

though barred by limitation, is a pious duty, for the performance of which a Hindu widow may alienate her husband's property, and the same view was taken of the law by this Court in an unreported case, being appeal from the Appellate Decree No. 45 of 1890 (1), and that we think is the correct view of the law. As the Court of appeal below accepts the first Court's finding as to the existence of the debt, and as to its satisfaction out of the purchase money, we think, upon the facts found in this case, we must hold that the alienation by Umatara to the plaintiffs, conveyed to them an absolute title. That being so, the decree of the lower Appellate Court must be set aside, and the case remanded to that Court for the trial of the other questions arising in it.

The appellants will have their costs of this appeal. The other costs will abide the result.

Appeal allowed and case remanded.

C. S.

Before Mr. Justice Ghose and Mr. Justice Gordon.

HARA COOMAR SIRCAR (PETITIONER) v. DOORGAMONI
DASI (OBJECTOR).*

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Sept. 4.

Probate—Application for, and grant of, probate—Probate and Administration Act (V of 1881)—Discretion of Court as to refusal to grant probate—Executor.

Where on application for probate by a person appointed executor by the will, the genuineness of the will is not disputed, and the applicant is a person not legally incapable, the Court acting under the Probate and Administration Act (V of 1881) has no discretion to refuse probate on the ground that in its opinion the applicant is not a fit and proper person to be appointed executor.

The facts of this case are set out in the judgment of the Lower Court, which was as follows:—

“This is an application for probate of the will of one Dhan Krishna Sircar by one Hara Coomar Sircar. The opposite party is one Doorgamoni, widow and executrix of the said testator. The admitted facts are that

* Appeal from Original Decree, No. 204 of 1892, against the decree of A. E. Staley, Esq., District Judge of Backergunge, dated the 8th of July 1892.

(1) See note (2), *ante p.* 190.

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Dhan Krishna died in 1296 (1889), leaving a will under which Doorgamoni and one Jagobundhu were to be his executors, and Hara Coomar Sircar was to collect rents under them as manager of the estate; and that on the death of Jagobundhu, Hara Coomar was to become executor. Jagobundhu and Doorgamoni obtained probate. Jagobundhu died on the 14th of Aghran 1298 (29th November 1891). Now, in accordance with the will, Hara Coomar asks to be appointed executor in place of the deceased Jagobundhu. This is resisted by the executrix on the ground that until Hara Coomar renders accounts of his collections he ought not to be appointed executor. Hara Coomar denies having made any collections. The evidence produced, in my opinion, sufficiently proves that Hara Coomar has made collections. Receipts given by him to tenants amounting to nearly Rs. 160 have been proved. He admits giving them, but denies taking the money, and says he only signed for Jagobundhu, who took the money. He has not produced any evidence to support this statement. A tenant has in respect of three of the receipts stated that he paid the money to Hara Coomar himself. But the evidence which is conclusive against Hara Coomar is that of Babu Kali Coomar Bose, pleader of this Court, and Bhugwan Chunder Guha, a respectable talukdar. These state that Hara Coomar agreed to give the executrix accounts from the death of Dhan Krishna, the testator, in their presence, and admitted the collections. Under these circumstances it would, in my opinion, be inequitable to appoint Hara Coomar executor. He has made collections and denied them; undertaken to render accounts and has failed to redeem his promise. No law has been shown me which requires me to appoint him under such circumstances as executor. To appoint him as executor now would be to the detriment of the estate, and would enable him to resist the demand of the executrix for accounts and settlement. The application is accordingly dismissed with costs."

From this decision Hara Coomar Sircar appealed to the High Court, on the grounds that the Judge had erred in law in refusing probate to him in spite of his appointment as executor under the will of the testator; that the reasons assigned by the Judge for refusing probate were neither valid nor sufficient; and that the Judge had erred in holding that to appoint the petitioner "as executor would be to the detriment of the estate and would enable him to resist the demands of the executrix for accounts and settlement."

Babu Jogesh Chunder Roy for the appellant.

Babu Srinath Das and *Babu Chunder Kant Sen* for the respondent.

The arguments are sufficiently stated in the judgment of the Court (GHOSH and GORDON, JJ.), which was as follows :—

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This is an appeal from an order of the District Judge of Backergunge dismissing an application for probate of the will of one Dhan Krishna Sircar. The application was made under the following circumstances:—Dhan Krishna Sircar died on the 3rd April 1889. On the 27th March 1889 he executed a will, which was duly registered on the 29th of that month. By this will, he devised the bulk of his estate to his minor grandson Pratap Chandra Sircar, and he appointed as his executors his brother Jagobundhu Sircar and his wife Doorgamoni; and he also appointed his nephew Hara Coomar Sircar (son of a deceased brother Tarini Charan Sircar) to manage the collection business of his estate: and the last paragraph of his will runs thus :—“If before Sriman Pratap Chandra Sircar attains majority Jagobundhu dies, then Hara Coomar Sircar will be executor in his place; and in case of Doorgamoni's death the minor's mother Nistarini will be executrix in her place. Be it noted that there must be two executors in the way stated above to the *ijmali* estate till Sriman Pratap Chandra Sircar attains majority.”

After the death of Dhan Krishna, Doorgamoni and Jagobundhu applied to the District Judge for probate of his will, which was granted to them on the 25th June 1889. Jagobundhu died on the 29th November 1891, and on the 17th February 1892 the present application for probate was filed by Hara Coomar Sircar. The application is opposed by Doorgamoni, the widow of the testator and solo surviving executrix, to whom, as we have already said, probate was granted jointly with Jagobundhu on the 25th June 1889. The grounds on which she opposes the application are that, although the applicant has as manager been making collections of the rents of the estate for the years 1296 and 1297, he has omitted to submit to the executors any accounts of those collections; that he has misappropriated a large sum of money belonging to the estate, and has refused to render accounts; and that for these reasons he has caused loss to the minor and is not a fit and proper person to be appointed executor. The applicant Hara Coomar denies having made any collections. He gave his evidence and several witnesses were examined for the objector; and the learned District Judge finds

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on this evidence that Hara Coomar actually made collections from the tenants of the estate, and he undertook to render accounts and has failed to fulfil his promise, and that under these circumstances he is unfit to be appointed executor. "To appoint him," says the District Judge, "as executor now would be to the detriment of the estate, and would enable him to resist the executrix's demands for accounts and settlement." The District Judge accordingly dismissed Hara Coomar's application, and he appeals.

The District Judge's finding of fact is not challenged before us on appeal, but the learned pleader for the appellants argues that the District Judge had no discretion to refuse probate; in other words, that as the genuineness of the will is not disputed, and the petitioner is not legally incapable (*e.g.*, he is not a minor or of unsound mind), the District Judge was bound to give effect to the wishes of the testator as expressed in his will appointing the petitioner as executor on the death of Jagobundhu, and therefore to grant probate to him.

We have carefully considered this question and we think that this argument is sound. We have been referred by the learned pleaders on both sides to several sections of the Probate and Administration Act, V of 1881, as bearing upon this particular matter, but we are unable to find any provision in the Act which gives the District Judge any discretion to refuse an application for probate by an executor named in the will on the ground that, in the opinion of the Judge, he is not a fit and proper person to be entrusted with that office. It is noteworthy that, under the Act, probate can only be revoked for "just cause" (see section 50), and that unfitness or incompetency of an executor does not fall within the meaning of "just cause" as explained in that section; so that apparently an executor, however unfit or incompetent he may be, cannot be removed by the Court from his post, though no doubt he may be removed for the reason given by the Judge for holding the petitioner in this case to be disqualified, *viz.*, the omission to exhibit an account of the assets which have come into his hands. But this refers expressly to the revocation of a probate after it has been granted, and can have no application to the conduct of the executor before the probate is granted, and much less to the conduct of a person, who, like the petitioner,

occupied the position of a manager. Again, sections 22, 41, and 85 of the Act give the Court discretion to grant to any one of the persons entitled to the estate of an intestate, or to a third party, letters of administration, or to make an order refusing to grant any application for letters of administration. But the Act nowhere provides for any such discretion being exercised in the case of an application for probate by an executor named in the will and considered qualified by the testator to act as such. And we do not think that a Court acting under the Probate and Administration Act has any more discretion than a Court of Probate has in England, where it seems to have been held that a person convicted of felony, or one who is attainted or outlawed, may maintain a suit for establishing the validity of a will by which he is appointed executor (see *Smethurst v. Tomlin* (1), *In the goods of Samson* (2), and *Williams on Executors*, 8th ed., Vol. I, p. 239).

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The learned pleader for the respondent contends that an executor is in fact a trustee, and that as such a Court of Equity can either grant or refuse him probate at its discretion. We think, however that this contention is not sound. An executor may no doubt be regarded as occupying the position of a trustee for the purpose of administering the estate, and he may also be a trustee under a will appointing him executor and creating the trust, but that is quite a different matter from saying that an executor *quod executor* is a trustee. The true position, powers, and duties of an executor are essentially different from those of a trustee. We think, therefore, that the District Judge was bound to grant probate to the applicant in this case. As to the observation of the District Judge that to appoint the petitioner to be an executor would be to the detriment of the estate, and would enable him to resist the executrix's demand for accounts, all that we need say is that such a consideration cannot and ought not to influence the action of the Court when the petitioner was named as an executor by the testator. Whether or no the petitioner may be compelled to render accounts in a suit properly framed for the purpose by the executrix, or how otherwise the monies in his hands may

(1) 30 L. J. Pro., 269; 2 Sw. & Tr., 143.

(2) L. R., 3 P. & D., 48.

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be realized, is, however, a question which we are not called upon to discuss in the present case.

The appeal will accordingly be decreed. The applicant will be granted probate of the will of Dhan Krishna Sircar, and we think the proper way to give effect to this order will be to substitute the applicant's name for the name of Jagobundhu, deceased, in the probate already granted to him and Doorgamoni jointly, and which we observe was filed in the Court of the District Judge with the application in this case.

We make no order as to costs.

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

CLARK v. ALEXANDER.*

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 Sept. 8.

Sale in execution of decree—Rateable distribution—Attachment of salary—Civil Procedure Code, 1882, ss. 285, 295—Attachment by Small Cause Court—Transfer of decrees to superior Court.

Practice of the Calcutta High Court in favour of the principle of rateable distribution amongst all the attaching creditors, without any such condition as the transfer of the execution proceedings to the superior Court, adopted and held supported by the cases of *Gopeo Nath Acharje v. Achcha Bibee* (1), *Bykant Nath Shaha v. Rajendro Narain Rai* (2), and *Bhugwan Dass Bogla v. Bunko Behary Bajpie* (3).

Muttalagiri Nayak v. Muttayyur (4) and *Nimbaji Tulsiram v. Padia Venkati* (5) not followed.

ON the 13th February 1893 the plaintiff obtained in the High Court a decree against the defendant for Rs. 9,970-4.

In execution of this decree, under an order of the 11th April 1893, the plaintiff attached a moiety of the salary of the defendant, who was a member of the Bengal Pilot Service, and in accordance with an order obtained by the plaintiff on the 22nd May 1893, the Accountant-General on the 4th July paid into Court

* Original Civil suit No. 30 of 1893.

(1) I. L. R., 7 Calc., 553. (3) Suit No. 130 of 1884, unreported.

(2) I. L. R., 12 Calc., 333. (4) I. L. R., 6 Mad., 357.

(5) I. L. R., 16 Bom., 633.