
(1949) 08 CAL CK 0010
In the Calcutta High Court
Case No : A.F.O.D. No. 110 of 1945

Adeline Maude Ellanor Catchick Nee Robertson and Another	APPELLANT
Vs	
Sunderlal Daga and Others	RESPONDENT

Date of Decision : 18-08-1949

Acts Referred:

Succession Act, 1925 — Section 269, 307, 332, 333, 335

Citation : AIR 1950 Cal 559

Hon'ble Judges : Lahiri, J;G.N. Das, J

Bench : Division Bench

Advocate : Atul Ch. Gupta and Upendra Ch. Mallik, for the Appellant;Naresh Chandra Sen Gupta and Jnanendra Nath Bakshi, for the Respondent

Final Decision : Dismissed

Judgement

G.N. Das, J.—This is an appeal by the plaintiffs against a decision of Mr. B. Mookerjee, Additional Subordinate Judge, 2nd Court, Alipore, District 24 Parganas, dated 29th November 1944, dismissing their suit for possession and mesne profits.

2. The plaintiffs' case is that the disputed property and other properties belonged to their father George Adolphus, Robertson. The latter was at all material times, living separate from his wife Olivia by whom he had several children. He had by one Mrs. Adeline Maude Bredee, a widow, two daughters viz., the plaintiffs.

3. On 4th July 1892, Mr. Robertson executed a will. The will inter alia provided that Mrs. Bredee would be entitled to the disputed property for her life and the remainder would go to the plaintiffs. Mrs. Bredee and the testator's two brothers William Cecil Robertson and Edwin Robertson were appointed executors.

4. On 12th January 1894, a son named George Nathaniel Robertson was born of Mrs. Bredee by the testator.

5. On 11th June 1898, the testator executed a codicil modifying several dispositions made in the will. The effect was that as regards the disputed property, it was to devolve on Mrs. Bredee for her life and the remainder was to go to the plaintiffs and the said George Nathaniel Robertson in certain contingencies.

6. Mr. William Cecil Robertson, one of the executors, having died, one Joseph Leslie was appointed an executor in his place.

7. The testator died on 30th August 1898. Mr. Edwin Robertson did not join in the application for probate of the will and the codicil which was filed by Mrs. Bredee and Mr. Joseph Leslie on 13th September 1898 in the Original Side of this Court. Probate was granted on 13th November 1898.

8. Joseph Leslie died on 27th May 1901. On 9th August 1901, Mrs. Bredee for self and as executrix to the estate of George Adolphus Roberson, mortgaged the disputed property to one Narendranath Mookerjee to secure an advance of Rs. 6,000 with interest at 9 per cent. per annum with quarterly rests for the alleged purpose of paying off debts incurred for effecting thorough repairs and making substantial additions and alterations in the disputed property.

9. On 3rd December 1901, Mrs. Bredee for self and as executrix raised a sum of Rs. 1,000 from the said Narendranath Mookerjee on a further charge of the disputed property, on similar conditions and for the same purpose. On 7th August 1903, Mrs. Bredee for self and as executrix released the equity of redemption in the said property in favour of the said Narendranath Mookerjee for a consideration of Rs. 3,168 only.

10. On 8th April 1904, the said George Nathaniel Robertson died. On 22nd January 1934, the said Narendranath Mookerjee took a loan from the defendant on a mortgage by deposit of the title deeds of the disputed property and of other properties. The said Narendranath Mookerjee instituted a suit being Suit No. 169 of 1935 for redemption of the said mortgage in the Original Side of this Court.

11. Pursuant to a preliminary and a final decree in the said suit, the disputed property and certain other properties were sold by the Registrar of this Court on 11th May 1938 and the defendant was declared the purchaser; the sale was confirmed and on 27th September 1938 a sale certificate was issued in favour of the defendant; the defendant took possession through Court and is in possession.

12. Mrs. Bredee died on 13th September 1941; and in terms of the will and the codicil, the plaintiffs have become entitled to the disputed property.

13. The plaintiffs further alleged that prior to 9th August 1901, the estate had been fully administered and that no money was required for purposes of administration at the date of the mortgage in favour of the said Narendranath Mookerji or at any later date; that at the material dates, Mrs. Bredee was in possession as legatee and not as executrix, and the said Narendranath Mookerjee had notice, actual or constructive, of these facts; that accordingly no

title except that of Mrs. Bredee as legatee passed to the said Narendranath Mookerji and to the defendant.

14. The plaintiffs prayed for recovery of possession, mesne profits and certain incidental reliefs.

15. The defendant filed a written statement and pleaded inter alia that the estate of George Adolphus Robertson had not been fully administered at the material dates, and that Mrs. Bredee was at the time, in possession as executrix, that the mortgage, further charge, and release were bona fide documents, the moneys raised thereby were required for administrative purposes; that the executrix was not guilty of any breach of trust and the said Narendranath Mookerji had no notice, actual or constructive, of any fraud or breach of trust, that the title to the disputed property validly passed to the said Narendranath Mookerjee and subsequently to the plaintiff; that the heir of the said Narendranath Mookerji was necessary party; that the plaintiffs knew about their rights and did not assert the same at the date of the transactions and their claim is barred by estoppel, waiver and acquiescence.

16. The following issues were framed for trial,

1. Is the suit maintainable ? 2. Is the suit bad for non-joinder of parties ? 3. Is the suit barred by estoppel, waiver and acquiescence ? 4. Is the suit properly valued for court-fee ? 5. Was the estate of the testator fully administered prior to August, 1901 ? Was Adeline Maude Bredee then in possession of the property as executrix, or a mere legatee ? 6. Did the said Adeline Maude Bredee mortgage and sell the property as executrix ? Was she entitled to do so ? Are such transactions binding on the legatees ? Are their interests affected thereby ? 7. Were the transactions for lawful consideration ? This issue was deleted by order dated 23rd November 1944. 7. Was Narendra aware of the said transaction as alleged in the plaint? 8. Was Narendra's title to the property absolute and complete? 9. Are plaintiffs legatees under the will and are they entitled to maintain this cause against the defendant? 10. What damage, if any, is plaintiff entitled to and what relief, if any, is plaintiff entitled to ?

17. By order No. 34 dated 28th April 1943, issue No. 4, was decided in favour of the plaintiffs. The finding on the issue has not been contested on behalf of the respondents in this appeal.

18. Issues Nos. (1), (2), (9) were decided in plaintiffs' favour. The findings on these issues have not also been challenged on behalf of the respondents in this appeal.

19. The findings on issues (3), (5), (6), (7), (8), (10) were in favour of the respondents. In the result, the suit was dismissed with costs. The plaintiffs have preferred this appeal.

20. Mr. Gupta for the plaintiffs-appellants pressed the following points: (1) That the administration of the estate of Robertson was complete before the date of

the mortgage and of the later transactions and that at these dates Mrs. Bredee could not act as executrix but only as a legatee. (2) Assuming that the administration was not complete and Mrs. Bredee could act as executrix virtue office she has no right to transfer more than her life estate for the purposes mentioned in the documents. (3) That the purposes recited in the documents were illusory.

21. The findings of the learned Subordinate Judge that Narendra had no notice, actual or constructive, of any extravagance or waste on the part of Mrs. Bredee or that Narendra advanced money to her believing the recitals to be true were not disputed before us.

22. It is not disputed that the effect of the will (Ex. 4) and the codicil EX. 5, was (1) to bequeath the household furniture, gold and jewellery and other moveables in the Lillooh house and a sum of Rs. 100 to the testator's wife Olivia Laure Robertson and sum of Rs. 100 each to a son and 2 daughters born of her and a further sum of Rs. 1000 to another daughter born of her, should she remain a spinster up to the time of the testator's death but to be reduced to Rs. 600 in case she marries; (2) a life estate in 19 and 20 Canal Street to Mrs. Bredee with a remainder absolutely to his illegitimate children, viz., the plaintiffs and a son named George Nathaniel Robertson; (3) the rest and residue of the testator's estate, of what nature or kind soever, including lands and houses, (if any) Company's papers, moneys in the testator's possession at the time of his death and moneys that shall or may be due and payable to him and all the household furniture; jewellery, moneys, and other moveable properties that shall or may be in the house in which Mr. Bredee may be residing, absolutely to her.

23. On 13th November 1898, probate of the will and codicil was granted by this Court. The list of assets annexed to the petition for probate shows that the estate was valued at Rs. 37,458 as. 5 pies 6 only, and included large sums due to the testator at his death. No debts due by the testate were mentioned. Paragraph (5) of the plaint states that the testator had no debts. Paragraph (9) of the written statement does not specifically traverse the allegation. But in para. (6) there is a general denial of all allegations in the plaint which are not expressly admitted. There is no evidence that the testator had no debts. The list of assets filed shows that a large sum was due to the testator from various people. Paragraph (6) of the plaint and para. (10) of the written statement would shew that Rs. 6500 was received from the purchaser Mr. A. P. Houghton, and it is likely that the sum was received about 7th January 1899 when the conveyance was executed. There is no evidence whether the other sums due from the persons named in the petition for probate were realised and if so, when. No inventory or account which was required to be filed u/s 317, Succession Act, by the executrix, has been produced.

24. The testamentary expenses would be a fairly large sum. The pecuniary legacies which would be payable under the will and the codicil might come up to Rs. 1900. The residuary estate was given to Mrs. Bredee. The executor Mr. Leslie

and the executrix Mrs. Bredee were not, however, obliged to spend all the receipts towards meeting the testamentary expenses and the pecuniary legacies. Mrs. Bredee required moneys for maintaining herself and her infant children. In these circumstances, it is difficult to draw the inference that the estate was fully administered before the date of the mortgage and further charge.

25. The observation of Kekewitch J. In *re Timmis; Nixon v. Smith* (1902) 1 Ch. 176; (71 L. J. Ch. 118) to the effect that "There was no apparent obstacle in winding up the estate in a reasonable time, and I must assume that the executors did their duty" has no application to the facts of the present case. In the case of AIR 1927 151 (Privy Council) on which reliance was placed by Mr. Gupta, the transactions which were in question took place long after the death of the testator and it was apparent that the administration must have been completed long ago.

26. The first contention raised on behalf of the appellant must therefore be overruled.

27. It follows that Mrs. Bredee could not be said to have no duty to perform as executrix and that she could act as such Virtute office as the relevant dates.

28. The second contention proceeds on the above assumption. What is contended for, is that the purposes mentioned in the relevant documents were not administrative purposes, and a transfer for such purposes was in excess of the powers of the executrix and could not pass the title to the estate.

29. The first document is the mortgage bond Ex. a dated 9th August 1901. It recites the purchase of 19 and 20 Canal Street by the testator on 12th September 1897, the title of Mrs. Bredee and of her illegitimate children including the plaintiffs to the disputed property, under the will and the codicil, the grant of probate by the High Court on 13th November 1898 and the sale of 20 Canal Street, and of part of 19 Canal Street to A. P. Houghton in January 1899 for the consideration mentioned, and the death of the co-executor Joseph Leslie on 27th May 1901 without leaving any funds for the administration of the estate. The deed then proceeds to state that the house and premises No. 19 Canal Street "was in a very bad state of repairs and was about to come down unless necessary repairs were given to it." And that the mortgagor as executrix incurred debts to a large extent for the purpose of thoroughly repairing the said premises and for making substantial additions and alterations thereto." The deed then goes on to state that as the debts have become pressing, and there was no money in the hands of Mrs. Bredee the executrix, the latter applied as such executrix to the mortgagee "for a loan to her as such executrix of the sum of Rupees six thousand upon security of the said house and premises no. 19 Canal Street" and "the said mortgagor for herself and as personal representative" of the said deceased testator, granted, conveyed, transferred and assigned to the mortgagee, his heirs, representatives and assigns the said house and premises no. 19, Canal Street, on the terms and conditions mentioned, the due date of

payment was fixed for 9th August 1903. The recital of consideration shews cash payment of the same.

30. The deed of further charge, Ex. C, followed about 3 months later and is dated 3rd December 1901. It incorporates similar recitals and states that the loan taken under the deed of mortgage, Ex. B, proved insufficient to pay the debts incurred by Mrs. Bredee for the purposes recited in Ex. B. The consideration is recited to have been paid in cash.

31. The deed of release of the equity of redemption by Mrs. Bredee, Ex. B, is dated 7th August 1903. It contains recitals similar to those in the mortgage deed Ex. A, the consideration is Rs. 10,937-0-5, being the sum total of Rs. 7769-0-5, due on the mortgage and further charge, Rs. 1668 being the amount of principal and interest due on a promissory note dated 28th April 1902 executed by Mrs. Bredee, and Rs. 1500 in cash.

32. The learned Subordinate Judge held that the recitals in the deeds of mortgage and further charge had not been shown to be untrue. As regards the deed of release the learned Subordinate Judge was of opinion that the plaintiff had not shewn that the sum of Rs. 1000 borrowed on a pronote was not taken for purposes other than administration. The learned Subordinate Judge held that all these transactions were entered into in due course of administration of the estate and were binding on the plaintiffs; and their interests were affected thereby.

33. In order to deal with the contentions raised on behalf of the appellant, we have to consider the extent of the power of disposal enjoyed by an executor at the relevant dates. The law was at that date, contained in Section 269, Succession Act (x [10] of 1865). The section, practically corresponds to Section 307 of the present Succession Act, XXXIX [39] of 1925. In the present case, the will and codicil do not impose any restriction on the powers of the executors. The Act gives the executor powers at least as extensive as those enjoyed by executor in England before 1926: *Geetaranee De Vs. Narendrakrishna De*, .

34. The principle why executors are vested with such large powers was stated by Lord Thurlow in *Scott v. Tyler*, 2 Dick 725:

"It is of great consequence that no rule should be laid down here which may impede executors in their administration or render their disposition of the testator's effects unsafe or uncertain to the purchaser, his title is complete by sale and deliver; what becomes of the price is of no concern to him."

35. The alienee from an executor who is acting as such has a right to infer that the latter is acting fairly. The fact that the alienation does not purport to be made for administrative purposes does not affect his title. The alienee is not bound to see to the application of the money. The immunity is however lost when the alienee has notice, actual or constructive, of the title of other persons and of the fact that the executor is acting in breach of trust, or the alienation is made for

purposes which the executor has no power to do in the course of the administration, *Watkins v. Cheek* (1825) 2 Sim : 1994 (25 R. R 181). In *Roper on Legacies* (4th Edn.) p. 447, it is stated that the power of the executor does not extend to authorise him to sell or pledge the testator's assets with a creditor of his own, so as to prevent the persons interested in the testative will from following them, for the law seems to say, as declared by Lord Kenyon "Let the executors do their duty and let the authority cease when injustice begins."

36. The extent of the executor's (alienee's ?) duty to inquire came up for consideration in the case of AIR 1940 30 (Privy Council) where the facts were shortly these: one Thakurdas Kerr carried on business as book-sellers and publishers under the name and style of R. Cam-bray & Co. He executed a will appointing his two sons as executors and directing them to carry on the business. The executors proved the will after the testator's death. They later raised money on a mortgage. The mortgage bond did not shew that the money was in fact required for a new business to be started at Madras. The mortgagees sued upon the mortgage and obtained; a final decree. Some of the sons of the executors brought a suit for construction of the will, for administration and for declaration that the mortgage decree was not binding on the estate as the mortgage was taken for starting a new business. The decree of dismissal of the suit was maintained by the Privy Council, their Lordships, observing that the transferee was not bound to inquire beyond the will, on the ground that much of the usefulness of the statutory power conferred by Section 307 on executors would be nullified if an extended duty of inquiry was imposed on parties dealing with executors.

37. Tested in the light of the above principles the question which arises with regard to the mortgage and the further charge is whether the expenses of repairs and improvements are administrative purposes for which executors can charge the estate.

38. As already stated the transactions in question took place before the present Successful Act (XXXIX [39] of 1925) came into force and are governed by the Indian Succession Act x [10] of 1865. In the latter Act there was no section corresponding to Section 308 of Act XXXIX [39] of 1925 which defines the general powers of administration possessed by executors.

39. The expenses incurred were for thorough repairs and substantial additions and alterations. The property was bequeathed to the executrix Mrs. Bredee for life with a remainder to the plaintiffs. Mr. Gupta first contends that in the absence of a covenant to repair contained in a will or a deed of transfer the liability to pay for the same rests as between the tenant for life and the remainderman in the former and the same rule applies to the case of improvements made by the life tenant. This may be conceded, *Rowley v. Ginnever*, (1897) 2 Ch. 503, *Re Balke's settled Estate* (1923) 2 Ch. 128 : (92 L. J. Ch. 329).

40. The further contention of Mr. Gupta that in administration of the estate, the executor has to follow the above rule and cannot burden the remainder in any circumstances, cannot however, be accepted.

41. An executor represents the estate and has, in ordinary course of management, power to effect necessary repairs and to effect improvements which are reasonable and proper. For such purposes, he can charge the estate.

42. In *Marguis of Bute v. Rydar* (1884) 27 Ch. d. 196 where the trustees under the will of the plaintiff's father employed a large annual surplus of income to the payment of improvements it was observed that:

"If they, the trustees, had raised the money by sale or mortgage, they would have charged the corpus of the estate, that they were at liberty to charge the estate cannot be disputed, but there is clear authority for holding that in no case can the exercise by the trustees of their discretion affect the rights of the parties inter se."

43. The above case has been followed in *Ouchterlony v. Ouchterlony*, 11 Mad. 360.

44. In *Williams on Executors* Edn. 12 vol. I part III, Book I, p. 582, the law is thus stated:

"Personal representatives may for purposes of administration or during a minority of any beneficiary or the subsistence of any life estate or until the period of distribution arises, effect certain authorised improvements upon any land vested in them as such."

45-46. In this state of the law, it is difficult to say that the alienee Narendra Nath Mukherji was not entitled to advance the money for the purposes recited.

47. There is nothing on the record to show that the alienee had any notice of the fact that the repairs or improvements were unnecessary or that the sums alleged to be required for the purpose were inflated. The burden rests upon the person impeaching the validity of the trans. action to prove that the alienee had notice of the facts *Corser v. Cartwright* (1875) 7 H. L. 731 : (46 L. J. Ch. 605). The plaintiffs have failed to discharge the burden in the present case. The mortgage and the deed of further charge are therefore binding on the plaintiff.

48. Coming to the deed of release Ex. B, a part of the consideration consists of the dues on a promissory note. There is no evidence as to purpose of the loan. The alienee was entitled to assume that it was duly incurred. Both as regards this sum and the additional cash consideration, the alienee could trust the person whom the testator had trusted and appointed as executrix. There is nothing to suggest that at the time the alienee had any notice that the money was borrowed for improper purposes.

49. If the moneys as aforesaid had not been the subject of the deed of release, different considerations might have arisen. In that case, the lender who could

have only stood in the shoes of the executor and rely on the latter's indemnity, would be required to prove that the loan was taken for administrative purposes or benefited the estate; (Maharaja Sir) Manindra Chandra Nandi Vs. Sudir Krishna Banerjee and Others, . The position here is different, as the executrix acting as such executed a deed of release for consideration as recited in the deed of release. Geetaranee De Vs. Narendrakrishna De, .

50. We accordingly hold that the deed of release is also binding on the estate and passed the title of the plaintiff.

51. Mr. Gupta also contended, as a subsidiary point that the assent of the executors to the plaintiff's legacy must be presumed from the fact that in the deed of mortgage, the executrix purported also to mortgage her life-estate.

52. Reference was made to Sections 332, 333, 335, Succession Act, and it was urged that assent of the executors to the legacies should be inferred. 53. This question was not specifically put in issue. In AIR 1940 30 (Privy Council) , their Lordships of the Judicial Committee were of opinion that the question of assent was one of fact, and did not allow the point to be raised all that stage. The assent required by the Act may be given in fact or may be inferred, the inference being made where the executor has so acted as to involve as a matter of necessary inference, his having done so. The mere fact that an executor who is also a devisee, includes property of his own in the security or gives security for an originally unsecured advance is not sufficient to rebut the ordinary presumption that the money had been raised for administrative purposes. Barrow v. Griffith (1864) 11 Jnr. (N. S.) 6 : (147 R. R. 783); Miles v. Durnford (1852) 2 De. G. M. & G. 641 : (21 L. J. Ch. 667).

53. It is, therefore, not permissible to conclude from the bare fact that the executrix purported also to convey his life estate, that the assent had been given to the plaintiff's legacies. This contention is also overruled.

54. The third contention that the rentals are illusory remains to be discussed.

55. In the plaint, the plaintiff alleged that Mrs. Bredee had a joint business in horses with one Inglis Harvey. The allegation was denied in the written statement. The alleged deed of partnership is not signed by Mrs. Bredee and is undated. The only evidence is that of plaintiff 1 who was at the time about 13 years old. The transaction took place about 40 years ago. Plaintiff 1 is an interested witness. Corroborative evidence could have been produced but has not been produced. On the evidence of plaintiff 1, the business continued till 1939. Persons who carried on the business or who were customers or neighbours could have been examined. The quick march of events affords room for suspicion. But on the evidence as a whole, the conclusion does not follow that the moneys were borrowed for the alleged horse business. The plaintiffs and their mother were on the plaintiff's evidence on good terms. The payment of consideration on the disputed transactions was not challenged.

56. The burden lay on the plaintiff to dig-prove the falsity of the recitals made in the old documents. In our opinion, the third contention must also be negated. The result, therefore, is that the appeal fails and must be dismissed.

57. In the facts and circumstances of the case, we direct that the parties do bear their own costs in this appeal.

Lahiri J.

I agree.