1877

MACKINTOSH v. HUNT.

we think the transaction is not one which ought to be enforced by a Court of Equity. The Calcutta Court of Small Causes is empowered to entertain equitable defences, and ought, as it appears to us, on the facts found, to have given the defendant relief.

The judgment for Rs. 800 is set aside, and judgment will be entered for the plaintiff for Rs. 400 with interest at 12 *per cent. per annum* from September 6th, 1875, to the date of suit, without costs.

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Birch.

1876 *June* 28.

IN THE MATTER OF THE PETITION OF DESPUTTY SINGH (A MINOR).

BAIJNATH SHAHAI AND OTHERS *v.* DESPUTTY SINGH.*

Creditors of alleged Heir—Application for grant of probate—Succession Act (Act X of 1865), *s.* 250.

A Hindu testator died, leaving *B*, alleged to be his adopted son, and *C*, who would be his heir in default of adoption. On application made by *B* for probate of the will after the usual notices, the creditor's of *C* came in and opposed the grant of probate.

Held, under the Succession Act, as made applicable by the Hindu Wills Act, that the creditors were not parties having any interest in the estate of the deceased, and therefore were not entitled to oppose the grant of probate.

THE facts of the case appear sufficiently in the judgment.

Mr. *Kennedy* and *Munshi Mohamed Yoosoof* for the appellants.

The *Advocate-General*, offg. (Mr. *Paul*) and Mr. *Woodroffe* for the respondent.

The following cases and authorities were referred to by Counsel on both sides:—

Dabbs v. *Chisman* (1), *Baskcomb* v. *Harrison* (2), *Kipping* v. *Ash* (3), and Coote's Probate Practice, pp. 227, 228, and 231, and cases there cited.

* Miscellaneous Regular Appeal, No. 259 of 1875, against the order of A. V. Palmer, the Officiating Judge of Zilla Shahabad, dated the 9th of August, 1875.

(1) 1 Phill., 155. (2) 2 Rob. Ecc., 118. (3) 1 Rob., 270.

The judgment of the Court was delivered by

1876

IN THE MATTER OF THE PETITION OF DESPUTTY SINGH.

KEMP, J.—On the 14th of July 1875, Baboo Desputty Singh, a minor, through the manager of his estates, Abdool Hye, applied to the District Judge for probate of the will of the late Bindessurree Pershad Singh, who it is alleged died at Arrah on the 31st of July 1871 leaving properties, moveable and immoveable, situated in the district of Shahabad. To the petition, an instrument purporting to be the will of the deceased was annexed. Mr. J. H. Thornton, Civil Surgeon of Arrah, one of the subscribing witnesses to the said instrument, verified the petition, as laid down in s. 248, Act X of 1865. Upon this petition an order was passed, directing "advertisements to be made at the Collectorate and at the Civil Courts of the district. Notice also to be served on parties to suits before the Subordinate Judge, in which Desputty Singh was concerned. This application to come up on the first miscellaneous day after Mr. Palmer takes charge, say Saturday the 24th July." This order was passed by Mr. Geddes.

Baijnath Shahai and others the appellants are the creditors of Baboo Reetbhunjun Singh; and they objected to the grant of the probate, on the ground that Desputty Singh was not the heir of the late Bindessurree Singh, but that their debtor Reetbhunjun was.

It appears that notices were issued by the Subordinate Judge of the district, dated the 20th July 1875, calling upon Baijnath Shahai and others to file any objections they might have to make in the matter of the petition of Abdool Hye before the Judge of the district on or before the 22nd of July 1875. They appeared and filed their objections. The Judge, on the 9th of August, after considering the objections of Baijnath Shahai and others, passed the following order—"That letters of administration will be granted by this Court to Moulvie Abdool Hye, petitioner, as manager and next friend to Baboo Desputty Singh, minor, on his undertaking to make a true inventory of the property and credits of the late Baboo Bindessurree Pershad Singh deceased, and to exhibit the same in this Court at or before the expiration of one year next ensuing, and to render

1876

IN THE MATTER OF THE PETITION OF DESPUTTY SINGH.

a true account thereof, and also on his filing a bond with two sureties engaging for the collection, getting in and administering the estate of the deceased Baboo Bindessurree Pershad Singh. Each party to pay their own costs."

On the case coming before us, it was contended by the learned Advocate-General for the respondent that the appellants ought not to have been made parties to these proceedings, and he asked the Court to dismiss the appeal without hearing their Counsel or entering into the merits. We were of opinion that as the appellants were made parties to the proceedings by the action of the Court and were called upon to file their objections, and did file them without any objection on the part of the respondent, we ought to hear the appeal. We therefore called upon the learned Counsel Mr. Kennedy, who appeared for the appellants, to satisfy us that his client was in a position to oppose the grant of probate of the estate of the late Baboo Bindessurree Pershad Singh. After hearing his argument and that of the learned Advocate-General for the respondent, we are of opinion that the appellants ought not to have been permitted to object in the lower Court to the grant of probate.

Numerous cases in the English courts were cited by the learned Counsel on both sides; but, in deciding this case, we have not to look to what is or was the English law on the subject—we must look to the Act itself, Act X of 1865, as the law applicable to the case—*De Souza* v. *The Secretary of State* (1).

The application for probate having been formally made, it was lawful for the District Judge, under s. 250, Act X of 1865, to issue citations, calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. The citation to be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the district.

No caveats, on the part of the appellants before us, had been lodged against the grant of probate or letters of administration. The Judge, therefore, acted illegally in directing notices to be

(1) 12 B. L. R., 423, at p. 427, *per* Macpherson, J.

served on the appellants through the Subordinate Judge of the district, inviting them to file any objections they might have to make against the grant of probate. The appellants cannot be said to be parties "having any interest in the estate of the deceased" within the meaning of s. 250 of the Act. The appellants, who are the creditors of Reetbhunjun Singh, who, in the event of Baboo Bindessurree Singh having died without executing a will, and without having adopted Baboo Desputty Singh, on whose behalf the application for probate was made, he being a minor, may be the heir of the late Baboo Bindessurree Singh, but that does not entitle them to claim as of right as interested in the estate of Baboo Bindessurree Singh to oppose the grant of probate or letters of administration.

The order granting letters of administration to the respondent is affirmed, such order however being without prejudice to the appellants who have no present right to oppose such grant, nor precluding them from seeking any further remedy they may be advised to pursue as against their debtor Reetbhunjun Singh.

The appeal is dismissed with costs.

BIRCH, J.—I also am of opinion that those who, in the petition of appeal, style themselves "opposite parties," ought not to have been allowed "to come and see the proceedings before the grant of letters of administration."

Section 250 contemplates the citation of those directly interested in the estate of the deceased. Its provisions cannot, I think, be strained to include creditors of the next-of-kin to the deceased. It is admitted that the appellants are not the only creditors of Reetbhunjun, but that there are several other creditors, and, if the appellants had succeeded in their opposition to the granting of letters of administration, they would not be in any better position than other creditors of Reetbhunjun.

We have to be guided by the provisions of Act XXI of 1870 and those sections of Act X of 1865 which are by the former enactment declared to apply to wills made by Hindus after 1st September 1870. I do not think it incumbent upon us to consider what the law and practice were antecedent to the law

1876

IN THE MATTER OF THE PETITION OF DESPUTTY SINGH.

by which we have to be guided. Nor do I think it necessary to discuss in a case such as we have before us the English cases cited by Mr. Kennedy. I would only remark that no case which has been cited supports the learned Counsel's contention, that a creditor, not of the deceased, but of his next-of-kin, is a person interested in the estate of the deceased and entitled to come in and controvert a will said to have been executed by the deceased. It has been held on the Original Side of this Court in *DeSouza* v. *The Secretary of State* (1), that, since the passing of Act X of 1865, the courts in this country must look to that Act and it alone for the law of British India applicable to all cases of testamentary or intestate succession; and the correctness of that ruling has never been impugned.

Then as to the argument of the learned Counsel, that his client is barred from taking any further steps against the estate, and prejudiced by having been made a party to these proceedings, I find nothing in the Act which leads me to conclude that this argument has any foundation. By s. 242, letters of administration are conclusive as to the representative title of the person who obtains them, and creditors of the deceased must look to him for satisfaction of their debts. If the appellants have any claim against the estate of the deceased, I fail to see how they can be deprived of their remedy by an order granting letters of administration.

What we now decide is, that the Judge was wrong in citing the appellants to see the proceedings, and that they have no right to oppose the granting of letters of administration. We cannot, on their appeal, go into the merits of the case. The result is, that the appeal must be dismissed with costs.

Appeal dismissed.

(1) 12 B. L. R., 423.