhuttacharjee, after the plaintiff had got his decree against Bibuty, obtained probate of the will, and then applied that the property which the plaintiff had attached in execution of his decree might be released from attachment, which application was granted.

The plaintiff then brought this suit to have it declared that the property of Prankristo in the hands of Prosunno Chunder was liable to satisfy the decree which he obtained against Bibuty as representative of the deceased.

The Courts below have found upon evidence that the debt was really due by Prosunno Chunder; that the plaintiff brought his suit against Bibuty in good faith, believing her to be the true representative of Prankristo; and that Prosunno Chunder, though he was aware of these proceedings, and knew what mistake the plaintiff was making, purposely abstained from coming forward or saying anything about the will. It also appears that Bibuty was not the wife of Prankristo, but the widow of a relation living under his protection. Both Courts have declared the property in the hands of the defendant Prosunno Chunder, belonging to the estate of Prankristo, to be liable to be taken in execution of the plaintiff's decree. The defendant Prosunno Chunder has appealed.

There is no doubt that it will be a grievous hardship upon the plaintiff if he fails in this suit. If he cannot enforce the decree which he obtained against Bibuty, he will lose the debt which is justly due to him; for the cause of action on the original bond has been barred long ago, and yet the plaintiff has been diligently pursuing his remedy against the person who, he had every reason to believe, was the true representative of the deceased.

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The question is really this—are the creditors of a deceased person liable to have their claims defeated by the trick of keeping secret the existence of a will until their claims are barred by limitation?

If this had been the estate of a European British subject, there would have been no difficulty. Under s. 206 of the Succession Act, the plaintiff as a creditor might have applied for letters of administration. Then, whether the party in possession of the will had produced it or not, the administration would have gone on, and the creditors would not have lost their remedy. But s. 206 of the Succession Act does not apply to Hindus.

The executor does not represent the deceased by virtue of the will until he has obtained probate. Who then represents the deceased who has left a will from his death until probate has been obtained? Surely some one must do so, or the law would not have provided that the Statute of Limitations should run between the death and the grant of probate as it undoubtedly does.

The decisions of the Courts in India have been liberal in recognizing the acts of the *de facto* manager of a deceased's estate as valid. If Bibuty had actually paid the debt of the plaintiff, or if the plaintiff had actually seized and sold the property of the deceased whilst in her possession, and had received payment out of the proceeds, I do not think the executor could have recovered back either the money paid to the plaintiff or the property sold in execution (see the cases set out in my judgment in the case of *Assamathem Nessa Bibee v. Roy Lutchmeput Singh* (1).

Upon the whole, I think that, until some other claimant comes forward, the party who takes possession of the estate of a deceas-

(1) *Ante*, p. 142, see p. 156; S. C., 2 C. L. R., 223.

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ed Hindu must, in the present state of the law, be treated for some purposes as his representative, and that a judgment obtained against such a representative is not a mere nullity. Even if it cannot be executed against the estate in the hands of the executor when he has taken out probate, it is at any rate sufficient to enable the plaintiff to bring a suit against the executor in order to have the decree satisfied.

I give this opinion with some hesitation as the subject is one which in its general bearings has not been much considered. But, on the whole, I think that this view of the matter, whilst it meets the justice of the case, is in accordance with decided cases.

I think, therefore, that the decree of the Munsif was right, and should be affirmed, and that this appeal should be dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

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June 27 and
July 28.

RASHI BEHARY BUNDOPADHYA (DEFENDANT) v. PEARY MOHUN
MOOKERJEE (PLAINTIFF).*

*Landlord and Tenant—Rent Suit—Liability of Tenant—Rent due by former
Tenant - Liability of the Tenure.*

A decree for rent obtained by a landlord against his registered tenant renders the tenure comprised in the decree liable for sale, although such tenure may have passed into other hands than those of the judgment-debtor. The landlord's remedy is, however, in such case, strictly confined to the sale of such tenure under his decree. He cannot make a tenant personally liable for rent which accrued due before such tenant became the owner of the tenure.

The remedies which are provided by the Rent Law for enforcing the payment of rent by sale of the tenure or by distress are remedies *in rem*. The personal liability of one tenant cannot be transferred to another.

IN this case the plaintiff, who was the owner of a half share in a certain patni talook, sued to recover arrears of rent for

* Special Appeal, No. 1072 of 1877, against the decree of H. T. Prinsep, Esq., Judge of Zilla Hooghly, dated the 1st of February 1877, affirming the decree of Baboo Gobind Chunder Ghose, second Munsif of Serampore, dated the 31st of October 1876.