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For these reasons I agree that the answer to the question should be in the negative and I also agree to the order of costs proposed by my learned brother.

Order accordingly.

K. D.

APPELLATE CIVIL.

Before Varma and Manohar Lall, JJ.

SREEMATI INDU PROVA DEBI

v.

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st, 3, 28.

Succession Act, 1925 (Act XXXIX of 1925), sections 332 and 335—Will—residuary legatee appointed executor—mortgage by executor in his capacity as residuary legatee—assent of executor, whether implied—renunciation of executorship without taking out probate—mortgage, whether valid—assent, whether inoperative—letters of administration granted to a legatee—such legatee, whether entitled to recover possession of mortgaged property—grant of letters of administration, whether raises a presumption that the estate remains unadministered—residuary legatees and their transferees, whether liable to have the property in their possession reduced in order to repay specific legatees.

A legatee, to whom letters of administration with copy of the Will annexed have been granted, is not entitled to institute a suit for the recovery of possession of an estate which has passed out of the possession of the executor as a result of a transaction entered into by the executor in his character as the residuary legatee before he renounced his executorship without taking out probate.

The mere fact that a legatee has obtained letters of administration with Will annexed cannot raise a presumption that the estate remains unadministered or that all the legacies, or at least the legacy in favour of the particular legatee who obtains letters of administration, have not been paid in accordance with the tenor of the Will.

*Appeal from Original Decree no. 120 of 1937, from a decision of C. E. Walze, Esq., Subordinate Judge of Deoghar, dated the 31st March, 1937.

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Adwait Ch. Mondal v. *Krishnadhone Sarkar*(1) and *Durgapada Bera* v. *Atal Chandra Bera*(2), relied on.

A mortgage, by a legatee under a Will, of immovable property left to him by the testator, before the assent of the executor to the legacy is obtained, is valid and the mortgagee is entitled to cut off the equity of redemption. The reason for this rule is that although the legatee has no property in the legacy by the devise until the assent of the executor is obtained, he has an interest therein which is capable of being transferred; in other words, though on the assent of the executor the full title passes to the legatee, the assent creates no new title but merely perfects the title acquired under the Will.

Khagendra Nath Mookerjee v. *Khetra Nath Pal*(3), followed.

Where an executor, in his capacity as a legatee, mortgages the property bequeathed to him and applies the money to his own use, and not for the purpose of administering the estate of the testator, the executor will be deemed to have assented to the legacy in his own favour on the date when he gave the property in mortgage.

Commissioners of Inland Revenue v. *Smith*(4) and *Attenbourough* v. *Solomon*(5), referred to.

An assent given to a legacy by the executor is not rendered inoperative by reason of the fact that the executor renounces the executorship without taking out any probate.

Kadiyala Venkata Subamma v. *Katreddi Ramayya*(6), relied on.

Satya Prashad Pal Chowdhry v. *Motilal Pal Chowdhry*(7), not followed.

The residuary legatees and their transferees are always liable to have the property in their possession reduced to a proper extent in order to repay the specific legatees.

(1) (1917) 21 Cal. W. N. 1129.
(2) (1937) 41 Cal. W. N. 1204.
(3) (1922) I. L. R. 50 Cal. 171.
(4) (1930) 1 K. B. 713.
(5) (1913) A. C. 76.
(6) (1932) L. R. 59 Ind. App. 112.
(7) (1899) I. L. R. 27 Cal. 683.

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Khagendra Nath Mookerjee v. *Khetra Nath Pal*(1), followed.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Manohar Lall, J.

S. N. Bose (with him *S. S. Rakshit* and *S. K. Sarkar*), for the appellant.

P. R. Das and *S. Mustafi*, for the respondents.

MANOHAR LALL, J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Deoghar dismissing the suit of the plaintiff which was instituted by her, as a person to whom letters of administration were granted, for recovery of possession of the properties in suit belonging to the estate of the testator (who left a legacy in her favour) which passed to the possession of the respondents in the circumstances narrated below.

The case of the plaintiff very briefly stated is this. One Gopal Chandra Chatterji had three sons, namely, (*1*) Kali Prasanna Chatterji, (*2*) Siva Prasanna Chatterji and (*3*) Sarda Prasad Chatterji who died leaving the plaintiff as his widow and one Ganesh Chandra Chatterji as their son. Sometime before 1923, Shiva Prasanna Chatterji, after the death of his father, executed a Will regarding his property in favour of his nephew Ganesh Chandra Chatterji and nominated him as his executor. Shiva Prasanna died on the 18th of September, 1923. In the same year, on the 8th of December, Kali Prasanna Chatterji executed another Will in which he left a legacy to the plaintiff for Rs. 2,000 and three other legacies for a total sum of Rs. 4,200. By this Will Ganesh was appointed as the executor. Kali Prasanna died on the 13th of November, 1924,

(1) (1922) I. L. R. 50 Cal. 171.

leaving the aforesaid Will as his last Will and testament, which is exhibit 1 in this case. In the Will he, after setting out the specific legacies stated by me just now, bequeathed

"all the rest residue and remainder of my estate..............after payment of my funeral and testamentary expenses and just debts and the legacies bequeathed.........unto and to the use of my said nephew Ganesh Chandra Chatterji for his own absolute use and benefit".

In other words, Ganesh Chandra Chatterji was both the executor and residuary legatee under this Will of his uncle.

On the 10th of September, 1925, Ganesh Chandra executed a mortgage (exhibit 2) by which he mortgaged the properties in suit in favour of the Hindustan Co-operative Insurance Society, Limited (hereinafter referred to as the Society) who is the second defendant and the only contesting respondent before us. The mortgage was to secure an advance of Rs. 1,05,000. The purpose of the loan was to administer the estate of Shiva Prasanna, who appointed the mortgagor as his executor under the Will of 18th of September, 1923, already referred to. So far as the properties in suit are concerned, the mortgagor expressly stated that he was absolutely seized and possessed of or otherwise well and sufficiently entitled to them and that he was executing the mortgage in his individual capacity. So far as other properties of Siva Prasanna were included in this mortgage bond, the mortgagor expressly purported to give the mortgage in his own capacity as executor of Siva Prasanna. It was further stipulated in this document that the mortgagor will, within six months, obtain a probate of the Will of his uncle Kali Prasanna under which he claimed the properties described in the third schedule and will execute a deed in favour of the mortgagees confirming these presents and, in case the mortgagor failed to do that within the period of six months, he will repay to the mortgagees a sum of Rs. 30,000 out of the principal sum of Rs. 1,05,000 on the said

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terms. The mortgagor did not carry out this undertaking and the mortgagee instituted a suit in 1927 in the Calcutta High Court to enforce the mortgage of 1925. The Society duly obtained a preliminary decree in January, 1928, and the decree was made final in December, 1928. The properties mortgaged were ordered to be put to sale and the date fixed for the sale was the 19th of June, 1931. The properties were accordingly sold and were purchased by the first defendant who subsequently transferred his interest to the Society, the second defendant. The sale certificate was duly granted on the 5th of August, 1931, to the auction-purchaser. The sale certificate was transferred to the court of Dumka for delivery of possession on the 23rd of July, 1932. An objection by the plaintiff to this delivery of possession was rejected and the delivery of possession was ordered on the 8th of September, 1932. That matter came to this Court and by an order of the 28th March, 1933, (exhibit F) in Civil Revision no. 619 of 1932, Mr. Justice Macpherson affirmed the order of the lower Court but set it aside in so far as the property consisted of the holdings of a raiyat or a part thereof on the ground that transfers of this kind of property were invalid under section 27 of Regulation III of 1872.

In the meantime, the plaintiff on the 16th of June, 1931, applied for letters of administration with the Will of the late Kali Prasanna annexed before the District Judge of Dumka. A notice was issued to the executor named in the Will who renounced his executorship on the 18th of July, 1931. The letters of administration were granted without any opposition on the 21st of September, 1932, and the present suit was instituted on the 5th of September, 1933, asking for reliefs in the form that the plaintiff has a right to hold possession over the properties in suit as administratrix of the estate of Kali Prasanna Chatterji. She desired possession of those properties from the Society after vacating the order of the

learned Subordinate Judge which was affirmed by this Court to the extent indicated by the order of the 28th of March, 1933.

The events narrated above are strong indications of the correctness of the view that the appellant applied for letters of administration simply with a view to avoid or obstruct the contemplated sale fixed for the 19th June, 1931; but this consideration is wholly irrelevant. The plaintiff is always entitled to rely upon her rights and if these are established in accordance with law the Court is bound to give proper relief to her irrespective of the motive which induced her to obtain letters of administration and then to institute the suit.

The real question is whether a legatee, to whom letters of administration with copy of the Will annexed have been granted, is entitled to institute a suit for recovery of possession of the estate which has passed out of the possession of the executor as a result of a transaction entered into with the defendants by the executor in his character as the residuary legatee before he renounced the executorship without taking out probate.

It is necessary in the first instance to determine whether the estate of Kali Prasanna Chatterji was unadministered on the date of the present suit. The plaintiff alleged in paragraph 5 of the plaint that the executor Ganesh Chandra Chatterjee did not take any steps for obtaining probate of the Will of the testator, nor did he make any payment to the plaintiff and other persons according to the directions in the Will and subsequently he openly renounced the executorship. The defendants refused to admit the correctness of these allegations in paragraph 4 of the written statement and they asserted that no legacies remained to be paid out of the estate of Kali Prasanna Chatterji. In the face of these pleadings the onus was upon the plaintiff to prove that the estate remained unadministered. No evidence at all

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was offered by the plaintiff in the present case; it is significant that neither of the three legatees are made parties to this action, nor has any of them including the executor and the plaintiff chosen to come forward to give evidence to support the allegation of the plaintiff that the legacies still remained unpaid. But it was argued by the learned Advocate for the appellant that as soon as it is established that letters of administration with Will annexed have been granted by the Court of the District Judge to the plaintiff it must be presumed in law that the specific legacies, or at least the legacy in favour of the plaintiff, were still due on the date when the letters of administration were granted on the 16th June, 1931, and that the same state of affairs should be assumed to continue on the 5th September, 1933—the date when the present suit was filed. The current of authority, however, is against this view. It is enough to refer to two cases of the Calcutta High Court, namely, *Adwait Ch. Mondal* v. *Krishnadhone Sarkar*(1) and *Durgapada Bera* v. *Atul Chandra Bera*(2). In the former case it was held that " where a Will has been propounded and proved, the Probate Court should grant probate even though it should appear that there were no debts due to or by the testator and the legatees have been in possession in accordance with the directions of the Will for a long time, it being absolutely necessary for the legatees to establish their title by proving the Will " and it was observed by the learned Judges that " the Probate Court cannot go into the question whether the legatees have acquired independent title by adverse possession ". The case of *Durgapada Bera* v. *Atul Chandra Bera*(2) expressly follows the case just referred to and it is directly laid down in this case that " in cases of testamentary succession, where there is a Will and it has never been probated, the question whether the estate has or has not been already fully administered is not relevant and cannot be gone into

(1) (1917) 21 Cal. W. N. 1129.
(2) (1937) 41 Cal. W. N. 1204.

by the Court in dealing with an application for probate or letters of administration ''. In my opinion, therefore, the mere fact that the plaintiff obtained letters of administration with Will annexed from the learned District Judge is no evidence to prove that the estate must be assumed to have been still unadministered, nor that this Court should presume that all the legacies or at least the legacy in favour of the plaintiff has not been paid in accordance with the tenor of the Will.

The respondent, as already stated, obtained a title to remain in possession of the lands in suit by virtue of the sale in execution of a mortgage decree obtained on the footing of a mortgage bond which, in my view, must be taken to be executed by the executor in his personal capacity as a residuary legatee. Mr. P. R. Das, relying upon the case of *Doe* v. *Sturges*(1), argued that it must be held that the mortgage was executed by the mortgagor in his capacity as an executor; but I am not able to place such a construction upon the mortgage bond as this will involve, apart from straining the language used in the document, the inference that the executor committed a breach of trust. The recitals in the bond are clear that Ganesh Chandra Chatterji was executing the mortgage in order to raise funds not to administer the estate of Kali Prasanna Chatterji but to administer the estate of Shiva Prasanna Chatterji. Unless I am forced to come to the conclusion by the clear words used in the bond I must hold that no breach of trust was committed by the executor.

It is now well settled that where a legatee under a Will mortgages an immovable property left to him by the testator before obtaining the assent of the executor to the legacy, the property could form the subject-matter of a valid mortgage, and the mortgagee is entitled to cut off the equity of redemption. The reason for the rule is that although the legatees have

(1) (1816) 129 E. R. 87.

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no property in the legacies by the devise until the assent of the executor is obtained, they have an interest in them which is capable of being transferred. In other words, as pointed out in the case of *Khagendra Nath Mookerjee* v. *Khetra Nath Pal*(1), "though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the Will".

The question which is relevant to consider in these circumstances is whether the executor assented to the legacy. The facts speak for themselves. A useful illustration of how to determine whether there was an assent by an executor, which may be by conduct, to a legacy is afforded by the case of *Commissioners of Inland Revenue* v. *Smith*(2). The Master of the Rolls at page 733 observes: "All the relevant matters must be taken into consideration and, as Rowlatt, J. says in his judgment in the present case, you may have an assent by conduct: 'When it is said that the executor assents to a bequest', what is meant is not that he assents to the disposition of the testator, but that he assents to its taking effect upon the specific property if the bequest is specific, upon a sum of money if it is pecuniary, or upon the residue brought out by the executor at the end of the administration if it is a residuary bequest. Lord Haldane's exposition in *Attenborough* v. *Solomon*(3) makes this clear. The assent of the executor, it is important to add, may be inferred when there is clearly nothing more to be done by way of administration". The other Lord Justices took the same view.

It was faintly argued that until the residue is ascertained the residuary legatee was not in a position to transfer his rights to the defendants. In the present case it is admitted and proved that all the outgoings, as provided by the testator in the Will, had been paid off before the mortgage of 1925, at

(1) (1922) I. L. R. 50 Cal. 171.
(2) (1930) 1 K. B. 713.
(3) (1913) A. C. 76.

least there is no evidence to the contrary. The principle applicable is expressed by Sir George Jessel in *Trethewy* v. *Helyar*(1) where he says: "It appears to have been long-settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle" [*See* also *King* v. *Commissioners*(2)].

Applying these tests to the present case, as I have stated just now, the facts speak for themselves. There is no proof in the present case that any of the specific legacies remained to be paid out. Section 332 of the Succession Act (Act XXXIX of 1925) provides that the assent of the executor is necessary to complete the legatee's title to his own legacy and by section 335 it is provided that when the executor is a legatee his assent to his own legacy is necessary to complete his title to it and his assent may be express or implied. Sub-clause (*2*) provides that assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor. The illustration to the section is of an executor who took the rent of a house or the interest of government securities bequeathed to him and applied it to his own use and this is stated to be an assent. In the present case the mortgage was by the executor in his individual capacity as a legatee with respect to the properties bequeathed to him. He applied the money to his own use, because, I have pointed out already, the loan was taken by him not to administer the estate of his testator Kali Prasanna Chatterji. It follows, by applying the principles in the English cases referred to above and also as

(1) (1876) 4 Ch. Div. 53.
(2) (1920) 1 K. B. 468.

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provided by the sections of the Succession Act referred to above, that the executor assented to the legacy in his own favour on the date he gave the mortgage to the defendants.

It was then argued by Mr. S. N. Bose appearing for the appellant that the executor has no power to give assent as an executor before he obtained the probate of the Will and as in this case no probate was ever obtained the assent given by the executor to himself as a residuary legatee was no assent in the eye of the law. A short answer to this contention is afforded by the case of *Kadiyala Venkata Subamma* v. *Katreddi Ramayya*(1) where their Lordships have authoritatively laid down that "the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor under the Probate and Administration Act, 1881, even though probate has not been obtained". In the present case the Will has been duly proved before the Probate Court anterior to the suit.

Mr. Bose sought to get over the difficulties thus created in his way by arguing that Ganesh Chandra Chatterji, the executor, having renounced his executorship in July, 1931, and he never having taken out any probate, the assent by him would be inoperative to pass any title to the defendants. He relied upon the case of *Satya Prashad Pal Chowdhry* v. *Motilal Pal Chowdhry*(2), where the learned Judges made this observation at page 688: "It is only the executors who have obtained probate that can act as representatives of the testator; and we think it but reasonable that an executor who renounces or refuses or is unable to act should be regarded as if he had never been appointed". This view seems to have been the older view of the Calcutta High Court but this was negatived by their Lordships of the Judicial Committee in the case referred to above.

(1) (1932) L. R. 59 Ind. App. 112.
(2) (1899) I. L. R. 27 Cal. 683.

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The present suit is not a suit by a legatee to recover his specific legacy from the person in possession of the testator's estate. The learned Subordinate Judge observes that Kali Prasanna Chatterji left two other houses worth about Rs. 4,000 in Jasidih Bazar. Be that as it may, if the testator left no other property than the property in suit, it is always open to the legatee to recover his specific legacy, if he brings an appropriate action and there is no other obstacle by way of limitation or otherwise in his way, by suing for the amount from the persons in possession of the property of the testator as transferees. The transferees of the residuary legatee or the residuary legatees are always liable to have the property in their possession reduced to a proper extent in order to repay the specific legatees [*See Khagendra Nath Mookerjee* v. *Khetra Nath Pal*(1) already referred to].

For the reasons given above I am of opinion that the appeal fails and should be dismissed with costs.

VARMA, J.—I agree.

S. A. K.

Appeal dismissed.

LETTERS PATENT.

Before Harries, C. J. and Fazl Ali, J.

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Transfer of Property Act, 1882 (*Act IV of* 1882), *sections* 6 *and* 130—*assignment of a part of a debt, whether valid—enforcibility—Code of Civil Procedure*, 1908 (*Act V*

* Letters Patent Appeal no. 1 of 1939, from a decision of Mr. Justice Rowland, dated the 11th November, 1938.

(1) (1922) I. L. R. 50 Cal. 171.