1895

SURRUT COOMARI DASSEE v. RADHA MOHUN ROY.

it ought to be so made by clear statutory enactment rather than by the adoption of a construction which would be at variance with the existing rule regulating the practice of the Court. I think, therefore, the Judges of the Small Cause Court have the power to hear the application for a new trial. That is the only point that I decide.

The costs of the present application will abide the result of the application for a new trial.

Attorney for the plaintiffs in the claim suit: Babu *Kedar Nath Mitter*.

Attorney for Radha Mohun Roy the plaintiff in the original suit: Mr. *W. Swinhoe*.

C. E. G.

PRIVY COUNCIL.

P. C.* 1895 *February* 20. *March* 30.

THE ADMINISTRATOR-GENERAL OF BENGAL (DEFENDANT) *v.* PREMLAL MULLICK (PLAINTIFF) AND OTHERS.

[On appeal from the High Court at Calcutta.]

Administrator-General's Act (II of 1874), section 31—Transfer by Hindu executor to Administrator-General—Construction of Statutes.

The right of executors to devolve the property of their testator, with all powers and duties relating to its administration, upon the Administrator-General, conferred by section 31 of Act II of 1874, is not confined to any particular class of executors or of estates. The right is given to any executor *in whom estate* of the deceased has been vested by virtue of the probate upon the one condition that the Administrator-General shall consent.

It is not required that in a consolidating statute each enactment, when traced to its source, must be construed according to the state of things which existed at a prior time when it first became law; the object being that the statutory law, bearing on the subject, should be collected and made applicable to the existing circumstances; nor can a positive enactment be annulled by indications of intention, at a prior time, gathered from previous legislation on the matter.

Proceedings of the Legislature in passing a statute are excluded from consideration on the judicial construction of Indian, as well as of British, statutes.

* *Present*: LORDS WATSON, HOBHOUSE, MACNAGHTEN, and SHAND, and SIR R. COUCH.

1895

ADMINISTRATOR-GENERAL OF BENGAL v. PREMLAL MULLICK.

Executors having obtained probate of the will, and possession of the estate, of a Hindu testator, executed a deed, purporting to be in terms of section 31, Act II of 1874, transferring the property, vested in them by the probate, to the Administrator-General.

Held, reversing the judgment of a majority of the Appellate Court, and affirming that of the Chief Justice, that this transfer was valid under that section.

APPEAL from a decree (1) (16th May 1894) of an Appellate Bench of the High Court, affirming a decree (21st December 1893) made in the exercise of the Ordinary Original Civil Jurisdiction.

This suit was brought on the 6th September 1893 by the minor adopted son of Babu Nundo Lal Mullick, a Hindu, who died in 1891, having made his will, dated the 5th August 1889. The plaintiff, through the widow as his guardian, claimed that the estate of the deceased should be administered under the direction of the Court, that a Receiver should be appointed, and that an injunction should be granted restraining the Administrator-General from taking possession of the estate, the executors having transferred to that officer, on the 14th August 1893, all estates, effects and interest vested in them in virtue of the probate obtained by them on the 17th March 1891. The defendants were the Administrator-General, who alone now appealed, and the two executors, Sambhunath Roy and Dwarkanath Bunjo. The two latter, who were joined as respondents, did not appear on this appeal.

No written answer was filed. On the 22nd September 1893 application was made by the plaintiff for an injunction to restrain the present appellant from disposing of part of the estate which had been advertised for sale, and for the appointment of a Receiver. These were granted on the 21st December 1893 by SALE, J., sitting in exercise of the Original Jurisdiction. He was of opinion that the transfer by the executors was not authorized by section 31 of the Administrator-General's Act, II of 1874. His reasons are given at length in his judgment reported in I. L. R., 21 Calc., 732. Having held the transfer to be invalid, he appointed a Receiver of the property belonging to the estate of the deceased.

An appeal was preferred by the Administrator-General, and

(1) *The Administrator-General* v. *Premlal Mullick*, I. L. R., 21 Calc., 732.

1895

ADMINISTRATOR-GENERAL OF BENGAL v. PREMLAL MULLICK.

heard on the 23rd, and three subsequent days of January 1894 by a Bench (PETHERAM, C.J., and PRINSEP and TREVELYAN, JJ.). A majority of the Judges affirmed the decision below, but the Chief Justice differed from them, holding the transfer to have been valid under section 31, Act II of 1874. The judgments are given at length in I. L. R., 21 Calc., 732.

On the 5th April 1894, the appeal of the Administrator-General to Her Majesty in Council was declared by the High Court to have been admitted.

Sir *R. Webster*, *Q.C.*, and Mr. *J. D. Mayne*, for the appellant, argued that the judgment of the Chief Justice was right, and that the decree following the decision of the majority should be reversed. The opinion that the Legislature had not authorized the administration of the estate of a Hindu testator by the Administrator-General, the latter consenting to take a transfer from the executors, was not well founded. It was not necessary to the appellant's case to maintain that before 1870 the executors of a Hindu's estate might have made a transfer under section 30 of Act XXIV of 1867. Whether before 1870 he could, or could not, have made such a transfer, he had another power conferred upon him after the change in the law, whereby he came to answer the description of an executor deriving title in virtue of the probate—a position which he occupied when by the Hindu Wills Act, XXI of 1870, section 179 of the Indian Succession Act, of 1865, was, with other sections of that Act, extended to the wills of Hindus. The effect of that section, with section 187, also extended, was that to establish his right the executor must have probate, and that in him when he had obtained probate the property of the deceased vested. There was nothing in section 5 of the Hindu Wills Act of 1870 which declared that nothing in that Act should affect the rights, duties, and privileges of the Administrator-General, nor was there anything in section 66 of the Act, II of 1874, or in any of the Acts relating to his office, which could prevent full effect being given to section 31 of Act II of 1874. The contention, for the appellant, was that section 5 of the Hindu Wills Act of 1870 could not control the later enactment, II of 1874, even if it operated upon section 30 of the prior Act, XXIV of 1867, though it was by no means admitted that it did counter-

act section 30 of the Act last mentioned. The main argument was that, as the result of the extension of section 179 of the Indian Succession Act of 1865 to the wills of Hindus, and the unqualified re-enactment in 1874 of the power of executors to transfer to the Administrator-General, the latter was placed in the same position in regard to his capacity to take transfers from the executors of Hindu testators in which he was regarding his right to take a transfer from the executors of Anglo-Indians. Section 31 of Act II of 1874 was wide in its terms, and apparently was applicable to all executors who derived title from the probate. If intention was to be sought in a case of plain construction, the Legislature must have been aware that, since 1870, the Hindu executor had been the legal representative of the testator for all purposes, the property vesting in him as such, and that no right as a Hindu executor could be established by him unless he had obtained probate. That the Hindu executor, before 1870, derived no title from the probate, and was not until that year within the meaning of section 30 of the Act, XXIV of 1867 (if that were so), afforded no reason for reading section 31 of Act II of 1874 by the light only of the previous law relating to the Hindu executor, ignoring the legislation that had taken place and the change effected. It had been supposed below that section 5 of the Act of 1870 prevented the operation of section 31 of Act II of 1874, but that again was to make the law of the past affect and negative that of the present, though the latter had been enacted in positive terms. Hindu testators had been brought by the Legislation of 1870 within the same purview of the law as regarded the powers of executors to transfer to the Administrator-General, as the executors of those who belonged to the European community; and that officer had been placed, as regarded his capacity to take a transfer, in the same position in reference to the executors of Hindu testators that he already occupied with regard to the executors of Europeans in India. There was a fallacy in the argument that because Act II of 1874 was a consolidating Act, it must be taken to have been enacted with reference only to the state of things to which the provisions of earlier Acts related.

Mr. *H. H. Cozens Hardy, Q.C.*, Mr. *R. B. Finlay, Q.C.*,

1895

ADMINISTRATOR-GENERAL OF BENGAL v. PREMLAL MULLICK.

and Mr. *J. H. A. Branson*, for the respondent, Premlal Mullick, contended that section 31 of Act II of 1874 did not apply to Hindu executors of a Hindu testator, and that the executors of Nundo Lal Mullick had no power to transfer the estate of their testator to the appellant, who also was not authorized by law to take such a transfer. Until the Hindu Wills Act of 1870 was passed the estate of the testator did not vest in virtue of the probate. He derived title from the gift which the will made, taking nothing from any grant of the Court—*Sharo Bibi* v. *Baldeo Das* (1) and other cases cited in the judgments below on this point. Although that his testator's property vested in virtue of the probate resulted to the Hindu executor from the legislation of 1870, it did not follow that the *verbatim* re-enactment of section 30 of the Administrator-General's Act of 1867, now section 31 of the Act of 1874, could be construed as having, by reason of legislation intermediate between these two Acts, the effect of giving to Hindu executors the power to free themselves from their office by transferring to the Administrator-General. Nor did it follow that the latter could exercise a power that had been withheld from him in previous Acts. The re-enactment in 1874 of the section in identical words from Act XXIV of 1867 required that the law, as it stood at the date of the earlier enactment, should be referred to. In construing a consolidating Act, which merely re-enacted sections in prior Acts, an incidental effect could not be attributed to it of altering the law on a matter which would properly be the subject of express declaration, if alteration were intended by the Legislature. It ought not to be concluded that powers were added in the consolidating Act which were not within the contemplation of the prior Acts. Reference was made to *Mitchell* v. *Simpson* (2) (where the Sheriff's Act of 1887 was construed not to include a new state of things, but to have reference to the former law of attachment for debt). The judgments below had rightly given effect, in construing section 31 of Act II of 1874, to the marked distinction in the position of the Hindu executor who obtained probate under the circumstances existing at the time when the Acts VII

(1) 1 B. L. R., O. C., 24. (2) L. R., 23 Q. B. D., 373.

of 1849, VIII of 1855, XXIV of 1867, afterwards consolidated by II of 1874, were passed ; also the state of the law under the Indian Succession Act of 1865, section 331. Section 17 of Act II of 1874 showed that section 15 did not empower the Administrator-General to apply directly for the administration of the estate of a deceased Hindu within the local limits of the original jurisdiction, unless he could satisfy the Court that danger was to be apprehended to the estate unless letters should be granted. It could not be urged consistently with this that the Administrator-General could get a transfer of the estate by arrangement with an executor of it. Yet this incidental effect that the Administrator-General could arrange with an executor to take a transfer was, according to the appellant's case, to be attributed to the same Act. These restrictions upon the action of that officer were inconsistent with the effect that was sought to be given to section 31. Again, the trusts of a Hindu will might impose duties, of maintaining and controlling religious establishments, that could not well be carried out by him. The gist of the legislation on this subject down to 1870 was that the Administrator-General should not administer the estates of Hindus. In 1874 the power to apply under exceptional circumstances and with a limit of locality was given. All this pointed to the construction of section 31 placed upon it by the majority of the Court below, while the opposite construction would authorize the effecting in a circuitous manner what could not be done under orders obtained, in a direct manner, from the Court.

Sir *R. Webster*, *Q.C.*, replied, relying on the argument that, as the result of the extension of section 179 of the Indian Succession Act, 1865, to the executor of a Hindu testator, effected by the Hindu Wills Act 1870, another power was given to that executor ; and that the positive language of section 31 of Act II of 1874 should receive effect.

Afterwards on March 30th their Lordships' judgment was delivered by

LORD WATSON.—Nundo Lal Mullick, a wealthy Hindu resident in Calcutta, died in February 1891, leaving a last will by which he disposed of his whole estate, real and personal, and appointed Dwarkanath Bunjo and Sambhunath Roy to be his

1895

ADMINISTRATOR-GENERAL OF BENGAL v. PREMLAL MULLICK.

executors and trustees. These gentlemen accepted the office thus conferred on them; and in March 1891 they obtained a grant of probate from the High Court at Calcutta, and proceeded to administer the trusts of the will. On the 14th August 1893 they executed a deed, by which they transferred the whole estates, effects and interests vested in them by virtue of the said probate to the appellant, the Administrator-General of Bengal, professedly in terms of section 31 of the Administrator-General's Act 1874 (Act No. II of 1874).

The clause in question enacts that "any private executor or administrator may, with the previous consent of the Administrator-General of the Presidency in which the property comprised in the probate or letters of administration is situate, by an instrument in writing under his hand, bearing a stamp of ten rupees and notified in the local Gazette, transfer all estates, effects and interests vested in him by virtue of such probate or letters to the Administrator-General by his name of office."

The same section provides that, upon the instrument being duly executed and notified, the transferor shall be exempt from all liability for any act or omission after its date; and that the Administrator-General for the time being shall have the same rights and shall be subject to the same liabilities, which he would have had, and to which he would have been subject, if the probate or letters of administration had been granted to him by his name of office at the date of the transfer.

It is not matter of dispute that, if the executors and trustees of the late Nundo Lal Mullick are within the class of persons empowered by section 31 to devolve their administrative functions upon the Administrator-General, the transfer was properly executed and notified, and must receive effect. The only question raised and discussed in the Courts below, and in the course of this appeal, has been whether the transferors, as the executors and trustees of a deceased Hindu, are private executors within the meaning of the clause.

The present suit was brought in September 1893 before the High Court, by Premlal Mullick, the adopted son and heir of the testator (hereinafter referred to as the respondent), by his

adoptive mother and next friend, Sreemutty Tregoona Sundery Dassee. The plaint contains a variety of conclusions, the first three of these being (1) for the administration of the testator's estate under the direction of the Court; (2) for the appointment of a Receiver pending the final determination of the suit; and (3) for an injunction restraining the Administrator-General from taking possession of or interfering with the estate. The testamentary executors and trustees of the deceased and the Administrator-General were called as defendants.

Mr. Justice Sale, who tried the suit, found by a decree, dated the 21st December 1893, that the transfer purporting to be made by the executors and trustees to the defendant, the Administrator-General, on the 14th August 1893, was invalid; and he appointed a Receiver of the moveable property, and of the rents, issues and profits of the immoveable property belonging to the estate of the deceased. On appeal, his decision was affirmed by the majority of the Court, consisting of Prinsep and Trevelyan, JJ., Petheram, C.J., dissenting. The present appeal has been been brought by the Administrator-General against these judgments. The executors and trustees, although called as respondents, have made no appearance.

Their Lordships have been unable to adopt the construction of section 31 of the Act of 1874, which commended itself to the majority of the learned Judges. The right view of the Statute was, in their opinion, expressed by the Chief Justice.

The clause in question is a re-enactment, without verbal alteration, of section 30 of the Administrator-General's Act, 1867 (Act No. XXIV of 1867). At the time when that Act passed, the executor of a Hindu estate could not have availed himself of the provisions of section 30. His powers and functions were not those of an English executor, but rather those of a manager; he did not require probate, and probate, if obtained, would not have vested him with any title to the estate, either real or personal, which he administered. Accordingly he was not, within the meaning of section 30, a private executor or administrator who could transfer to the Administrator-General any estates "vested in him by virtue of such probate or letters."

1895

ADMINISTRATOR-GENERAL OF BENGAL v. PREMLAL MULLICK.

A very important change was made in the law by the Hindu Wills Act, 1870 (Act No. XXI of 1870), which, *inter alia*, enacted that certain portions of the Indian Succession Act of 1865 (Act No. X of 1865) should apply to all wills and codicils made by any Hindu on or after the 1st day of September 1870. Amongst the clauses thus applied were sections 179 to 189, both inclusive, which make provision for the granting of probate and letters of administration. It is sufficient for the purposes of this case to refer to two of these clauses. Section 181 is to the effect that probate can be granted only to an executor appointed by the will. Section 179 provides that the executor or legal administrator, as the case may be, of a deceased person, shall be his legal representative for all purposes, and that all the property of the deceased person shall vest in him as such.

It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased. The will of the late Nundo Lal Mullick was executed in August 1889, and his executors, therefore, on their obtaining probate, became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease.

The right to devolve the property of a deceased testator, with all powers and duties relating to its management and administration, which is conferred by section 31 of the Act of 1874, is not confined to any particular class of executors or of estates. It is given, in broad and comprehensive terms, to any and every testamentary executor, in whom the estates of the deceased testator have been legally vested by virtue of his probate. The clause only attaches one condition to the exercise of the executor's right, which is, that no transfer shall be made to the Administrator-General without his consent. It is left to the discretion of that official to determine whether the property falling under the will, and the trusts which it creates, are of such a character that he ought to undertake the duty of administration.

In these circumstances, it appears to their Lordships that the

executors and trustees of Nundo Lal Mullick were, according to the very letter of the enactment, persons having power to transfer the estates vested in them, in that capacity, to the Administrator-General, under the provisions of section 31. Indeed it was hardly disputed, in the argument for the respondent, which, to a great extent, consisted in a repetition of the reasons assigned for their judgments by the Courts below, that, if section 31 be taken *per se*, no other result could follow. But it was maintained that, although the language of the clause is framed in such general terms as to include every executor who has obtained a grant of probate under the 179th and following sections of the Indian Succession Act of 1865, it must nevertheless be held to exclude the executor of a Hindu will, because it appears *aliunde* that the Legislature so intended. It is conceivable that the Legislature, whilst enacting one clause in plain terms, might introduce into the same Statute other enactments which to some extent qualify or neutralise its effect. But a positive enactment in a Statute of 1874 cannot be qualified or neutralized by indications of intention gathered from previous legislation upon the same subject. And there is no legislation, subsequent to that of 1874, with respect to the power of an executor to make over his office with all its rights and liabilities to the Administrator-General.

One of the arguments, if not the main argument, urged for the respondent was, that section 30 of the Administrator-General's Act of 1867 at no time conferred any right of transfer upon the executor of a deceased Hindu; and that section 31 of the Act of 1874, which was a consolidating Statute, merely re-enacted the provisions of section 30, and was neither intended nor could be held to have a wider effect. The argument rests upon two assumptions which do not appear to their Lordships to be well founded. Section 30, at the time when it became law, had no application to a Hindu executor, who, as the law then stood, had no estate vested in him which he could transfer. But a Hindu executor who, prior to the Act of 1874, obtained probate and had the estate vested in him, by virtue of the Hindu Wills' Act of 1870, was in a very different position. He answered the description given in section 30 of the persons who were entitled to transfer; and, apart from a clause in the Act of 1870 which they

1895

ADMINISTRATOR-GENERAL OF BENGAL v. PREMLAL MULLICK.

will shortly notice, their Lordships see no reason why he should have been deprived of the benefit of its provisions. Assuming, however, the argument to be so far well founded, it does not follow that the Hindu executor is not within the ambit of section 31 of the Act of 1874. The respondent maintained this singular proposition, that, in dealing with a consolidating Statute, each enactment must be traced to its original source, and when that is discovered must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed.

The respondent relied upon the terms of section 5 of the Hindu Wills Act of 1870, which provides that "nothing contained in this Act shall affect the rights, duties and privileges of the Administrators-General of Bengal, Madras and Bombay, respectively." It is by no means clear that a reservation in these terms was meant to have the effect of precluding the Administrator-General from accepting, if he thought proper, the devolution upon him of the administration of a Hindu succession, under section 30 of the Act of 1867. But it does not appear to their Lordships to admit of doubt that the reservation cannot control the powers given to the Administrator-General by the Act of 1874.

Another argument for the respondent was based upon the enactments of sections 16 and 17 of the Act of 1874. The first of these sections empowers the Administrator-General to apply for letters of administration to the estate of a deceased person who leaves assets exceeding the value of Rs. 1,000, either generally or with a will annexed, if no person appears to claim the right to administer within a month after the death; but Hindu estates are expressly exempted from its operation. On the other hand, section 17 empowers the Court to make an order, at the instance of [illegible], directing the Administrator-General to apply for letters of administration of the effects of any de-

ceased person, Hindus included, in cases where it is shewn, to the satisfaction of the Court, that danger is to be apprehended of the misappropriation, deterioration, or waste of the assets, unless such letters of administration are granted. These enactments do not appear to their Lordships to conflict with the provisions of section 31. Section 17 gives the Administrator-General no right, or excludes his right, to take up, at his own hand, the administration of the estate of a Hindu, who has died testate or intestate, which is not in danger; whilst, if the estate be in danger, he may be directed by the Court to do so, at his own instance, or at the instance of parties interested in the succession. It appears to their Lordships to be impossible to derive from these provisions an inference that the Legislature cannot have intended to allow the Administrator-General to become the administrator of a Hindu estate, at the request of the executors, at all events an inference so strong as to override the plain enactments of section 31.

It was also maintained that the Legislature cannot have intended that, in any circumstances, the Administrator-General should have the duty imposed upon him of carrying out the trusts of a Hindu will, which might probably or possibly involve the execution of religious trusts, with which a public official ought to have no concern. The answer to that argument is twofold. In the first place, the administrator may have that duty imposed upon him by the Court, in cases where there is no existing administration, and the estate is in danger of being dilapidated. In the second place, section 31 does not impose upon him the duty of administering any estate, whether Hindu or not, in any case where he is not requested to do so by the acting executors, and where the purposes of the will are in his judgment such as ought not to be executed by an official in his position.

Their Lordships observe that the two learned Judges who constituted the majority in the Appellate Court, although they do not base their judgments upon them, refer to the proceedings of the Legislature which resulted in the passing of the Act of 1874 as legitimate aids to the construction of section 31. Their Lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations

1895

ADMINISTRATOR-GENERAL OF BENGAL v. PREMLAL MULLICK.

when the clauses of an Act of the British Legislature are under construction, are equally cogent in the case of an Indian Statute.

Their Lordships will humbly advise Her Majesty to reverse the decrees appealed from, to dismiss the suit, and to direct that the costs of both parties in the Courts below, as between solicitor and client, shall be paid out of the estate of the deceased. The costs of this appeal must be borne by the estate in like manner.

Appeal allowed.

Solicitor for the appellant: Mr. *J. F. Watkins.*

Solicitors for the respondent, Premlal Mullick: Messrs. *T. L. Wilson & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Stevens.

GOPI NATH BAGDI AND OTHERS (PLAINTIFFS) *v.* ISHUR CHUNDRA BAGDI AND OTHERS (DEFENDANTS.) *

1895
May 28.

Co-sharers—Bengal Tenancy Act (VIII of 1885), sections 171, 174—Payment of decretal amount by one co-sharer to set aside sale, Effect of—Charge.

Where the plaintiffs and defendants were co-tenants of certain *jotes* which were sold by auction in execution of a decree for rent, and the plaintiffs, by paying the decretal amount and auction-purchaser's fees under section 174, Bengal Tenancy Act, had the sale set aside,

Held, that the plaintiffs did not by such payment acquire a charge on the shares of their defaulting co-tenants. *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) followed.

THE plaintiffs and defendants were co-tenants in two *jotes* held under their talukdar, Rajani Kanta Dutta, who obtained a decree against them for rent, in execution of which the defaulting *jotes* were sold by auction. The plaintiffs, under the provisions of section 174 of the Bengal Tenancy Act, paid into Court the sum of Rs. 170-9½ in liquidation of the decretal amount, and the sum of

* Appeal from Appellate Decree No. 1192 of 1894, against the decree of Babu Rajendro Kumar Bose, Subordinate Judge of Burdwan, dated the 23rd of April 1894, affirming the decree of Babu Loke Nath Nundy, Munsif, first Court, Burdwan, dated the 15th of June 1893.

(1) I. L. R., 14 Calc., 809.