

**(1867) 07 CAL CK 0003**

**Calcutta High Court**

**Case No:** None

Sharo Bibi

APPELLANT

Vs

Baldeo Das

RESPONDENT

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**Date of Decision:** July 11, 1867

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### **Judgement**

Norman, J.

I am of opinion the probate in this case does not prove the Will. In English law, probate is proper evidence of the executor's title to personality. That depends on a peculiar law and state of things, which does not exist in regard to Wills of Hindus. Much controversy has taken place as to the powers of the English Ecclesiastical Courts, and as to the exact nature of that of which they divest themselves and confer on the executor in granting probate to him. The subject was very much discussed, and the true principle laid down in *Dyke v. Walford* (5 Moore, P. C, 434). Probate in England is granted to the executor by the Ecclesiastical Court, which has a right of possession and administration of the estate. If the executor had the grant, he had the title; the Will was not recognised as conferring a title to personality without the assent of the Court that had the power to put the executor in a position to administer. In England, the effect of probate for the purposes of evidence is not treated as standing on the same footing as an ordinary judgment. It is treated as a quasi estoppel. It is so classed by Mr. Smith in his notes to the *Duchess of Kingston's* case, 2 Smith's Leading cases, 5th Edition, 713. As regards a person appointed as executor of the Will of a Hindu, his position is different. He takes nothing from any grant of the Court. His title is founded solely and simply on the Will of the testator, considered as an instrument of gift. Except for the purposes of evidence, the Will of a Hindu does not require probate, the executor obtains a sentence of the Court, and in Looking at the effect of that sentence in evidence against others, we must apply those principles which determine whether decrees of Courts of Law, Equity, or Admiralty are evidence against persons not parties to these. As against those who get the probate or oppose the grant of it, is no doubt binding, as against parties cited it is evidence, but it has no greater effect than the

ordinary decree in a Civil Court against persons who have no means of appearing in the suit, or right to dispute the grant. Probate under the English law of evidence, is no proof of the title to land, or of the due execution of a power, because on such subjects the Ecclesiastical Court had no jurisdiction or power. As the technical reason which makes a grant of probate in England evidence of title to personality, does not apply to the grant of probate of the Wills of Hindus, I think we can only apply the rules governing the admissibility of decrees of Courts. Was the party against whom the probate is sought to be used a party or privy to the suit? Here the defendants were strangers. They purchased the rights and interest of the widow. A purchaser of the rights of a debtor at a sale under an execution, ordinarily speaking, is not bound by the acts of such debtor; were it otherwise, he might be bound by acts committed for the express purpose of defrauding him. In this case I cannot treat the probate as evidence, against the defendants, of the execution of the Will.