

(1878) 06 CAL CK 0001

Calcutta High Court

Case No: None

Behary Lall Sandyal

APPELLANT

Vs

Juggo Mohun Gossain

RESPONDENT

Date of Decision: June 3, 1878

Acts Referred:

- Succession Act, 1865 - Section 240

Citation: (1879) ILR (Cal) 1

Hon'ble Judges: Richard Garth, C.J; McDonell, J

Bench: Division Bench

Judgement

Richard Garth Kt., C.J.

The questions involved in this case are of great general importance, and having considered them carefully, we are of opinion that the view taken by the Judge in the Court below was erroneous. [His Lordship then stated the facts of the case, and continued.] It has been argued for the appellant, first, that the questions raised by the second issue was one which the Judge had no right to entertain in a proceeding of this nature and secondly, that even if he had a right to decide whether the testatrix had any disposable property at all, there was sufficient evidence that she had some stridhan, which would be quite enough to justify the grant of probate.

2. We do not think it expedient to enter into the consideration of this latter point because we do not wish to prejudice the rights of either party in case of any future litigation upon that subject. It is sufficient for us to say that if it were necessary to establish that the lady had some stridhan, we think there is sufficient evidence of fact to justify the grant of probate.

3. But it is not necessary, in our opinion, to enter upon these considerations, because we think, that upon an application for probate of a will, as long as it is made bona fide, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose.

4. Since the passing of the Succession Act (Act X of 1865) no executor can make title to any property of the testator, whether disposed of by the will or not; nor can he sue for or claim any such property or even clothe himself with his representative character, for the purpose of collecting or paying debts, or otherwise legally intermeddling with the affairs of the testator, without first obtaining probate of the will.

5. Nor, again, can any persons who may be interested under the will (devises or others to whom property is bequeathed) make any title or attempt to enforce their right to it unless probate of the will has first been obtained.

6. On the other hand, it is clear that the grant of probate to the executor does not confer upon him any title to property which the testatrix had no right to dispose of. It only perfects the representative title of the executor to the property, which did belong to the testator, and over which he had a disposing power.

7. Mr. Phillips endeavoured to make a distinction in the case of wills made by Hindu widows upon the ground that *prima facie*, they have no right to make a will; and this apparently was one of the considerations which influenced the Judge in the Court below. But there is no rule of law that we are aware of which forbids a Hindu widow to make a will of property which belongs exclusively to herself. She cannot, except for special purposes, alienate her husband's estate by will or otherwise, because she has only a life-interest in it. But she is only like other persons in that respect; and the grant of probate to the executor in this case will not prejudice in any way the objector's rights, if the property really belonged to him, and not to the testatrix.

8. Mr. Phillips also argued that, u/s 240 of the Succession Act, the Judge had no right to grant probate, unless the testatrix in this case had a fixed place of abode and some property, moveable or immoveable, within the jurisdiction of the District Court. But this is really an objection to the jurisdiction of the Judge, and it was never raised in the Court below; and, moreover, if it had been, it appears that the testatrix had a fixed abode at the time she died within the district.

9. We are of opinion, therefore, that the judgment of the Court below should be reversed, and that probate should be granted to the applicant in accordance with the petition.

10. The petitioner will recover the costs incurred in the lower Court as also in this Court.