

decree of the lower Court as to mesne profits, but, under the circumstances of the case, we think that each party should bear his own costs in this as well as in the lower Court.

Decree varied.

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 SHOSHI
 SHIKHURES-
 SUR ROY
 v.
 TAROKESSUR
 ROY.

Before Mr. Justice Morris and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF NILMONEY SING.*

UMANATH MOOKHOPADHYA v. NILMONEY SING.

1880
 Sept. 10.

Probate—Application for Order revoking Probate—Attaching Creditor of Next-of-kin—Succession Act (X of 1865), s. 234.

A judgment-creditor, who has attached property of his debtor, which purports to have been inherited by such debtor from his deceased father, may, where the will of such deceased is set up and proved at variance to his interests, apply for a revocation of the order granting probate of the will so set up.

Komollochan Dutt v. Nilruttun Mundle (1) followed.

THE facts of this case material to this report are as follows:—

One Bamon Dass died some time in January 1875, leaving him surviving his widow Bhoyharini Debi, his son Taranath, and several other sons. Nilmoney Singh, the petitioner, having obtained a decree against Taranath, attached, in February 1875, certain lands purporting to be the property of Taranath inherited from his father. The widow Bhoyharini intervened in these attachment-proceedings; but, on the 11th February of the same year, her claim was disallowed. Subsequently, on the 14th March 1876, Bhoyharini, in conjunction with her sons other than Taranath, applied for, and on the 24th of the same month obtained, an order granting her probate of the alleged will of her husband Bamon Dass. The probate itself, however, was not issued till the 21st of December following. On the 1st April 1876, Bhoyharini instituted a suit against Nilmoney, praying for a declaration of her right to

* Appeal from Original Decree, Nos. 108 and 109 of 1879, against the decree of L. R. Tottenham, Esq., Officiating Judge of Nuddea, dated the 24th March 1879.

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the lands attached by Nilmoney under the decree previously obtained by him against Taranath. On the 22nd of December 1876, Nilmoney lodged an application, under s. 234 of the Succession Act, in the Court of the District Judge, for a revocation of the order of the 24th March granting probate of the alleged will of Bamon Dass to the widow Bhoyharini. The District Judge, on the hearing of this application, reversed his former order granting probate, and also subsequently dismissed the regular suit instituted by Bhoyharini against Nilmoney. The widow appealed in both cases to the High Court. By its judgment, dated the 8th May 1878, the High Court (Markby and Prinsep, JJ.) set aside the order made by the District Judge, reversing his previous order granting probate to the widow, on the ground of inadequate service of notice on all the parties interested under the will, and remanded the matter to the Court below in order that it might be again adjudicated upon after an opportunity had been afforded the petitioner to remedy this material defect. The High Court also reversed the order made in the regular suit instituted by the widow against Nilmoney, and remanded it to the Court below for rehearing. Under these orders of remand the Court below retried both cases, but substantially adhered to its former judgments, revoking the former grant of probate and dismissing the suit of Bhoyharini.

The widow again appealed in both cases to the High Court.

Baboo *Sreenath Dass*, Baboo *Mohiny Mohun Roy*, Baboo *Rashbehary Ghose*, Baboo *Kashee Kant Sen*, and Baboo *Grish Chunder Chowdhry* for the appellant.

Baboo *Ambica Churn Bose* and Baboo *Bhowany Churn Dutt* for the respondent.

The judgment of the Court (MORRIS and PRINSEP, JJ.), so far as is material for the purposes of this report, was delivered by

MORRIS, J. (who, after stating the facts, proceeded as follows):—The first question that arises is, whether Nilmoney Singh, as creditor of Taranath, has any *locus standi*? Whether he has

such an interest in the estate of the deceased Bamon Dass as gives him a right to apply for revocation of the probate granted of his will? In support of the proposition that he cannot apply for the revocation of probate, several authorities have been cited. In *In the matter of Mee Tsee* (1), Mr. Justice Norman, delivering the judgment of the Court, says: "We have no doubt of the soundness of the proposition that a person who is not next-of-kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate or dispute the validity of the will. In England it has been held, that even a creditor cannot controvert the validity of a will, because it is a matter of indifference whether he should receive his debt from the executor or from an administrator." Then the case of *Baij Nath Shahai v. Desputty Singh* (2) is quoted to show that the learned Judges there considered that, in this country also, the creditors of next-of-kin to the deceased are not entitled to have citations served upon them under s. 250, Act X of 1865, calling upon them "to come and see the proceedings before the grant of probate or letters of administration." But this case came subsequently under the consideration of another Bench of this Court, of whom a member of the present Bench was one, in connection with the case of *Komollochun Dutt v. Nilruttun Mundle* (3); and Mr. Justice Markby, in giving the judgment of the Court, made the following observations: "If we thought that the decision in *Baij Nath Shahai v. Desputty Singh* (2) went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such ruling." We entirely concur in the opinion here expressed and considered, that it is applicable to, and meets the circumstances of, the present case. There is no question that Nil-money Singh, immediately after the death of Bamon Dass, and before probate of his alleged will had been taken out,

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(1) 15 W. R., 351.

(2) I. L. R., 2 Calc., 208; S. C., 25 W. R., 489.

(3) I. L. R., 4 Calc., 360.

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attached the property, which is the subject of the suit of Bhoyharini, as the property of his judgment-debtor Taranath, to which he had succeeded on the death of his father. Owing to the devolution of the property of Bamon Dass by natural succession to Taranath, Nilmoney Singh has such an interest in the property of the deceased as entitles him to dispute the genuineness of a will which purports to divert the succession from Taranath to another. Under s. 234 of Act X of 1865, the grant of probate or letters of administration may be revoked or annulled for just cause; and according to *illus. (c)* at the foot of that section, such a just cause would be when the will, of which probate was obtained, was forged. Part XXXI, which succeeds s. 234, relates to the practice in granting and revoking probates and letters of administration. Under s. 250 of that chapter, the Judge, when a will is brought before him for probate, may 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, &c. The words are general, and as Nilmoney Singh has, unquestionably, for the reasons above given, an interest in the estate of Bamon Dass, we see no sufficient cause under the Act why he should not be allowed to enter a *caveat* and oppose the application for probate by Bhoyharini and the other members of the family interested under the will. If he has the right to enter a *caveat* regarding the grant of a probate, he can, on similar grounds, apply for revocation of a probate improperly granted. To rule otherwise would, it seems to us, work great injustice and shut out Nilmoney Singh from all remedy. As pointed out by Mr. Justice Markby, in the case of *Komollochun Dutt v. Nilruttun Mundle* (1), already referred to, "it would lead to the greatest confusion if the validity of a will could be questioned in a civil suit after the grant of probate. There might be any number of conflicting decisions as to the validity of the will. The grant must be contested by a suit in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of probate, and not in the exercise of its ordinary civil jurisdiction." We, therefore,

(1) I. L. R., 4 Calc., 360.

decide this first point in favor of Nilmoney Sing, and proceed now to deal with the evidence bearing upon the genuineness or otherwise of the alleged will of Bamou Dass.

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I would, therefore, set aside the order of the lower Court, and dismiss the application of the Raja petitioner for revocation of the will of Bamou Dass, and decree the suit of the plaintiff Bhojhariui with costs in both Courts (1).

Appeal allowed.

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

JUGTANUND MISSER (PLAINTIFF) v. NERGHAN SINGH AND
 ANOTHER (DEFENDANTS).*

1880
 Sept. 15.

Evidence Act (I of 1872), s 92, prov. 3—Parol Evidence in addition to condition in Kistibundi—Part Performance of portion of obligation in Kistibundi.

Per GARTH, C. J.—Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force until some condition precedent has been performed, the rule that parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the contract has not become binding, cannot apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.

The true meaning of the words “any obligation” in the 3rd proviso to s. 92 of Act I of 1872 is any obligation whatever under the contract, and not some particular obligation which the contract may contain.

ONE Ram Monorath sold certain properties to Nerghan Singh and another (defendants), and desired them to pay parts of the purchase-money to one Jugtanund Misser (the plaintiff), to be applied to the discharge of certain debts charged on the properties. The defendants paid part of the purchase-money in cash to the plaintiff, and for the remainder executed a kistibuudi in his favor, and gave as security a mortgage on certain immove-

* Appeal from Appellate Decree, No. 636 of 1879, against the decree of E. Grey, Esq., Judge of Gaya, dated the 30th December 1878, reversing the decree of Baboo Matadin, Officiating Subordinate Judge of that district, dated the 28th August 1877.

(1) See *In the matter of the Petition of Bhubosunduree Dabee*, post, p. 460.