

**(2004) 09 CAL CK 0011**

**Calcutta High Court**

**Case No:** P.L.A. No. 163 of 1991 and G.A. No. 2717 of 2004

In Re: Satidas Mukherjee alias  
S.D. Mukherjee, Decd. <BR> In  
Re: Sudip Mukherjee

APPELLANT

Vs

RESPONDENT

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**Date of Decision:** Sept. 23, 2004

**Acts Referred:**

- Succession Act, 1925 - Section 232

**Citation:** (2005) 2 CALLT 169 : (2005) 1 CHN 27

**Hon'ble Judges:** Subhro Kamal Mukherjee, J

**Bench:** Single Bench

**Final Decision:** Allowed

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### **Judgement**

@JUDGMENTTAG-ORDER

Subhro Kamal Mukherjee, J.

The Court: An application for grant of probate of the alleged last Will and testament of Satidas Mukherjee, since deceased, was filed by the executor named and appointed in the said Will.

2. Since a caveat was lodged, the proceeding became contentious.

3. Unfortunately, before the Will could be proved, the executor died on September 15, 2002.

4. The present application has been filed by one of the legatees under the Will for leave to proceed with the said application upon conversion of this proceeding for grant of probate into a proceeding for grant of letters of administration.

5. Mr. Debasish Kundu, learned Advocate, appearing in support of the application, cites the cases of Shambhu Prasad Agarwal and Others vs. Bhola Ram Agarwal,

(2000) 9 SCC 714 and [Santi Swarup Sarkar Vs. Pradip Kumar Sarkar and others, .](#)

6. Mr. Saha, learned Advocate, appearing for the caveator, opposes this application.

7. In the case of Haripada Saha and Anr. v. Gobinda Chandra Saha and Ors., reported in 51 CWN 917, the sole executrix under the Will of one Rampada Saha applied for grant of probate. Only six days after the said application was filed, the sole executrix died. Three persons made an application before the learned District Delegate, inter alia, praying for permission to continue the said proceeding instead and in place of the sole executrix and they prayed for letters of administration with a copy of the Will annexed. As objection was raised, the proceeding became contentious and the learned District Delegate returned the application with a direction to the applicants to present the said application before the learned District Judge. The learned District Judge granted letters of administration with a copy of the Will annexed to two of the petitioners inasmuch as one of the petitioners, in the meantime, abandoned his claim. The objectors appealed against the order granting letters of administration.

8. A Division Bench of this Court in the said case held "When in substance, the application for substitution was treated as one for letters of administration with a copy of the Will annexed on the basis of the respondents' own rights to the property left by the testator as heirs of Subasini, it would, we think, be sacrificing justice to mere technicality, if we are to set aside the entire proceeding at the present stage, and direct the plaintiffs to proceed afresh. There is undoubtedly a technical defect, but it is not a defect which has in any way affected the merits of the case or the jurisdiction of the Court. In substance the application of the plaintiffs contain all the particulars which are necessary for a proper petition for letters of administration with a copy of the Will annexed, as heirs of the sole legatee and we think that we can ignore the defective portion of it, and treat it as one made by the plaintiffs in their own right".

9. In Santi Swarup Sarkar (supra) the application for grant of probate in respect of the Will of Charu Sila Sarkar, since deceased, was set down as contentious cause. During the pendency of the said proceeding, the sole surviving executor died. The said Santi Swarup Sarkar filed two applications before the Court. The first application was for transposing him as the plaintiff instead and in place of the deceased testator and to grant him leave to proceed with the proceeding for grant of letters of administration with a copy of the Will annexed u/s 232 of the Indian Succession Act; the second application was for amendment of the application for grant of probate into an application for letters of administration with a copy of the Will annexed in place of the prayer for probate.

10. It has been held that the learned Trial Judge should have allowed the prayers made in the said applications. The learned Judge observed "If it is competent for a legatee to file fresh application for grant of letters of administration in a case where

the executor dies during the pendency of a probate proceedings, I wonder why a legatee, already on record as a defendant in a probate proceedings, as in the instant case before us, would not be competent to continue the proceedings for grant of letters of administration, in place of grant of probate, by transposing him as a plaintiff in the suit, treatment the relevant proceedings to have been instituted from the date of filing the relevant applications for transposing him as a plaintiff and for amendment of the plaint for the said purpose".

11. The Gujarat High Court in the case of [Jadeja Pravinsinhji Anandsinhji Vs. Jadeja Mangalsinhji Shivsindhji and Others](#), observed "It is, therefore, clear that an executor in applying for probate is not fighting a personal action but fighting for the interests of all the beneficiaries under the Will. Therefore the action of an executor in applying for a probate is not in substance a personal action and as observed earlier by me the maxim *actio personalis moritur cum persona* could not apply to such a case. If the executor fails in his duty, any of those whom he represents are entitled to intervene and carry on the proceedings with a "formal modification" that the prayer must then be for letters of administration with the Will annexed".

12. In [Govind M. Asrani Vs. Jairam Asrani and Another](#), it is observed "To put it in other words, the proceedings taken out either for the grant of probate or letters of administration with the Will annexed are in the interest of the legatees and the question involved in such proceedings will be the same, namely, about the truth and genuineness of the Will. In both the cases it will be open to a person interested to intervene. Final adjudication as to the genuineness of the Will in both cases will operate as judgment in rem".

13. In Shambhu Prasad Agarwal (supra) one Matadin Agarwal filed an application for grant of probate in respect of the Will of one Maina Devi. Matadin Agarwal died; his heirs applied for their substitution in place of Matadin Agarwal. They, also, filed another application for amendment of the petition. In the amendment application, it was prayed that instead of grant of probate, the legal heirs might be granted letters of administration. These applications were rejected by the Court below.

14. The Supreme Court of India observed, "We find that it is not disputed that Matadin Agarwal was a legatee under the Will. It is true that Matadin Agarwal ought to have applied for issue of letters of administration and not for probate. However, this did not debar his heirs to get the probate petition amended. The Trial Court rejected both the applications of the appellants on the ground that since the probate petition filed by the legatee related to his personal right, therefore no right accrued to the appellants for their substitution in his place. This view, according to us, is not correct. Matadin Agarwal, as stated above, was a legatee and not an executor under the Will. It is true that where an executor dies, his heirs cannot be substituted because the executor possessed personal right, but this is not applicable where the heirs of a legatee apply for issue of letters of administration. It is not disputed that today the appellants can file a petition for issue of letters of

administration".

15. It is settled law that a Court has got inherent power to take note of subsequent events and to mould the reliefs on the basis of the altered conditions to meet out justice. As far as possible the anxiety and endeavour of the Court should be to remedy injustice rather than deny relief to an aggrieved party on pure technical ground.

16. Since the executor had died before he could prove the Will, the legatees under the Will are entitled to apply for grant of letters of administration u/s 232 of the Indian Succession Act, 1925. There is no period of limitation governing such an application.

17. I, therefore, allow this application and permit the applicant to proceed with this application upon conversion of the proceeding into a proceeding for grant of letters of administration.

18. The petitioner is, however, directed to put in the amended copy of the application within ten days from the date. Liberty is granted to the petitioner to re-verify the plaint.

19. I make no order as to costs.

20. Department and all parties are to act on a xerox signed copy of this dictated order on usual undertaking.

Later:

21. After the judgment is pronounced, Mr. Saha, learned advocate, appearing for the caveator, prays for stay of the operation" of this order. Such prayer is carefully considered and is declined.