

(1909) 06 CAL CK 0067
In the Calcutta High Court

Jogendra Lal Chowdhury

APPELLANT

Vs

Atindra Lal Chowdhury and Others

RESPONDENT

Date of Decision : 17-06-1909

Acts Referred:

Citation : (1909) 06 CAL CK 0067

Judgement

1. Jogendra Lal Chowdhury applied to the District Judge of Hooghly for probate of the will of his father Badan Chandra Chowdhuri dated 17th July 1901, of which he is named as the sole Executor. Badan Chandra Chowdhuri died on 18th August 1907. On 29th August 1908 the respondent Atindra Lal Chowdhuri a grandson of Badan Chandra Chowdhuri filed a caveat. He did not deny the factum of the will of 17th July 1901 which was duly registered, but pleaded that the execution of it by his grandfather was procured by the undue influence of the appellant. He claimed (that a former will of 3rd July 1899 (which was also registered) was the true last will of the testator. By the former will he would have received a share in the testator's estate. By the latter he was entirely disinherited. It is admitted that of the former will, as of the latter the appellant was appointed sole executor. On 23rd December 1908 Atindra Lal Chowdhury filed an application for the appointment of an administrator pendente lite. The application was heard by the District Judge on the 6th February 1909. On 30th April 1909, he passed an order that an administrator pendente lite should be appointed, and on 6th May 1909 he appointed Babu Girindra Nath Banerji, pleader, as such administrator. Against this order Jogendra Lal Chowdhuri has appealed. No exception is taken to the administrator appointed on personal grounds, but it is contended that such an order was wholly unnecessary in this case.

2. It was contended by counsel for the respondent No. 1 that in contested probate proceedings, where the case is likely to be protracted, an order for an administrator pendente lite will be made as of course, and he relied upon the cases *Rendall v. Rendall* 1 Hare 152. and *Bellew v. Bellew* 4 S. and S. 58. Those cases were decided before the passing of the Court of Probate Act, 1857, Section 70 of which corresponds with Section 34 of the Indian Probate and

Administration Act, 1881. It is necessary in England, and must also be necessary here, that in each case the Court should be satisfied that the appointment is necessary and proper (see Williams on Executors Vol. I p. 400). The circumstances of this case are somewhat peculiar. The caveator did not in these probate proceedings put forward any objection to the appellant's appointment as executor, nor to his acting in that capacity. On the contrary he desired and still desires to set up the former will of which also (as we have said) the appellant is the named executor. Moreover, for more than a year, i. e., between the death of the testator and the application for probate, the caveator raised no objection to the estate remaining in the appellant's hands, nor did he in fact do so for four months after the application for probate. It is clear that his main object was and is to get the first will substituted for the second, in which case the appellant would still be entitled to administer the estate as executor. In this respect the case is not unlike that of *Mortimer v. Paull* L.R. 2 PD 85 where there was no question as to the appointment of the executor and the Court, accordingly, refused to appoint an administrator pendente lite.

3. It remains then to be considered whether there is anything against the appellant personally which would necessitate the Court taking the estate out of his hands at the present stage and entrusting it to a stranger. The charges which the caveator has preferred against the appellant in his present application are that he has concealed a number of Government promissory notes belonging to the estate, that he has fraudulently suppressed accounts which the testator had with certain Banks, that he withdrew a sum of Rs. 3,360 from the National Bank of India without authority that he has manipulated and falsified a book of account of the testator by making entries and alterations in pencil; that he is indebted to the estate of the testator; that there are debts to the estate which are likely to become* time-barred, and that during his father's lifetime he received rents from tenants without granting them receipts. The learned District Judge has gone through these charges and has found that not one of them is proved. We need not deal with them in detail. It is sufficient to say that we entirely agree. It is, however, necessary to say that, in our opinion, the mode in which the accounts were kept during the testator's life-time, and any laxity, there may have been in keeping them, has absolutely no bearing on the present question. It appears that the appellant held a power-of-attorney from his father for the management of his property, the accounts were written by one Sarada, a clerk in the local municipality, and occasionally checked by Raghu Nath Dass, a pleader. The subsequent action of the appellant and Raghu Nath Dass with respect to the book of accounts for the period preceding the testator's death appears to us to tell rather in favour of the appellant than against him. The pencil entries and notes show that what he was doing was fair and above board, and we have no doubt that his object was to reduce to something like order the accounts which admittedly had been imperfectly kept. The fact that the appellant is a debtor to the estate, which he admits, would be no obstacle to his acting as executor or remaining now in charge of the estate. It does not appear that the

amount is large or that the appellant has, in any way, misrepresented that amount.

4. The fact, that some debts may be about to become barred by limitation, has no bearing on the question before us. As executor named in the will appellant has the power to file suits if necessary to recover any debts due to the estate. He could not (it is true) obtain a decree until his position was confirmed by probate, but limitation would be saved.

5. The learned District Judge has proceeded on a ground which was not put forward by the caveator in his application, namely, that the appellant has not satisfied him that he is at present keeping proper accounts of the estate. We are assured by his counsel that he is. The learned District Judge does not appear to have held any enquiry on this point and has certainly decided against the appellant without examining him or giving him an opportunity of disproving the suggestion. It was contended that the matter was one within the discretion of the learned District Judge and that this Court would not lightly interfere with the exercise of that discretion. With this we entirely agree, and we should certainly not interfere unless we were convinced that the discretion had not been judicially exercised. We regret, however, that we are forced to come to such a conclusion in this case. The learned District Judge has found all the points urged against the appellant in his favour, and has decided against him on another point, which he was never given a proper opportunity of meeting. We cannot see that there is any necessity for an administrator pendente lite in this case. There is no reason why the probate proceedings should not be disposed of at an early date. In our opinion, they have already been unduly protracted. That the learned District Judge cannot have regarded this question as one of urgency would appear from the fact that his decision was not pronounced until nearly three months after the hearing of the application. The appeal is allowed and the order of the District Judge appointing Babu Girindra Nath Banerjee administrator pendente lite is discharged. Respondent No. 1 must pay to the appellant his costs of this appeal. We assess the hearing fee at 5 gold mohurs. The other respondents must bear their own costs. It is not clear why they were made parties to the probated proceedings. They are supporting the will propounded by the appellant and their only object, we are told, was to answer some allegations made against them by the appellant. This could have been done by affidavit without making them parties to the proceedings.

6. The rule which we granted in this case for an interim stay was adjourned to the hearing. It is unnecessary now that the appeal is decided. It is, accordingly, discharged. No order as to costs.