
(1923) 07 CAL CK 0030
In the Calcutta High Court

Promila Bala Debi

APPELLANT

Vs

Jyotindra Nath Banerji and Others

RESPONDENT

Date of Decision : 16-07-1923

Acts Referred:

Probate and Administration Act, 1881 — Section 34

Citation : AIR 1924 Cal 631

Judgement

1. This is a Rule for the appointment of an administrator pendente lite u/s 34 of the Probate and Administration Act during the pendency of an appeal lodged in this Court against the decree for grant of probate in respect of the estate of one Haricharan Mukherjee who died on the 25th February, 1921.

2. On the 29th June, 1921, the executors applied for probate of the alleged will. On the 20th July, 1921, the objectors prayed for the appointment of an administrator pendente lite and five days later their application was granted, as the District Judge recorded the opinion that the grounds urge for the appointment of an administrator pendente lite were very strong. On the 27th July, 1921, upon the joint application of all the parties concerned, Babu Bibhuti Bhushan Banerjee was appointed administrator pendente lite on a fixed remuneration of Rs. 60 a month. The application for probate was strenuously contested; but ultimately judgment was pronounced on the 25th May, 1923, in favour of the will. On the 28th May, 1923, an order made for the issue of probate and probate was actually issued on the day following. On that day, an application was made to the District Judge by the unsuccessful caveators in order that proceedings might be stayed, so as to enable them to lodge an appeal in this Court and obtain an order for stay. The District Judge stated, however, that possession had already been delivered by the administrator pendente lite to the executors. The appeal was lodged in this Court on the 29th May, 1923 and two days later the Rule now under consideration was issued. In answer to the Rule, the executors have contended that as possession has been obtained by thorn from the administrator pendente lite further action should be taken by this Court.

3. We are of opinion that the circumstance that the executors have managed to obtain possession from the administrator pendente lite with what has been described as unusual speed should not affect the decision of the question whether the estate in litigation should or should not be secured during the pendency of the appeal in this Court. We may add that the parties are not agreed as to whether entire estate has been delivered by the administrator pendente lite to the executors and there seems good ground for the assertion made by the appellants that the executors managed to obtain possession from the administrator pendente lite even before the probate had been actually issued; these matters, however, are not material for our present purpose. The judgment of this Court in *Hukum Chand Boid v. Kamalanand Singh* (1906) 33 Cal. 927 which was applied in *Sati Nath v. Tatanmani* (1912) 15 C.L.J. 335, makes it abundantly clear that the Court of Appeal will not allow itself to be paralysed by a successful endeavour on the part of the litigant to obtain possession in view of an apprehended appeal to be followed by a stay order.

4. We have carefully considered the circumstances of this litigation which are set out in the order made by the District Judge, when he held that there were grounds for the appointment of an administrator pendente lite. We have taken into account the nature and value of the estate. We cannot overlook the fact that the executors have not furnished security for the due discharge of their duties? We cannot ignore the fact that the executors are bound to administer the estate in terms of the will which is the source to their authority. We feel no doubt whatever that, in the interest of the party who might in the end turn out to be entitled to the estate, it is essential that the estate should be secured during the pendency of the appeal already lodged in this Court. It is well-known that it was not the practice of the Prerogative Court to grant administration pendente lite, unless by consent, or on proof that such a grant was necessary for the preservation of the property. Soon after the establishment of the Court of Probate, however, Sir J.P. Wilde in a considered judgment in the case of *Bellow v. Bellow* 4 Sw. and Tr. 58, observed as follows : "The rule of the Court of Chancery appears to be, that whenever there is a bona fide suit pending, the Court will appoint a Receiver quite irrespective of the condition of the estate, or of the person who has the actual possession of it, on the ground that while the suit is pending there is no one legally entitled to receive or to hold the assets, or to give discharges. I wish to give notice that I shall in future assimilate the practice of this Court to that of the Court of Chancery, and that I shall grant administration pendente lite, wherever the Court of Chancery would appoint a Receiver." In the Probate Division, however, the appointment of an administrator pendente lite does not follow as a matter of course whenever litigation is pending. The applicant is required to show some necessity for the grant, for example, that it is necessary for the preservation of the estate, for receiving rents, payments of interest or the dividends on shares as they become due, and that no fit and proper person is in a position to discharge these offices : *Horrell v. Writs* 1 P.D. 103. The Court has power to appoint an administrator pendente lite, in contested

testamentary and administration suits, on the application of a person who is not a party to such suit. Accordingly, in an administration suit, which was likely to be protracted, the Court appointed an administrator pendente lite at the instance of a creditor who was not a party to the suit; *Tichborne v. Tichborne* 1 P. & D. 730. These principles were applied by this Court in the case of *Brindabanchandra Shah v. Sureswar Shaha Pramanick* (1909) 10 C.L.J. 260. We are of opinion that notwithstanding the judgment of the Court below in favour of the propounded will, the reasons which induced the District Judge to appoint an administrator pendente lite are still operative. In fact, from one point of view the necessity has been accentuated by reason of the fact that the executors propose to carry out the provisions of the will notwithstanding the pendency of the appeal. It is well settled in England that the duties of an administrator and receiver pendente lite commence from the order of appointment, and, if the decree in the action is appealed from, do not cease until the appeal has been disposed of. In the absence of any appeal the functions of an administrator pendente lite terminate with a decree pronounced in favour of a will and do not continue until the executors obtain probate. The case is not altered if there are no executors : *Taylor v. Taylor* (1881) 6 P.D. 29 and *Wieland v. Bird* (1894) P.D. 262. A similar principle has been applied in the case of an injunction where during the pendency of an appeal, the ad interim injunction granted by the trial Court is continued : *Polini v. Gray* (1879) 12 Ch. D. 438. We are not unmindful that, as pointed out by the Judicial Committee in *Hukumchand v. Pirthichand* (1919) 46 Cal. 670 the operation of a decree is not suspended or interrupted by the presentation of an appeal. But we feel no doubt that, in the case before us, if nothing had happened immediately on the delivery of judgment by the District Judge, this Court would have without hesitation continued the administrator pendente lite during the pendency of the appeal; and as we have said the fact that the executors were able to take out probate and to obtain delivery from the administrator pendente lite before the objectors could come up to this Court to lodge their appeal and to obtain an order for stay, does not really affect the decision of the question.

5. We direct accordingly that this Rule be made absolute and that the gentleman who was appointed administrator pendente lite by the District Judge (Babu Bibhutibhushan Banerjee) be re-appointed administrator pendente lite on the remuneration fixed by the Court below. He will administer the estate subject to the direction of this Court. Liberty is reserved to both parties to apply for further orders. The costs of this Rule will be costs in the appeal. We assess the hearing fee at two gold mohurs. The executors will forthwith place the administrator pendente lite in possession of the estate.