

## APPELLATE CIVIL.

*Before Mr. Justice Beverley and Mr. Justice Ameer Ali.*

**KHETTRAMONI DASÍ (PLAINTIFF) v. SHYAMA CHURN KUNDU  
AND OTHERS (DEFENDANTS).\***

1894.  
Jan 17.

*Appeal—Order refusing to make person party defendant to an application for probate—Probate and Administration Act (V of 1881), ss. 53 and 86—Exercise of power of High Court under s. 622 of the Civil Procedure Code, 1882, where there is no appeal.*

Section 86, read with section 53 of the Probate and Administration Act (V of 1881), only allows an appeal to the High Court in cases in which an appeal is allowable under the Code of Civil Procedure. No appeal therefore lies against an order refusing to make a person opposing probate a party defendant to an application for probate.

*Abirunnissa Khatoon v. Komurunnissa Khatoon (1) and Karman Bibi v. Misri Lal (2) followed.*

Where a Hindu died leaving a widow, and also a daughter (who alleged collusion between the widow and one of the executors applying for probate of an alleged will), the daughter was held to have sufficient interest to entitle her to be made a party to the application and to oppose the grant of probate; and the Judge having refused to make her a party, the Court, finding that no appeal lay from that order, thought it a proper case for the exercise of its power under s. 622 of the Civil Procedure Code, and remanded the case for trial as a contested application.

This was an application by one Syama Churn Kundu, alleging himself to be the adopted son of Madhusudan Kundu for probate of the will of his father dated 24th Assin 1299 B.S. (9th October 1892), of which he was appointed one of the executors. The application was opposed by Nistarini Dasi, and she was made a party defendant in the case, but she afterwards withdrew her opposition to probate being granted to the petitioner, Syama Churn Kundu. Subsequently Khettramoni Dasi, the daughter of the testator, on 27th February 1893, put in a petition in opposition to the application for probate, in which she alleged collusion between Nistarini and Syama Churn and applied to be made a party

\* Appeal from Order No. 74 of 1893 against the order of J. Crawford, Esq., District Judge of Hooghly, dated the 8th of March 1893.

(1) I. L. R., 13 Calc., 100.

(2) I. L. R., 2 All., 904.

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defendant in the proceedings. On this application the Judge made on 1st March 1893 the following order:—

“It appears to me that as, failing proof of the plaintiff's adoption, the estate of the deceased is fully represented by the defendant, the intervenor Khettramoni has no *locus standi*. The plaintiff strongly objects to her being made a party. In the petition there is no substantial ground for believing that there is collusion between the widow and the plaintiff. The intervenor has no present interest in the estate; administration could not be granted to her in the lifetime of the widow. I therefore refuse to make her a party to this suit.”

The case was eventually heard on 8th March, when there was not sufficient proof of the alleged adoption, and probate of the will was ordered to be granted to Syama Churn Kundu as one of the executors of the will as in an unopposed case.

From the order refusing to make her a party Khettramoni Dasi appealed to the High Court.

Babu *Hem Chandra Banerjee*, Babu *Umakali Mukerjee*, and Babu *Tarit Mohan Dass* for the appellant.

Babu *Bhowany Churn Dutt* and Babu *Boido Nath Dutt* for the respondents.

A preliminary objection was taken that no appeal lay.

The judgment of the Court (BEVERLEY and AMER ALI, JJ.) was as follows:—

In this case a preliminary objection has been taken that no appeal will lie against the order of the learned District Judge, and we are of opinion that this objection is well founded. It is contended that under section 86 of the Probate and Administration Act the order is appealable. That section runs as follows:—“Every order made by a District Judge or district delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals.” Reading that section with section 53 of the same Act we are of opinion that it only allows an appeal to this Court in cases in which an appeal is allowable under the Code of Civil Procedure. Now, this is an appeal against an order refusing to make the appellant a party defendant in the application for probate; in other words, to add her as a defendant in the case under the provisions of section 32 of the Code. It has

been ruled, however, by this Court in the case of *Abirunissa Khatoon v. Komurunissa Khatoon* (1) and by the Allahabad High Court in *Karman Bibi v. Misri Lal* (2) that under section 588, clause 2 of the Code, an appeal will not lie against an order refusing to add the name of any person as plaintiff or defendant. That being so, we are of opinion that we ought to follow the decisions referred to, and as at present advised we must hold that no appeal will lie. We intimated this opinion at the rising of the Court yesterday, and to-day the learned pleader for the appellant has put in an application under section 622 of the Code asking us to interfere on the ground that the District Judge in refusing to hear Khettramoni Dasi has acted illegally and with material irregularity. We have heard the other side in the matter of this application, and we are of opinion that under the circumstances this is a case in which we ought to interfere. The learned pleader for the opposite party has relied upon the case of *Rabbaba Khanum v. Noorjehan Begum* (3), but we are of opinion that the circumstances of that case were very different from those in the case before us. In the present case it appears that the widow of the deceased, Nistarini Dasi, in the first instance opposed the grant of the probate, but she subsequently applied to withdraw her objections, and after that the appellant and petitioner before us, Khettramoni Dasi, who is the daughter of the deceased, applied that she might be made a party in order to contest the grant of probate. On the 8th of March 1893 the District Judge made this order:—(reads order *ante* p. 540). The same day that this order was made the case was heard, and it was heard as an unopposed case.

The District Judge states in his decree that “the objection on behalf of the female defendant,” (that is, of the widow Nistarini Dasi) “having been withdrawn, the case was heard without being contested.” It appears to us that when the Judge found, on proceeding with the trial, that the widow Nistarini was not contesting the case, there was ground for supposing that there was collusion between her and the petitioner, and that he ought to have allowed the applicant Khettramoni to take her place, so to say, and to

(1) I. L. R., 13 Calc., 100.

(2) I. L. R., 2 All., 904.

(3) I. L. R., 13 Calc., 90.

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contest the grant of the probate. It has been contended that Khettramoni has no such interest in the estate of the deceased as would entitle her to be heard in these proceedings, but we think that is not the case. It is clear that if the deceased died intestate Khettramoni would have an interest in the property upon the death of the widow; and there being ground for supposing that the widow was colluding with the applicant for probate, we think that Khettramoni had a right to be heard in these proceedings, and that the case should have been treated and tried as a contentious case. We accordingly set aside the decision of the District Judge and send the case back to him in order that Khettramoni, the applicant before us, may have an opportunity of contesting the case, and that the will may be proved in solemn form. We make no order as to costs.

*Appeal allowed.*

J. V. W.

*Before Mr. Justice Ghose and Mr. Justice Rampini.*

1894  
 Jan. 31.

HURRI PERSHAD CHOWDHRY (DECREE-HOLDER) v. NASIB SINGH  
 AND OTHERS (JUDGMENT-DEBTORS).\*

*Limitation Act (XV of 1877), Schedule II, Article 179—Execution of decree—Decree for payment of money by instalments on specified dates—Default in payment of first instalment—Right of waiver of default—Payment not certified to Court—Civil Procedure Code (Act VIII of 1859), s. 206 (Art. XIV of 1882), s. 258.*

A decree dated 22nd Cheyt 1295 (18th April 1882) provided "that the defendants do pay the decretal money as per instalments given below, otherwise the plaintiff will have the power to cancel the instalments and realize the entire amount." The first instalment was made payable on 30th Cheyt 1295 (26th April 1888), and the other six instalments on the 30th of the months of Magh and Bysack in the three following years. In an application made on 9th February 1892 for execution of the decree, the decree-holder stated that only the first instalment had been paid, and asked for execution for the amount remaining due under the decree, and the judgment-debtors denied having paid any of the instalments. *Held*, that the clause in the decree

\* Appeal from appellate order No. 369 of 1892, against the order of F. W. Badoock, Esq., District Judge of Bhagalpur, dated the 30th of July, 1892, affirming the order of Babu Prayag Nath, Munsif of that district, dated the 30th of May 1892.