

(1869) 04 CAL CK 0022

Calcutta High Court

Case No: Miscellaneous Regular Appeals Nos. 547 of 1868 and 50 of 1869

Mirza Daud Ali

APPELLANT

Vs

Syed Nadir Hossein

RESPONDENT

Date of Decision: April 26, 1869

Judgement

Loch, J.

We see no grounds for interfering with the order passed by the Judge in case No. 547. Nadir Hossein applied for a certificate, under Act XXVII of 1860, to collect the debts due to the estate of Mohammed Ali, deceased, who held certain property derived from one Khyrunnissa, subject to certain trusts. Mohammed Ali left this property by will to the petitioner, Nadir Hossein, and it is by virtue of that will, he prays to have the certificate granted to him. The application has been opposed by the appellant, Daud Ali, on various grounds. He claims to be the legal heir of the deceased, and alleges that the will of Mohammed Ali is spurious. He also alleges that the deed under which Mohammed Ali held from Khyrunnissa is also spurious. The Judge took evidence as to the validity of Mohammed Ali's will, which was satisfactorily proved, and gave Nadir Hossein the certificate prayed for. We think that this is the only point to be determined; and that, for the purpose of determining to whom the certificate is to be granted, it is unnecessary to go into the other questions raised by the appellant. We are satisfied with the proof given of the genuineness of Mohammed Ali's will, and reject appeal No. 547 with costs.

2. The other case relates to other property alleged to have belonged to Mohammed Ali. It is said the property left by his will to Nadir Ali, was waqf property derived by him from Khyrunnissa, but that he had other private property. Looking at the terms of Mohammed Ali's will, it is quite clear that it relates only to the property derived by him from Khyrunnissa, and limits the powers of Nadir Hossein as executor to that property. It is quite possible that, man may be the trustee of waqf property, and at the same time have property of his own. He may, by will, appoint a stranger to succeed him in the trust, while his legal heirs would succeed to the private property. The party appointed trustee would be entitled to collect debts due to the deceased

as trustee, and his legal heirs would be entitled to recover debts due to him in his private capacity; and there appears to be no sufficient reason why each party should not have a certificate granted to them to collect their respective debts. But it is said that the object of the law. Act XXVII of 1860, would be defeated, and there would be no protection for honest debtors, nor would the parties be able to collect; for the debtors, finding themselves not to be properly protected, would refuse to pay till compelled to do so by a decree of Court, and that the proper course is to permit the executor named in the will to collect all outstanding debts, and the legal heirs may, if so advised, require an account from him. It is not shown us what the alleged private property of Mohammed Ali consists of; but supposing him, for argument's sake, to have died possessed of a large zamindari, it is clear that the will appointing Nadir Hossein his executor with regard to certain waqf property would not prevent his legal heirs from entering upon possession of the zamindari and collecting debts due to the deceased as zamindar. Confusion may arise but not necessarily. If Mohammed Ali has left accounts, these will show in what capacity the money is due to him. Of course, if the debtor do not like to take the receipt of either one or other of the parties holding the certificates, the latter have their usual remedy by suit. The order of the Judge, however, appears to be erroneous in that he has directed the certificate regarding the private property of Mohammed Ali to be given jointly to the appellant and Nadir Hossein; for the latter did not apply for it, and is not entitled to it under the will, and that portion of the order is, accordingly, set aside with costs. The appellant is entitled to obtain an exclusive certificate to collect the debts due to the deceased on account of his own estate, and such a certificate should be, therefore, given to him.