

OD-8

ORDER SHEET

APOT/1/2023
With
PLA/226/2019
IA No. GA/1/2023

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

IN THE GOODS OF:
SMT JHARNA LAW, DECEASED
-AND-
IN THE MATTER OF :
AMAR CHARAN LAE

BEFORE :

THE HON'BLE JUSTICE HARISH TANDON

And

THE HON'BLE JUSTICE PRASENJIT BISWAS

Date : January 5, 2023.

Appearance:

Mr. Rupak Ghosh, Adv.

Mr. Arnab Dutt, Adv.

Mr. A. K. Awasthi, Adv.

The Court : The order impugned in the instant appeal is passed in an un-contentious probate proceeding securing the dismissal of a probate application solely on the ground that the surviving executor did not disclose the details of the legal heirs of the deceased joint executors and, therefore, the probate cannot be granted unless the heirs of the deceased joint executors are brought on record.

It has been contended before us that the probate Court did not take into consideration the provision contained under Section 312 of the Indian Succession Act and there is no necessity of bringing the heirs and legal

representatives of the deceased executor or executors in a probate proceeding. It is thus contended that the surviving executor is entitled to proceed with the probate application and, therefore, the impugned order cannot be sustained.

Before proceeding with points agitated before us, it would be profitable to reproduce the provisions contained under Section 312 of the Indian Succession Act which runs thus:

“312. Survival of powers on death of one of several executors or administrators.- Upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the survivors or survivor.”

It appears from the reading of the aforesaid Section that mere death of one or more of the several executors does not invalidate the proceeding for grant of probate but the surviving executor or executors shall have all the powers of the office. What logically deduced therefrom was that in case of death of one or more executors appointed in the Will shall not render the application for probate infructuous and/or invalid, provided the testator/testatrix while making or publishing a Will have intended otherwise.

Our attention is drawn to the Will for which an application for probate was taken out and we do not find any such instructions to have been incorporated therein which may be construed as an exception engrafted under Section 312 of the said Act. While proceeding simplicitor on the score that one of the joint executors appointed by the testatrix is entitled to obtain a probate on the death of other joint executors, the surviving executor may proceed with the application for probate in terms of the provision contained under Section 312 of the said Act. The office of executor is not a heritable estate but executor

assumed power by virtue of such appointment on the provisions contained in Section 211 of the said Act, the executor is regarded as a legal representative of the deceased person for all purposes and the properties being the estate left by the testator/testatrix vested upon the said executor. There are several provisions in the said Act which regulates, guides and gives power to the executor to act in respect of the estate which vested upon him by virtue of the said provision but cannot be regarded as a heritable estate so that the heir and the legal representative of the said executor are required to be brought in the event of the death of such executor.

The law is also clear in this regard that the executors are appointed by a maker of the Will and in the event of the death of the sole executor, if the proceeding would be converted into a Letters of Administration and will not lapse and/or abate merely on the death of such executor. Since the office of an executor is not a heritable estate, there is no necessity of bringing the heirs and legal representative of the deceased executor in a probate proceeding. We thus find that the impugned order cannot be sustained and is accordingly set aside.

The matter is remitted to the probate Court for taking further steps required in the matter.

The appeal is allowed.

(HARISH TANDON, J.)

(PRASENJIT BISWAS, J.)