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must be held that the appeals have abated as a whole and are, therefore, liable to be dismissed with costs.

DHAVLE, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

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v.

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Succession Act, 1925 (Act XXXIX of 1925), sections 232 and 233—Letters of Administration, application for, by sole legatee—application rejected—appeal to High Court—sole legatee, death of, during the pendency of appeal—substitution, petition for—heir, whether entitled to continue proceeding—probate proceeding, judgment in, whether operates as judgment in rem.

P, a sole legatee under a will, applied for the grant of letters of administration with a copy of the will annexed to the estate of the deceased testator. The District Judge not being satisfied that the will had been executed by the testator, rejected the application and the legatee appealed to the High Court. During the pendency of the appeal, however, the legatee died and her heir, who was a person interested in the will, applied to be substituted in her place.

Held, allowing the petition for substitution, that the heir was entitled to continue the proceeding in the place of the deceased appellant.

Hari Bhusan Datta v. *Manmatha Nath Datta*(1), not followed.

*First Appeal no. 40 of 1928, In re.

(1) (1918) I. L. R. 45 Cal. 862.

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Sarat Chandra Banerjee v. *Nani Mohan Banerjee*(1), distinguished.

A judgment given in probate proceedings operates as a judgment in rem and, so far as the genuineness or otherwise of the will is concerned, it binds not only the parties to the proceedings but also other persons.

Saroda Kanto Dass v. *Gobind Mohan Das*(2), *Ramani Debi* v. *Kumud Bandhu Mukerji*(3) and *Rallabandy Venkataratnam* v. *Yanamandra Satyavati*(4), followed.

The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

Pitamber Misra, for the appellant.

Sarjoo Prasad, for the respondent.

FAZL ALI, J.—The appellant in this appeal having died, the question we have to decide is whether the appeal can now be carried on by her daughter who has applied to be substituted in her place. It appears that the appellant applied for letters of administration before the District Judge of Muzaffarpur on the allegation that one Chedi Bhagat had died leaving a will, dated the 22nd December, 1926, under which the appellant was the sole legatee. The application was resisted by the widow of the deceased and the District Judge after taking evidence in the case rejected the application and held that it was not proved to his satisfaction that the will had been executed by Chedi Bhagat. The appellant thereupon preferred this appeal before this Court and she died sometime after the notice of the appeal had been served upon the respondent.

Now, it is contended on behalf of the respondent that the right of the appellant to apply for letters of administration was a personal right and, the appellant having died, the right to sue will not survive to her

(1) (1909) I. L. R. 36 Cal. 790.
(2) (1910) 12 Cal. L. J. 91.
(3) (1910) 12 Cal. L. J. 185.
(4) (1924) 79 Ind. Cas. 44.

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heir. The learned Advocate supports this position by referring us to the case of *Hari Bhushan Dutta* v. *Manmatha Nath Dutta*(1). That case was decided by Greaves, J. of the Calcutta High Court and the facts of that case are as follows—One Sreemuty Nrityamoni Dassee died on the 19th May, 1914. On the 23rd June, 1914, one Hem Bhushan Datta applied for a grant of the letters of administration with a copy of the will annexed to the estate of the deceased. After the caveats were entered by the defendants and the matter had been set down as a contentious cause, Hem Bhushan Datta died leaving Hari Bhushan Datta as his heir and representative. The question then arose whether any right to sue had survived to the applicant. Greaves, J. held that the right to a grant of administration was a personal right derived from the Court, and although the applicant, if the will was established, might be the proper person to obtain a grant, this would be not by virtue of any right of administration which he inherited from his father, but by virtue of the fact that as heir of the residuary legatee, he was the person most interested in the estate. Reference was made to another case of the Calcutta High Court—*Sarat Chandra Banerjee* v. *Nani Mohan Banerjee*(2)—where the executor named under the will having died during the pendency of the probate proceeding, his widow sought to be substituted as being his heiress, but Harington, J. held that the executor's right to sue did not survive to his widow.

Now, there is no doubt that the facts of the case relied upon by the learned Advocate for the respondent very closely resemble the facts of the present case. The learned Advocate for the petitioner, however, questions the correctness of the decision of Greaves, J., and he asks us to come to an independent conclusion on a consideration of the provisions of the Succession Act and certain cases decided in England. The

(1) (1918) I. L. R. 45 Cal. 862.
(2) (1909) I. L. R. 36 Cal. 799.

matter is by no means an easy one and the pronouncements of the Calcutta High Court in the two cases referred to above, for which we cannot but have great respect, add to the difficulty. On looking into the matter carefully, however, I find that the case of *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee*(1) on which Greaves, J. principally relied is easily distinguishable from the facts of the present case. In that case, as I have already said, the executor named in the will of which probate was sought had died before obtaining a grant and an application was made by the heirs of the executor to be substituted in his place. The case thus came directly within the mischief of section 222 of the Succession Act which provides that probate shall be granted *only* to an executor appointed by the will. Now, the words of this section show that the right to obtain a probate is confined to the executor and can by no means devolve upon the heir of the executor. The provision, however, as to the persons who are entitled to letters of administration is not so stringent. The principles which would govern the granting of the letters of administration are laid down in sections 232 and 233 of the Succession Act which run as follows—

Section 232:

"When—

(*a*) the deceased has made a will, but has not appointed an executor, or

(*b*) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or

(*c*) the executor dies after having proved the will, but before he has administered all the estate of the deceased, an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered."

Section 233:

"When a residuary legatee who has beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee."

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

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Now, a good deal of argument has been addressed to us as to the proper construction of section 233. The learned Advocate for the respondent contends that the expression "before the estate has been fully administered" suggests that the contingency contemplated by the section is to arise only when the letters of administration have already been granted, but the estate has not been fully administered. On the other hand, it is contended by the learned Advocate for the petitioner that there is no justification for putting such a narrow interpretation upon the section and that the section may apply even to those cases where letters of administration though applied for have not yet been granted and that such cases are fully covered by the somewhat comprehensive expression "before the estate has been fully administered." Without deciding whether the view taken by the Advocate for the petitioner is correct or not, it seems to me to be quite clear from the provisions of this section that in certain cases at least the heir of a residuary legatee has the same right to administration after the death of the legatee as the legatee himself. This will at once distinguish the case of the residuary legatee from that of an executor where no similar provision seems to have been made. So far as the English Law is concerned I may quote in this connection the following passage from the Law of Executors and Administrators by Williams—Volume I, 11th edition, page 380—

> "Where the residuary legatee survives the testator and has a beneficial interest, his representative has the same right to administration *cum testamento annexo* as the residuary legatee himself."

It is, therefore, beyond controversy that the heir of a legatee who is not a mere trustee but has an interest under the will is a person entitled to apply for letters of administration. Now, I can understand that when once letters of administration have been granted to a legatee and then he dies the duty of carrying on the administration of the estate will not

devolve upon the administrator's personal representative but on a person appointed for the purpose under sections 9 and 45 of the Probate and Administration Act [See *S. G. Ramanatham Chetti* v. *A. S. Ragammal*(1)]. But it is not so clear why a person, who has admittedly under the law the right to apply for letters of administration and who derives this right from the legatee by virtue of his being an heir of the legatee, should be debarred from carrying on the proceedings if the legatee happens to die after he had applied for letters of administration and before the letters have been granted. It is true that Greaves, J. does say in the case referred to by the learned Advocate for the respondent that " the right to a grant of administration was a personal right derived from the Court ", but so long as the right has not been conferred upon the applicant by the Court, it cannot be said to have been derived from the Court and I am not quite sure whether the right to sue should be regarded as a personal right in the sense in which the right of an administrator to administer the estate is a personal right after the letters of administration have been obtained.

Besides, there arises another difficulty which is suggested by the order passed by Greaves, J. in the case to which I have referred. It was distinctly observed in that case that although the application of the heir of the deceased legatee to be substituted failed there was nothing to prevent the applicant from applying for a grant on his own account. That observation was made obviously on the ground that the heir of the legatee had an interest in the property which was alleged to be the subject-matter of the will and he was one of the persons competent to obtain letters of administration. The position occupied by the petitioner is identical here and it is not denied that the petitioner also is one of the persons competent to obtain letters of administration if the will is held to

(1) (1914) 27 Ind. Cas. 849.

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be genuine. In fact from the terms of the will it would appear that the property was devised to Musammat Phekni as the sole legatee and the terms of the device would suggest that it was given to her in absolute right, meaning thereby that the heirs of Musammat Phekni would also be persons interested in the grant under the will. That being so, the practical question which arises is—can we pass a similar order in this case to the order that was passed by Greaves, J. in the case before him? It is to be noticed that in the latter case the applicant died during the pendency of the proceeding before the Judge, or, in other words, before the Court had come to a decision as to the genuineness or otherwise of the will and it was, therefore, open to any person interested under the will to make a fresh application for the grant of the letters of administration. In this case a decision has already been given which is adverse to the appellant, the District Judge having held that the will had not been proved. That being so, I am very doubtful whether the petitioner who is admittedly interested under the will and who is admittedly entitled to apply for letters of administration can successfully make an application before the District Judge. The difficulty which the applicant will have to face arises on account of a series of decisions in which it has been held that a judgment given in probate proceedings will be considered to be a judgment in rem and will bind not only the parties to the proceedings, so far as the genuineness or otherwise of the will is concerned, but will also bind other persons. To refer to a few cases only, it was pointed out in the case of *Saroda Kanto Das* v. *Gobind Mohan Das*(1) that " the action of a Probate Court of competent jurisdiction, when it admits a will to probate or rejects it as not duly attested and executed, is in the nature of a proceeding in rem, and so long as the order remains in force, it is conclusive as to the due execution and

(1) (1910) 12 Cal. L. J. 91.

the validity of the will, not only upon all the parties who may be before the Court, but also upon all other persons whatever in all proceedings arising out of the will or claims under or connected therewith.'' Similarly in another case—*Ramani Debi* v. *Kumud Bandhu Mukerji*(1) while pointing out the limitation of the above rule, their Lordships observed—'' The true rule, based upon intelligible grounds is thus formulated in the case of *Schultz* v. *Schultz*(2) ' when a will has been propounded by a party interested, and fairly rejected on the merits, it would defeat the policy of the law, and be productive of many mischief, if it could be again propounded by the same party or by others, who might be interested, and the contest thus renewed from time to time. The sentence, therefore, against the will must be regarded as a sentence, against all claiming under it: it stands upon a footing analogous to the cases known as judgments in rem, which are regarded as final and conclusive, not only in the Courts in which they are propounded, but in all others in which the same question arises'.''

To the same effect is the decision of the Madras High Court in *Rallabandy Venkataratnam* v. *Yanamandra Satyavati*(3).

Now with these decisions before us it would be useless to direct the petitioner to apply for letters of administration again on her own account before the District Judge. Thus if we hold that the view taken by Greaves, J. is the correct view, the position which is created in this case will be one of extreme hardship. Having, therefore, given careful consideration to the matter, the conclusion that I have arrived at is that in view of the fact that a distinction has been drawn by the legislature itself between the position of an executor and that of an administrator and in view of

(1) (1910) 12 Cal. L. J. 185.
(2) (1853) 10 Guttan 358; 60 Am. Dec. 335.
(3) (1924) 79 Ind. Cas. 44.

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the admitted fact that the petitioner has an interest under the will and is a competent person to obtain letters of administration and also having regard to the fact that there is nothing in law which expressly stands in the way of the petitioner applying to this Court for carrying on the proceedings as a person interested in the will, I am inclined to think that the petitioner ought to be substituted in place of the deceased appellant for the purpose of carrying on the litigation which was commenced by the appellant and for the purpose of obtaining a final adjudication as to whether the will was a genuine one or not.

CHATTERJI, J.—I agree. The decision of Greaves, J. in the case of *Haribhusan Datta* v. *Manmatha Nath Datta*(1) is distinguishable from the facts of the present case. There an application for substitution was made in the original Court by the heir of a residuary legatee who had applied for letters of administration; while the position here is that the application is made by the daughter and heir of the sole legatee in appeal after an adjudication against the genuineness of the will. This decision under appeal is a judgment in rem under section 41 of the Evidence Act and takes away a legal right from the original appellant. Unless this judgment is removed as a bar, the petitioner who, as the representative of the sole legatee, has the right to administration under section 233 of the Indian Succession Act, 1925, cannot take under the will at all. Greaves, J., while refusing the petition for substitution, provided that it would be open to the heir while making a fresh application for grant "to apply to adopt such material proceedings as have been taken in the present suit." This will not be possible in the present case because the heir will at once be met with the plea that the will has been found to be not genuine in the presence of her mother and predecessor-in-interest who

(1) (1918) I. L. R. 45 Cal. 862.

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propounded the will. So the view taken by Greaves, J., cannot be extended in its application to a right of substitution in the appeal. As formulated in the case of *Schultz* v. *Schultz*(1), quoted with approval in *Ramani* v. *Kumud*(2), when a will has been propounded by a party interested and fairly rejected on the merits, it would defeat the policy of the law and be productive of many mischiefs if it could be again propounded by the same party or by others who might be interested, and the contest thus renewed from time to time; the sentence against the will must be regarded as a sentence against all claiming under it.

I, therefore, think that the petitioner should be substituted in the place of the original appellant. Even if it be conceded that the petitioner before us is not entitled to be substituted in the strict sense of the term, still we can under our inherent powers join her as party, for ends of justice, in order to continue the proceedings pending in this appeal. In any view it is quite proper, as stated by my learned brother, that she should be allowed to continue this appeal.

Application allowed.

REVISIONAL CRIMINAL.

SPECIAL BENCH.

Before Terrell C.J., James and Dhavle, JJ.

BHARAT KISHORE LAL SINGH DEO

v.

JUDHISTHIR MODAK.*

1929.

August, 14, 15.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 4(*h*), 190, 200 *and* 202—*complaint, what constitutes*

*Criminal Revision no. 426 of 1929, against an order of C. C. Mukharji, Esq., Deputy Commissioner of Manbhum, dated the 22nd May, 1929.

(1) (1853) 10 Gatlan 358; 60 Am. Dec. 335.

(2) (1910) 12 Cal. L. J. 185.