APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Reilly.

1932, August 19.

P. RAMA NAIDU AND THREE OTHERS (PLAINTIFF AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

RANGAYYA NAIDU AND TWO OTHERS (DEFENDANTS TWO TO FOUR), RESPONDENTS.*

Executor—Probate—Application for—Representative character of executor in—Death of executor during pendency of proceedings—Continuation of proceedings after—Right of his sons entitled to benefit under will.

An executor who prays for probate prays in form for something which can be granted to no one else. But the essence of the proceedings is that he seeks to establish a will, not for himself, but as the representative of those who take benefits under it. If he fail in his duty, any of those whom he represents may intervene to carry on the proceedings, having in effect by representation through the executor been a party to the proceedings from the outset. And, if in the course of the proceedings the executor drops out through death, any of those he has represented may similarly carry on the proceedings with the unessential modification that the prayer must then be for letters of administration with the will annexed.

Where an executor died during the pendency of an appeal preferred by him against the dismissal of his suit to establish the will, *held*, accordingly, that his sons, who were entitled to a benefit under the will, were entitled to prosecute his appeal.

APPEAL against the decree of the District Court of Chingleput in Original Suit No. 5 of 1927.

Advocate-General (*Sir A. Krishnaswami Ayyar*) and *M. Venkatasubbayya* for appellants.

S. Varadachariar and *R. Rajagopala Ayyangar* for respondents.

* Appeal against Order No. 294 of 1928.

JUDGMENT.

VENKATASUBBA RAO J.—One Rama Naidu applied in the lower Court for probate of the will of the deceased. Certain persons entered a *caveat* and the proceeding became a contentious one. The lower Court, holding that the will had not been proved to be genuine, refused probate and Rama Naidu filed the present appeal and died before the hearing. His sons have been brought on the record and an objection has been taken as to their legal competence to prosecute the appeal, and that is the first question we have to decide.

Rama Naidu besides being the executor is also the residuary legatee. We cannot as a Court of Probate decide questions of construction; but it is not disputed that, in any view, Rama Naidu's sons would be beneficiaries. If the estate taken by the deceased was an absolute one, his sons, on his death, become entitled to the legacy as his heirs; if, on the other hand, the bequest is to be construed as conferring on him only a life estate, the sons, by reason of the words "his male descendants" would take the legacy in their own right. In either case, the sons of Rama Naidu are persons entitled to a benefit under the will.

The decision on the point raised depends upon the view the Court takes of the true nature of the sons' application. Is that to be regarded as an application under Order XXII, Civil Procedure Code? Is it necessary for the sons to make out that the right to sue in such a proceeding *survives* and that they are their father's *legal representatives*? An applicant under Order XXII, rule 3, must establish these two positions, first, that the right to sue survives, secondly, that he is the plaintiff's legal representative. If the original plaintiff in filing the petition in his character as executor represented *the estate* of the deceased testator, then, on his death,

RAMA NAIDU v. RANGAYYA NAIDU.

VENKATA-SUBBA RAO J.

his right may fairly be said to have devolved upon his sons. This follows from the construction which the Judicial Committee was disposed to place in *Venkata-narayana Pillai* v. *Subbammal*(1) upon the expression "legal representative", when a contingent reversioner applied to be substituted in appeal in the place of the deceased presumptive reversioner. But, in my opinion, this is an inquiry which need not be pursued, for the applicants' right stands independent of Order XXII and this position, if realized, will clear the way of much irrelevant discussion.

The question is not, have the applicants a right to be substituted?; but is much more fundamental, have they a right to intervene at any stage of the proceedings? If they can come in at any time, the fact that the original petitioner has died can be of no consequence. Nor does it in principle make any difference whether they seek to intervene before or after the judgment was rendered by the first Court. The question then resolves itself into this; is a proceeding for the grant of probate (or letters of administration with a copy of the will annexed) a representative one; in other words, is the person who has commenced it to be regarded as having done so in his representative or merely individual character? In considering this question, there are two distinct matters which must not be confused. The right which a petitioner in such a proceeding asserts is in one sense an individual or a personal right. But because he asserts a *personal right*, the proceeding does not become one for his *personal benefit*. An executor applies for probate, for instance, on the strength of his special right, which he derives from his appointment under the will. But is the proceeding on that account to be regarded as having

(1) (1915) L.R. 42 I.A. 125; I.L.R. 38 Mad. 406.

been initiated by him in his individual character? He may often possess no beneficial interest and his right may rest on no more than a bare legal title. The proper view to take is that his object in commencing the proceeding is to get an adjudication in the interests not only of himself but of others that the will propounded is genuine and valid. In inviting the Court to pronounce in favour of the will, the executor is acting in a representative capacity, that is to say, for the benefit of the whole class of persons, including himself, interested in having it established. The position of a petitioner for probate is not dissimilar to that of a plaintiff under Order I, rule 8, Civil Procedure Code. What that rule contemplates is a common interest and, in the case of a petition for probate, there is an identity of interest on the part of the whole body of persons claiming under the will. One of the necessary incidents of a representative suit is that any person for whose benefit it is instituted may intervene and ask to be made a party—Order I, rule 8, clause 2. If a petition for probate stands on a footing similar to that of a representative suit, it is right in principle to extend the analogy and hold that any legatee or beneficiary may, on a proper case being made out, intervene at any stage and claim to come on the record. True, an executor when applying for probate does not purport to act under Order I, rule 8. This remark applies equally to a presumptive reversioner who brings a suit in the life-time of a Hindu widow for getting rid of an adoption or an alienation made by her. Nevertheless, the Judicial Committee has held in the case relied upon by the learned Advocate-General, *Venkatanarayana Pillai* v. *Subbammal*(1) already cited, that, on the death of the presumptive reversioner, the person next entitled to

(1) (1915) L.R. 42 I.A. 125; I.L.R. 38 Mad. 406.

RAMA NAIDU v. RANGAYYA NAIDU.

VENKATA-SUBBA RAO J.

the reversion can be substituted in his place, on the ground that the presumptive reversioner's suit must be deemed to be a representative one. In that case, the Judicial Committee refrained from deciding whether or not the adjudication in such a suit would operate as *res judicata* against the contingent reversioners not parties *eo nomine* to the action. But in a later case, *Kesho Prasad Singh* v. *Sheo Pragash Ojha*(1), they point out that from the view taken by them in the earlier case (*Venkatanarayana Pillai's case*) the conclusion necessarily follows that the judgment in the presumptive reversioner's suit is binding even as between the persons not directly parties to the previous suit.

The two questions, the right to intervene and the binding character of the judgment as *res judicata*, are, as Mr. Varadachariar rightly points out, inter-dependent.—Are the legatees entitled to intervene? If they are, the judgment given in their absence would be binding upon them as *res judicata*. Does the adjudication operate as *res judicata*? If it does, surely, they would have a right to intervene, for it would be unjust to hold that they would be bound by the judgment and yet deny to them the right of intervention. Explanation 6 to section 11, Civil Procedure Code, recognizes this principle and provides that judgments in representative actions bind also persons who are constructively parties.

Mr. Varadachariar, for the respondents, relies principally upon two cases of the Calcutta High Court. In *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee*(2) the application for the grant was made by the residuary legatee who died pending the suit. On his death, his widow applied for being substituted. In refusing her

(1) (1924) L.R. 51 I.A. 381; I.L.R. 46 All. 831.
(2) (1909) I.L.R. 36 Calc. 799.

request, HARRINGTON J. observes that the right to represent the estate has not devolved upon her. This case was followed by GREAVES J. in *Haribhusan Datta* v. *Manmatha Nath Datta*(1). It was the son of the original applicant, the residuary legatee, that applied to be made a party, and his application was similarly rejected. In these two cases, the question was not presented to the learned Judges in the form in which we are now considering it. The only contention put forward was that the applicants were entitled to be substituted under Order XXII, rule 3. It was not argued that they had a larger right flowing from the nature of the proceeding, namely, a right to intervene at any stage. *Musammat Phekni* v. *Musammat Manki*(2), on which the applicants rely, supports their contention. The facts in that case were similar to those in the present and it was held that the heir could be substituted. The conclusion although based on a ground different from what we are adopting seems, in my opinion, sound. This remark applies to another case relied on by the applicants, *Sachindra Nath Maity* v. *Bepin Behari Sasmal*(3), where also, on the death of the legatee who applied for probate, her representatives were substituted. Apart from authority, I am satisfied on principle that the sons of Rama Naidu have been properly brought on the record. In the course of the argument, my learned brother drew attention to a passage in Williams on "Executors", which most clearly and unequivocally supports my view. I shall extract that passage :—

"A legatee cannot set up a will after it has been litigated between the executor and next-of-kin, or between the executor and the executor of another will, and pronounced against, unless he can show the parties agreed to set aside the will by

(1) (1918) I.L.R. 45 Calc. 862. (2) (1929) I.L.R. 9 Pat. 698.
(3) (1931) 35 C.W.N. 1028.

RAMA NAIDU v. RANGAYYA NAIDU.

VENKATA-SUBBA RAO J.

fraud or collusion. But, if he is afraid the executor will not do justice, he may intervene in his own interest pending the suit but apparently not after the hearing."—*Williams on "Executors"*, twelfth edition, Volume I, page 213.

A further question was raised and argued, whether a judgment of a Probate Court, if against a will, amounts or not to a judgment *in rem* under section 41 of the Indian Evidence Act. On this point, several cases, such as, *Chinnasami* v. *Hariharabadra*(1), *Kalyanchand Lalchand* v. *Sitabai*(2), *Saroda Kanto Das* v. *Gobindo Mohun Das*(3) and *Ramani Debi* v. *Kumud Bandhu Mukerji*(4), have been cited at the Bar, but, in the view I have taken, it becomes unnecessary to deal with that question and I, therefore, refrain from dealing with it.

In the result, I have come to the conclusion that Rama Naidu's sons have been rightly brought on the record and are entitled to prosecute the appeal.

[His Lordship then considered the evidence and held that the execution of the will had been duly proved and concluded :—]

In the result, the appeal is allowed with costs throughout.

The District Judge is accordingly directed to issue under the provisions of the Indian Succession Act letters of administration with a copy of the will annexed to the appellants (the sons of Rama Naidu) or any of them as the District Judge may in his discretion think fit.

REILLY J.

REILLY J.—I agree with my learned brother that it is unnecessary on this occasion to express an opinion on the question whether a judgment refusing probate of a will is a judgment *in rem*, though that question was argued before us at some length. On that question

(1) (1893) I.L.R. 16 Mad. 380.
(2) (1913) I.L.R. 38 Bom. 309 (F.B.).
(3) (1910) 12 C.L.J. 91.
(4) (1910) 12 C.L.J. 185.

there is a conflict between the view expressed in this Court and the Calcutta High Court on the one hand and that of the Bombay High Court on the other. If Rama Naidu, the plaintiff, when he sought to prove the will in his suit for probate, was not only asserting his claim to be recognized as executor but can be regarded as seeking to establish the will as representing all the beneficiaries under it, then on his death any other beneficiary represented by him or any person succeeding to a benefit under it through his death could continue the proceedings either in the original Court or on appeal, though the prayer for probate would in those circumstances necessarily be changed to one for letters of administration with the will annexed. Representative suits in this country, in which those who are by name on the record fight the battles and represent the interests, not only of themselves, but also of others, who are in effect, though not in name, parties to the suits from the beginning, are not confined to suits in which permission to represent other persons has been obtained under rule 8 of Order I of the Code of Civil Procedure. That was recognized by their Lordships of the Privy Council in regard to Hindu reversioners in *Venkatanarayana Pillai* v. *Subbammal*(1), *Janaki Ammal* v. *Narayanasami Aiyer*(2) and *Kesho Prasad Singh* v. *Sheo Pragash Ojha*(3), in regard to members of the public interested in a public trust of a religious and charitable nature in *Raja Anand Rao* v. *Ramdas Daduram*(4) and in regard to worshippers in a temple in *Sankaralinga Nadan* v. *Raja Rajeswara Dorai*(5). In England that principle was long ago applied to probate

(1) (1915) L.R. 42 I.A. 125; I.L.R. 38 Mad. 406.
(2) (1916) L.R. 43 I.A. 207; I.L.R. 39 Mad. 634.
(3) (1924) L.R. 51 I.A. 381; I.L.R. 46 All. 831.
(4) (1920) L.R. 48 I.A. 12; I.L.R. 48 Calc. 493.
(5) (1908) L.R. 35 I.A. 176; I.L.R. 31 Mad. 236.

RAMA NAIDU v. RANGAYYA NAIDU.

REILLY J.

proceedings. In 1755 in *Bittleston* v. *Clark*(1) Sir GEORGE LEE said :

"A legatee cannot set up a will after it has been litigated between the executor and the next-of-kin and pronounced against, unless he can show the parties agreed to set aside the will by fraud or collusion, and so the Delegates held in *Lewis and Bulkeley*(2); but a legatee, if he is afraid the executor will not do justice, may intervene in his own interest",

which is in effect quoted in the passage taken by my learned brother from Williams on "Executors". In 1836 in *Hayle* v. *Hasted*(3) Sir HERBERT JENNER described executors who prayed for probate of a will and codicil as

"in effect representing and protecting the interests of all the parties benefited under those instruments."

Mr. Varadachariar contended that, when an executor prays for probate, he prays for something which is personal to himself, as no one but an executor can get probate. That is to look at the mere form of the proceedings and to ignore their real effect. As Sir HERBERT JENNER said in the same case,

"the executors in the former will represent and are the protectors of the legatees under it, being specially entrusted by the deceased with the care and management of her property and to see her intentions carried into effect"

and again

"the executors were bound to the best of their ability to defend the interests of the legatees under the first will, of which they stood before the Court praying probate and which they must be taken to have considered as containing the last will of their testator and which as such it was their duty to see carried into effect; for it is not the interest of the executors but the intention of the testator which is to be attended to."

It cannot be denied that the passages I have quoted represent the law in England to-day. An executor who

(1) (1755) 2 Lee 248; 161 E.R. 330.
(2) (1732) 1 Lee 513 Notes; 161 E.R. 189.
(3) (1836) 1 Curt. 236; 163 E.R. 80.

prays for probate prays in form for something which can be granted to no one else. But the essence of the proceedings is that he seeks to establish a will, not for himself, but as the representative of those who take benefits under it. If he fail in his duty, any of those whom he represents may intervene to carry on the proceedings, having in effect by representation through the executor been a party to the proceedings from the outset. And, if in the course of the proceedings the executor drops out through death, it follows that any of those he has represented may similarly carry on the proceedings with the unessential modification that the prayer must then be for letters of administration with the will annexed. There is no reason to doubt that the position is the same in this country. This aspect of the matter, I think it is clear, was overlooked in *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee*(1) and *Haribhusan Datta* v. *Manmatha Nath Datta*(2), on which Mr. Varadachariar relies, where the petitions before the Court were dealt with as if the only question arising was how Order XXII of the Code applied to them. I agree that Rama Naidu's sons are entitled to prosecute his appeal against the dismissal of his suit to establish the will.

[His Lordship then considered the evidence and held that the execution of the will had been duly proved.]

A.S.V.

(1) (1909) I.L.R. 36 Calc. 789. (2) (1918) I.L.R. 45 Calc. 862.