

ORIGINAL CIVIL.

Before Greaves J.

1918

Feb. 25.

HARIBHUSAN DATTA

v.

MANMATHA NATH DATTA.*

Parties—Right to sue—Cause of action, survival of—Abatement of suit—Letters of Administration, application by residuary legatee for grant of—Death of residuary legatee—Substitution of heir of residuary legatee—Contentious matter—Civil Procedure Code (Act V of 1908), O. XXII.

The right to a grant of administration is a personal right derived from the Court.

If on the death of the testatrix, the residuary legatee under her will had obtained a grant of administration to her estate with a copy of the will annexed, his title would have been derived from the Court and would not devolve on his heir. The heir of the residuary legatee may be the proper person to obtain a grant of administration with a copy of the will annexed, but this is not by virtue of any right to administration which he inherited from the residuary legatee, but by virtue of the fact that as heir of the residuary legatee, he is the person most interested in the estate of the testatrix.

Sarat Chandra Banerjee v. Nani Mohan Banerjee (1) referred to.

APPLICATION on behalf of Haribhusan Datta.

On the 19th May. 1914, one Sreemutty Nriyamoni Dassee died after having executed her last will and testament on the same date. As there was no executor appointed to the will, Hem Bhusan Datta, the residuary legatee, applied to the High Court on the 23rd June, 1914, for grant of letters of administration with copy of will annexed of the deceased. Thereafter,

* Application in Original Civil Testamentary Suit No. 7 of 1914.

Manmatha Nath Datta and others entered caveats and on the 4th December, 1914, by an order of Court the matter was set down as a contentious cause. It was further ordered that the petition of Hem Bhusan Datta be treated as the plaint, and the affidavit of one Phani Bhusan Datta, which had been affirmed on the 5th August, 1914, be deemed as the written statement of the said caveators in Testamentary Suit No. 7 of 1914. On the 8th August, 1917, Hem Bhusan Datta died leaving him surviving his son, Haribhusan Datta, as his sole surviving heir. On the 21st February, 1918, Haribhusan Datta applied to the High Court for an order, *inter alia*, that the fact of the death of his father, Hem Bhusan Datta, be recorded, that he be substituted as plaintiff in Testamentary Suit No. 7 of 1914 in the place and stead of his father, that the cause title of the said suit be amended accordingly, that the suit be proceeded with and that letters of administration with copy of will annexed of Sreemutty Nrityamoni Dasse be granted to him.

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Mr. A. C. Ghose (attorney for the applicant) submitted that this was a contentious cause and the provisions of O. XXII of the Civil Procedure Code, 1908, were applicable to it. The cause of action, therefore, survived to the applicant as heir and he was entitled to be substituted as plaintiff in the place of his deceased father and to be granted letters of administration with copy of will annexed of the testatrix. He relied on *Sarat Chandra Banerjee v. Nani Mohan Banerjee* (1), *Sham Chand Giri v. Bhayaram Panday* (2), *Janardhan Krishna Padhye v. Ramchandra Vithal Ranade* (3) and *Chotalal Chunilal v. Bai Kabubai* (4).

(1) (1909) I. L. R. 36 Calc. 799.

(3) (1901) I. L. R. 26 Bom. 317.

(2) (1894) I. L. R. 22 Calc. 92.

(4) (1897) I. L. R. 22 Bom. 261.

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Sir B. C. Mitter (with him *Mr. B. K. Ghosh*), for the caveators, contended that the right to the grant of letters of administration was a personal right and did not survive to the heir of the residuary legatee of the testatrix. He relied on a passage in *Ramani Debi v. Kumud Bandhu Mookerjee* (1) at p. 926. The cases relied on by the applicant, with the exception of *Sarit Chandri Banerjee v. Nani Mohan Banerjee* (2), which, if anything, was in favour of the caveators' contention, had no bearing on the present case.

Mr. A. C. Ghose, in reply.

Cur. adv. vult.

GREAVES J. This is an application by Haribhusan Datta for an order that the fact of the death of his father Hem Bhusan Datta be recorded, that the cause title of the suit should be amended by substituting his name in place of that of his deceased father, and that other consequential amendments should be made in the petition whereby these proceedings were originated, and that thereupon the suit should be proceeded with and letters of administration with copy of the will annexed of Sreemutty Nrityamoni Dassee should be granted to the applicant.

Sreemutty Nrityamoni Dassee died on the 19th May, 1914. Hem Bhusan Datta on the 23rd June, 1914, petitioned this Court for a grant of administration with a copy of the will annexed to the estate of Nrityamoni, dated the 19th May, 1914. I have not before me a copy of the will or of the petition, but I understand that no executors were named in the will and that Hem Bhusan Datta was the residuary legatee. A caveat or caveats were entered by the defendants and, on the 4th December, 1914, it was ordered that the matter should be set down as a contentious cause.

(1) (1910) 14 C. W. N. 924.

(2) (1909) I. L. R. 36 Calc. 799.

On the 8th August, 1917, Hem Bhusan Datta died leaving the applicant as his son, heir and legal representative. By virtue of section 197 of the Succession Act the applicant is now the person primarily entitled to a grant if the will is established.

It is urged on behalf of the applicant that now that the matter is a contentious cause, it is governed by the Code of Civil Procedure and that, under the provisions of Order XXII, he is entitled to be substituted as plaintiff as the right to sue survives. The sole question that arises on this application is whether any right to sue has survived to the applicant. I do not think that it has. The right to a grant of administration is a personal right, and although the applicant, if the will is established, may be the proper person to obtain a grant, this would be so not by virtue of any right to administration, which he inherits from his father, but by virtue of the fact that as heir of his father to the residue he is the person most interested in the estate. The reasoning of Mr. Justice Harington in *Sarat Chandra Banerjee v. Nani Mohan Banerjee* (1), seems to me to be equally applicable to the present application: in that case the executor named in the will of which probate was sought died before obtaining a grant, his widow sought to be substituted for him in the suit as being his heiress, and Mr. Justice Harington held that as the executor's right was derived under the will, the right did not survive to his widow: in the present case the right which Hem Bhusan sought was a right from the Court and if he had obtained a grant his title would have been derived from the Court and cannot, I think, devolve on his heir.

The result is, that the application fails and must be dismissed with costs. There is nothing to prevent

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the applicant, if he is so minded, from applying for a grant, and if he does so, it is open for him to apply to adopt such material proceedings as have been taken in the present suit.

O. M

Application dismissed.

Attorney for the appellant : *A. C. Ghose.*

Attorney for the caveators : *N. C. Bose.*

APPELLATE CIVIL.

Before Richardson and Beachcroft JJ.

LAKSHMI NARAYAN ROY

v.

SECRETARY OF STATE FOR INDIA.*

1918

Jan. 30.

Peshkosh—Abwab—Antiquity and purpose of payment—Contractual foundation—Bengal Tenancy Act (VIII of 1885), ss. 74; 30(c)—Public Demands Recovery Act (Beng. I of 1895).

Where the Collector in execution of a certificate issued under the Public Demands Recovery Act, realised from the plaintiffs certain charges described as *peshkosh* levied on two estates from time immemorial, and the plaintiff sued for a declaration that it was illegal and prayed for the cancellation of the certificate for the refund of the amount thereunder, and for a perpetual injunction restraining the defendant from levying the *peshkosh* in future :—

Held, that *peshkosh* could not be regarded as an imposition in the nature of an *abwab* within the meaning of the various provisions enacted on that subject. Such payment came out of the land and the right thereto was an interest in the land to which a title might be made by prescription.

* Appeal from Appellate Decree, No. 2465 of 1915, against the decree of G. B. Mumford, District Judge of Midnapore, dated June 4, 1915, confirming the decree of Nalini Kanta Bose, Munsif of Contai, dated Aug. 26, 1914.