APPELLATE CIVIL.

Before Nasim Ali and Khundkar JJ.

PRABHATNATH DAS

v.

RAMENDRAKUMAR SHAHA*

1934

June 12, 13.

Probate—Executor's right to institute suit before grant—Indian Succession Act (XXXIX of 1925), ss. 213, 247.

The grant of probate is not a condition precedent to the institution of a suit by an executor.

Chandra Kishore Roy v. *Prasanna Kumari Dasi* (1) referred to.

The executor has the right to institute the suit before obtaining probate.

It is well established on authorities that the executor will be entitled to get a decree, if he produces the probate before the passing of the final decree.

Menahim Yousef v. *Islam Aman Salah* (2) referred to.

APPEAL FROM ORIGINAL ORDER with SECOND APPEAL.

The facts of the case and the arguments in the appeals appear sufficiently in the judgment.

In M.A. 477 of 1932,

Jitendrakumar Sen Gupta and *Pareshchandra Sen* for the appellants.

Bhagirathchandra Das for the respondents.

In S.A. 184 of 1933,

Jitendrakumar Sen Gupta and *Mahendrakumar Ghosh* for the appellant.

Bhagirathchandra Das for the respondents.

*Appeal from Original Order, No. 477 of 1932, against the order of S. N. Guha Ray, District Judge of Noakhali, dated May 26, 1932, and Appeal from Appellate Decree, No. 184 of 1933, against the decree of S. N. Guha Ray, District Judge of Noakhali, dated May 30, 1932, reversing the decree of Nalininath Das Gupta, Third Additional Subordinate Judge of Noakhali, dated Jan. 9, 1931.

(1) (1910) I. L. R. 38 Calc. 327; L. R. 38 I. A. 7.

(2) [1931] A. I. R. (Bom.) 547; 134 Ind. Cas. 1167.

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NASIM ALI AND KHUNDKAR JJ. The facts which gave rise to these two appeals are as follows :—

One Ramsundar executed a mortgage bond in favour of Udaychandra Das borrowing Rs. 250 with interest at the rate of 2½ *per cent. per* month. There was also a stipulation for compound interest. On the 15th November, 1928, Uday's son, Mahendra, the sole appellant in S.A. 184 of 1933 and one of the appellants in M.A. 477 of 1932, instituted a suit on the mortgage bond against the heirs of Ramsundar for recovery of Rs. 1,200 as executor to the will left by his father Uday after the death of Uday. At the time of the institution of the suit Mahendra did not institute any proceeding for getting a probate of the will of his father. During the pendency of the suit, however, he applied for probate and was appointed administrator *pendente lite* under section 247 of the Indian Succession Act. Thereafter he prosecuted the mortgage suit as administrator *pendente lite* and obtained a mortgage decree on the 9th January, 1931. The plaintiff's claim for a personal decree for realisation of the balance, if any, that may remain unrealised from the sale proceeds, was, however, dismissed. Thereupon, the defendants filed an appeal to the lower appellate court on the 23rd March, 1931, impleading the appellant, Mahendra, as the sole respondent in the appeal. The application for probate, however, was dismissed on the 2nd April, 1932, only on the ground that the appellant could not pay the probate duty. On the 10th May, 1932, an application was filed by the heirs of Uday for being substituted as respondents in place of Mahendra, on the ground that the probate of the will left by Uday was not taken out. This application was rejected by the lower appellate court on the 21st May, 1932. On the 27th May, 1932, the heirs of Uday filed an application for staying the hearing of the appeal to enable them to file an appeal against the said order to this Court and to get an order for staying the hearing of the appeal from this Court.

This application was, however, refused. The appeal was, thereafter, heard by the learned judge and the suit was dismissed. M.A. 477 of 1932 is by the heirs of Uday against the order dated the 21st May, 1932 and S.A. 184 of 1933 is by Mahendra as executor, who has now ceased to be the administrator *pendente lite*, against the order dismissing the suit.

M.A. 477 of 1932.

From the facts stated above, it is clear that the interest in the subject matter of the suit, that is the interest in the mortgage security, did not come to or devolve upon the heirs of Uday during the pendency of the appeal in the lower appellate court. Consequently, the learned judge was right in dismissing the application for substitution and addition of the heirs under Order XXII, rule 10 of the Civil Procedure Code. This appeal is, accordingly, dismissed.

S.A. 184 of 1933.

It appears from the judgment of the lower appellate court that the only point, which it decided, was whether the decree could be maintained by the appellant after he had ceased to be the administrator *pendente lite*. The learned judge has observed:—

> Under section 213 of the Indian Succession Act, the plaintiff's right, as executor, could not be established till he was granted probate or letters of administration with a copy of the will annexed and, if he succeeded in obtaining a decree on the basis of a grant of letters of administration *pendente lite*, that decree must be regarded as conditional on the plaintiff finally obtaining probate of the will. When, therefore, his application for probate was allowed to be dismissed, the whole decree was liable to be set aside on that ground alone.

From the facts stated above, it is clear that the appellant is the executor to the will of his father. There is no dispute about the genuineness of the will. The appellant failed to get the probate, because he could not pay the probate duty in time. He, however, obtained the decree in the trial court as

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administrator *pendente lite*, as the application for probate was then pending. During the pendency of the appeal in the lower appellate court, the appellant ceased to be the administrator *pendente lite*. But this fact cannot take away his right to proceed with the proceeding or to maintain the decree as an executor. The grant of a probate is not a condition precedent to the institution of the suit by the executor. See *Chandra Kishore Roy* v. *Prasanna Kumari Dasi* (1). There cannot be any doubt that the appellant had the right to institute the present suit as executor before he obtained the probate. Whether as executor he would be entitled to recover the decree or to maintain the same passed by the trial court without producing the probate is an entirely different matter. It is well established on authorities that he will be entitled to get a decree, if he produces the probate before the passing of the final decree. In the case of *Menahim Yousef* v. *Islam Aman Salah* (2), Beaumont C. J. observed as follows :—

> If the deceased mortgagee left a will......the defect can be cured by the plaintiffs Nos. 3 to 6 (who are alleged to be and who sued as heirs and legal representatives of the deceased mortgagee) taking out probate and then proceeding with their action seeing that their title arises under the will and the only necessity for obtaining probate is to enable them to prove the will in the only manner which the court recognises.

The learned advocate for the appellant prayed before us for remanding this case to the lower appellate court in order to enable his client to cure the defect by producing the probate before the matter is finally disposed of by the said court. From what has been stated above it is clear that the learned judge has not come to any decision on the merits of the case. He dismissed the suit only on the ground that the appellant before us could not maintain the decree as he had already ceased to be the administrator *pendente lite*. It has been already pointed out that the appellant is still entitled to prosecute the suit as

(1) (1910) I. L. R. 38 Calc. 327; L. R. 38 I. A. 7.

(2) [1931] A. I. R. (Bom.) 547 (548); 134 Ind. Cas. 1167 (1168).

executor and will be entitled to get a decree, if the lower appellate court comes to a decision on the merits in his favour and if he produces the probate before the lower appellate court at the time of the hearing of the appeal.

We, accordingly, set aside the decree of the lower appellate court and remand the case to that court. If the plaintiff, appellant, produces the probate before the lower appellate court within five months from this date, it will thereafter proceed to hear the appeal as well as the cross-objection on the merits and, if the findings of the said court be in favour of the plaintiff, the suit will be decreed. If, however, the plaintiff fails to produce the probate within the time aforesaid, then the plaintiff's suit will stand dismissed with costs in the lower courts. There will be no order for costs of both the appeals in this Court.

M. A. 477 of 1932 dismissed.

S. A. 184 of 1933 allowed : case remanded.

G. S.