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In re ABIRUDDIN AHMED.

consideration of that sort to extend mercy to the petitioner we should be running the risk of injury and injustice to the litigant public. Upon the whole, giving its due weight to all that has been urged on behalf of the petitioner, we must refuse this application.

E. H. M. *Application refused.*

PRIVY COUNCIL.

CHANDRA KISHORE ROY

v.

PRASANNA KUMARI DASI.

*P.C.** 1910 *Nov. 3; Dec. 2.*

[On appeal from the High Court at Fort William in Bengal.]

Will—Construction of Will—Clause for maintenance of daughters—Succession Act (X of 1865) ss. 111, 187—"Uncertain event"—Marriage of daughters—Legatee, right of, to sue—Succession Act s. 3—"Probate" of Will obtained only after institution of suit—Grant of Probate, modified by High Court on appeal.

A Hindu died in 1879, leaving a will, whereby (among other things) he made provision for his wives and his daughters who survived him. The clause providing for the daughters was: "When they will be married, and if they desire to live in separate houses, the person in whose management my property will be at the time will make separate houses for them in the vicinity of my house from the income of my property. For the maintenance of my daughters I fix an allowance of Rs. 600 a year for Srimati Prasanna, and Rs. 600 for Srimati Sarat. As long as the daughters will live in the separate houses in this place they will get the fixed allowances, respectively, but if the daughters do not live in this place, they will get Rs. 10." The daughters married in 1888 and 1889, respectively, and lived in separate houses. In suits for their allowances it was contended that the bequests to them were given in the "uncertain event" of their marriage, and as that event did not happen until after the death of the testator, the bequests were void by reason of s. 111 of the Succession Act (X of 1865) and never took effect.

Held, on the construction of the above clause, that the payment of maintenance was not contingent on the daughters' marriages, and that therefore s. 111 was not applicable.

* *Present:* LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.

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At the time the suits were instituted no letters-of-administration had been granted, but pending the suits the widow obtained from the District Judge a grant of letters-of-administration with the will annexed. The grant was, on appeal, modified by the High Court by limiting it to the realisation of the maintenance allowance provided by the will for the widow; but before the letters-of-administration could be recalled and altered the widow died and the letters were never formally altered. It was contended that the suits could not be maintained with reference to s. 187 of the Succession Act which requires that before the right of a legatee can be established "probate of the will shall have been granted."

Held, that the grant of administration with the will annexed was, within the meaning of s. 3 of the Act, a grant of "probate" which was a compliance with the provisions of s. 187. The subsequent limitation of the grant was immaterial.

So long as the compliance with the section was prior to decree, the fact that it was after the institution of the suits made no difference and the Court was fully competent to deal with the suits.

TWO APPEALS consolidated from the judgment and decrees (29th May 1906) of the High Court at Calcutta affirming decrees (22nd April 1904) of the District Judge of Rangpur, which had affirmed decrees (23rd December 1903) of the Subordinate Judge of Rangpur.

The defendant was the appellant to His Majesty in Council.

The suits out of which the appeals arose were instituted respectively by Prasanna Kumari Dasi and Sarat Kumari Dasi, the daughters of one Kumar Shyam Kishore Roy, who died on 18th July 1879, having executed a will dated 16th Magh 1284 (28th January 1878), in which, after stating rules for the exercise of permission to adopt previously granted by registered deeds to his widows in 1875, the testator, by clause 6 of the will, made provision for maintenance allowance to be paid to his wives and to his daughters, "Rs. 15 each daughter as long as they remain joint in food with their mothers." And then in clause 9 he provided that—

"When the daughters will be married and if they desire to live in separate houses, the person in whose management my moveable and immoveable property will be at that time will make separate houses, for the daughters in the vicinity of my house from the income of my moveable and immoveable property. For the maintenance of my daughters I fix an allowance of Rs. 600 a year for Srimati Prasanna Kumari,

and Rs. 600 a year for Srimati Sarat Kumari. As long as the daughters will live in the separate houses in this place they will get the fixed allowances, respectively. But if the daughters do not live in this place they will get at the rate of Rs. 10."

The defendant in the suits was Kumar Chandra Kishore Roy, the appellant, who was, after the death of the testator, adopted by Rani Pran Kishori, the senior widow, in accordance with the provisions of the will. The defendant being a minor, the estate was managed for him by the Court of Wards.

The marriages of the two daughters took place in March 1888, and July 1889, respectively, and afterwards they each lived in a separate house, and each received, in accordance with the provisions of the will, an allowance of Rs. 50 a month from the Court of Wards.

The defendant received possession of the estate from the Court of Wards on 6th May 1896, since which date only a small portion of the allowance had been paid to the daughters who, in consequence of the non-payment, filed in 1900 plaints in the Subordinate Judge's Court, in which they set out the above facts and claimed the arrears of maintenance with interest.

The only original pleas in defence now material were (*a*) that the claims for maintenance under the will were not maintainable, because no probate or letters of administration with the will annexed had been granted; and (*b*) that on a true construction of the will the bequests of the allowances for maintenance were bad in law, because they were dependent on the happening of a specific uncertain event, namely, marriage, and that event had happened subsequent to the death of the testator. Whilst the suits were pending Rani Pran Kishori Dasi in October 1901 obtained from the District Judge of Rungpur a grant of letters of administration with the will annexed in respect of the entire estate of the testator; but on appeal by the defendant the High Court, on 24th February 1903, made an order to the effect that the letters of administration should be limited to the realisation of the maintenance allowance provided for her by the will. The

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District Judge thereupon called upon Pran Kishori Dasi to produce the letters of administration that had been granted, so that fresh letters with the limitation ordered by the High Court might be issued; but in the meantime she died, the result being that the letters already granted to her remained formally uncancelled.

The defendant thereafter raised the further contention in the suits, that as the effect of the order of the High Court dated 24th February 1903 was to cancel the letters of administration granted by the District Judge, and as no other letters had been, or could be, issued, the suits were not maintainable, having a regard to section 187 of the Indian Succession Act (X of 1865).

The Subordinate Judge made decrees in favour of the plaintiffs as prayed; and, on appeal, those decrees were upheld by the District Judge (except as to a small portion of the interest claimed).

Second appeals came before a Divisional Bench of the High Court (CHUNDER MADHUB GHOSE AND C. P. CASPERSZ JJ.), who held that section 187 of the Succession Act was no bar to the maintenance of the suits; and that, "upon reading the 9th paragraph of the will, as also the 6th paragraph thereof, which also bears upon the matter of the maintenance allowance to the daughters, the allowance provided by the first-mentioned paragraph is not contingent upon their marriage," and consequently that "section 111 of the Succession Act does not stand in the way of the plaintiffs getting the allowances they have sued for."

The High Court, therefore, dismissed the appeals with costs.

On these appeals,

Sir R. Finlay, K.C., and *E. U. Eddis*, for the appellant, contended that on the proper construction of clause 9 of the will the bequests for maintenance allowance payable to the daughters were contingent upon their respective marriages; and the marriages having taken place only after the death of the testator, such bequests became, under s. 111 of the

Succession Act (X of 1865), inoperative and could not be enforced. The marriage of a Hindu girl was an "uncertain event" as contemplated by that section. Reference was also made to section 118 of the Succession Act.

It was also contended that, as no probate of the will or letters of administration with the will annexed had been granted at the time of the institution of the suits, the claims to the maintenance under the will could not be maintained, and it was submitted that the grant of letters of administration by the District Judge after the institution of the suits had been, moreover, in effect cancelled by the order of the High Court on appeal limiting the grant to the realisation of the maintenance allowance given to the widow Pran Kishori: and there was consequently no actual "probate" of the will in existence within the meaning of section 187 of the Succession Act. Reference was made to section 3, 26, 119, 125, 130, 180 and 181 of the Act.

DeGruyther, K.C., and *G. Considine O'Gorman*, for the respondents, contended that the provisions of section 187 had been sufficiently complied with, inasmuch as the District Judge had in fact granted "probate" of the will as defined in section 3 of the Succession Act; and it was immaterial that it was granted only after the suits had been insitituted. That grant was not cancelled by the High Court's order limiting the grant. Cancellation could only have been effected by the recall and alteration of the grant already issued, which was prevented by Pran Kishori's death. Reference was made to the Probate and Administration Act (V of 1881), section 184; The Hindu Wills Act (XXI of 1870), section 2, showing that section 187 of the Succession Act was applicable to Hindu wills; the Succession Act section 3; and *Gordhandas* v. *Bai Ramcoover* (1).

Section 111 of the Succession Act was not applicable, because on the true construction of clause 9 of the will the bequests to the daughters for maintenance were not contingent on their marriage. Those bequests were vaild and enforceable.

(1) (1901) I. L. R. 26 Bom. 267.

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Eddis, in reply, cited *Mohamidu Mohideen Hadjiar* v. *Pitchey* (2).

The judgment of their Lordships was delivered by

LORD MERSEY. These are two appeals from the judgment and decrees of the High Court at Fort William in Bengal, dated the 26th May 1906, confirming a decree of the District Judge of Rungpur, dated the 22nd April 1904, which confirmed a decree of the Subordinate Judge of Rungpur, dated the 23rd December 1903. The suits were brought by two Hindu ladies, daughters of one Kumar Shyam Kishore Roy, deceased, against the appellant, who is the adopted son of the deceased, to recover arrears of maintenance alleged to be due to them under their father's will. The appellant denied that the respondents were entitled to any maintenance under the terms of the will, and further objected that they were not competent to maintain their suits, inasmuch as they had not obtained letters of administration to their father's estate.

The facts, so far as they relate to the first point, are as follows:—On the 18th July 1879 Kumar Shyam Kishore Roy died. He left no son, but he left two of his wives, namely, Rani Pran Kishori and Rani Basanta Kumari, surviving him. By the latter wife he had had two daughters, who are the present respondents. He had made a will dated the 28th January 1878. This will, together with certain deeds previously executed by the testator, granted permission to the wives to adopt sons, and in accordance with this permission the widow Rani Pran Kishori adopted the appellant. At this time the appellant was a minor. The will makes provision for the wives and for the two daughters. The clause in the will relating to the two daughters, omitting irrelevant words, is as follows:—

"When they will be married and if they desire to live in separate houses, the person in whose management my property will be at the time will make separate houses for them in the vicinity of my house from the income of my property. For the maintenance of my daughters I fix an allowance of Rs. 600 a year for Srimati Prasanna and Rs. 600

(1) [1894] A. C. 137, 142.

for Srimati Surat. As long as the daughters will live in the separate houses in this place they will get the fixed allowances respectively; but if the daughters do not live in this place, they will get Rs. 10."

The two daughters married—the one in 1888 and the other in 1889—and they went to live in separate houses. The estate was at this time under the management of the Court of Wards, the appellant being still a minor. The Court, after the respective marriages, paid to each of the ladies the Rs. 600 per annum as provided by the will. The appellant came of age in 1896, and then entered into possession of the estate. Since obtaining possession he has refused to make the allowance to the ladies, alleging that the clause in the will providing for the allowance is void by reason of the provisions contained in section 111 of the Indian Succession Act (Act X of 1865). Hence these two suits. Section 111 of the Succession Act is as follows:—

"Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable."

It is contended on behalf of the appellant that the bequests to the daughters were given only in the uncertain event of marriage, and that as that event did not happen in the lifetime of the testator, the bequests never took effect. Their Lordships are of opinion that this contention is not well founded.

The payment of the maintenance is not made contingent on the marriage of the ladies. The will deals with the maintenance in a clause which stands by itself and which must be read by itself. The clause contains no reference to marriage or to any other future event. Section 111 therefore has no bearing on the construction to be put on the bequest.

The facts relating to the second point are as follows. At the time when these suits were instituted (September 1900) no letters of administration had been granted; but while the suits were pending, namely, on the 7th October 1901, the widow Rani Pran Kishori obtained from the District Judge of Rungpur a grant of letters of administration with the will an-

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nexed. This grant was subsequently modified by a judgment of the High Court, dated the 24th February 1903, by limiting it to the realisation of the maintenance allowance provided for the widow by the will. Before the District Judge could recall and alter the said letters so as to bring them into conformity with the judgment of the High Court the widow died. Thus the said letters never were formally altered. Upon these facts the appellant contended that, having regard to section 187 of the Indian Succession Act, the Court was not competent to grant the relief prayed for. Section 187 is as follows:—

"No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the Province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the 180th section."

The 180th section here referred to relates exclusively to wills proved elsewhere than within the province and provides for grants of letters of administration upon the production of authenticated copies of such wills; the section has no relevancy to the case now under consideration, for here the letters of administration were granted within the province. The question therefore turns entirely on the effect of the first part of section 187, which requires that before the right of a legatee can be established, probate of the will shall have been granted by a court of competent jurisdiction within the Province. By clause 3 of the Act "probate" is defined as meaning "the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator." Their Lordships are of opinion that "probate" as here defined was in fact obtained. The will was proved before a court of competent jurisdiction within the Province, and that court duly issued to the widow a certified copy of the will under the seal of the court, with a grant of administration to the estate of the testator. The provisions of the section were therefore strictly complied with. The subsequent limitation of the grant to so much of the estate of the deceased as might be sufficient to satisfy the widow's claim, even if right appears to their Lordships to be immaterial. It is then said that even

if the provisions of section 187 were complied with, the compliance was after suit commenced, and was therefore too late. Their Lordships, however, are of opinion that, as the complaince was before decree, the Court was fully competent to deal with the case. Their Lordships will humbly advise His Majesty that the appeal should be dismissed and with costs.

J. V. W. *Appeal dismissed.*

Solicitors for the appellant: *Downer & Johnson.*

Solicitors for the respondents: *T. L. Wilson & Co.*

PRIVY COUNCIL.

NITYAMONI DASI
v.
MADHU SUDAN SEN.

Ex parte NITYAMONI DASI.

P.C.*
1911
March 10.

[On petition relating to an appeal from the High Court at Fort William in Bengal.]

Privy Council, Practice of—Stay of execution of decree pending appeal—Power of High Court where appeal has been admitted by special leave—Civil Procedure Codes (Act V of 1908), o. XLV, r. 13; (Act XIV of 1882), s. 608.

The High Court has power, under rule 13 of order XLV of the Civil Procedure Code (Act V of 1908), to stay execution of a decree, pending an appeal to His Majesty in Council, in a case where the appeal has been admitted by special leave.

THIS was a petition for stay of execution of decree pending the hearing and determination of the above appeal, in which the respondents Madhu Sudan Sen and others (plaintiffs), had obtained a decree (11th December 1908) of the High Court at Calcutta, which affirmed with some modifications a decree (29th December 1906) of the Subordinate Judge of the 24-Parganahs.

**Present*: LORD MACNAGHTEN, LORD ROBSON, AND SIR ARTHUR WILSON.