

(1896) 01 CAL CK 0012
In the Calcutta High Court

Dwarika Nath Addya

APPELLANT

Vs

Jagobandhu Dey Poddar

RESPONDENT

Date of Decision : 14-01-1896

Acts Referred:

Probate and Administration Act, 1881 — Section 90(4)

Citation : (1896) ILR (Cal) 446

Hon'ble Judges : Gordon, J; Banerjee, J

Bench : Division Bench

Judgement

Banerjee and Gordon, JJ.—This appeal arises out of a suit brought by the plaintiff respondent for a declaration that a certain kabala executed by the defendant No. 2 in favour of the defendant No. 1 is a collusive and benami transaction, and that the property covered by the said kabala is liable to attachment and sale for satisfaction of the decree obtained by the plaintiff against the defendant No. 2. The defence of the defendant No. 1 was that the kabala was a real and bond fide transaction, and that the property in dispute was therefore not liable to attachment and sale as the property of the defendant No. 2.

2. The Court of First Instance found that the kabala was a real and bond fide transaction, and it accordingly dismissed the plaintiff's suit.

3. On appeal by the plaintiff the Lower Appellate Court, whilst affirming the finding of the first Court as to the reality and bond fides of the kabala, has reversed its decision and given the plaintiff a decree upon the ground that the sale by the defendant No. 2 to the defendant No. 1 was invalid by reason of its having been made without the permission of the Court as required by Section 90 of the Probate and Administration Act.

4. In second appeal it is contended on behalf of the defendant No. 1 that this decision is wrong : first, because it gives the plaintiff relief upon a ground not set out in the plaint, nor embodied in any issue before the first Court; and, secondly, because the ground itself is unsound, Section 90 of the Probate and

Administration Act being no real bar to the validity of the sale in favour of the defendant No. 1, and even if it was a bar, the plaintiff not being entitled to maintain a suit for setting aside the sale by reason of its being in contravention of that section.

5. We do not feel very much pressed by the first ground, as it appears to have been raised before the first Court, and the learned Subordinate Judge in his judgment says: "The plaintiff, a stranger and not interested in the properties in question cannot take exception to the validity of defendant's purchase, on the ground that the will did not empower Dasarathi to sell."

6. But the second ground urged on behalf of the appellant is, in our opinion, sound and ought to prevail. The sale to the appellant took place the 2nd September 1889; the order for the grant of probate to defendant No. 2 was made on the 14th August 1889, and the probate was actually granted on the 14th September 1889. All these dates are subsequent to the 8th March 1889, the date when Act VI of 1889 came into operation, by Section 14 of which Section 90 of the Probate and Administration Act was amended. That being so, in order to see how far the sale in favour of the appellant is affected by the provisions of the Probate and Administration Act, we must refer to Section 90 of that Act as amended by Act VI of 1889, and not to the section as it originally stood. The amended section in Sub-section (2) enacts that "the power of an executor to dispose of Immovable property so vested in him is subject to any restriction which may be imposed In this behalf by the will appointing him, unless probate has been granted to him, and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any Immovable property specified in the order in a manner permitted by the order;" and Sub-section (4) provides that "a disposal of property by an executor or administrator in contravention of Sub-section (2) or Sub-section (3), as the case may be, is voidable at the instance of any other person interested in the property." Now, in the first place, we are of opinion that the power of the defendant No. 2 to alienate the property in question was not subject to any valid restriction. It is true that in the habala in favour of the defendant No. 1, he describes himself as. the person entitled to the property under the will of his maternal grandfather; but his position under the will is not merely that of an executor; it is that of a residuary legatee as well. That being so, and having regard to the provisions of the will, we think this case must be governed by the decision of the Judicial Committee in the case of *Ashutosh Dutt v. Doorga Churn Ghattejee* ILR 5 Cal. 438 : I. L.R. 6 I. A. 182 and we must hold that the defendant No. 2 had power to make the alienation under which the defendant No. 1 claims. And then, in the second place, even if there had been any valid restriction to the power of the defendant No. 2 to alienate the property under this will, the alienation is only voidable by Sub-section (4) of Section 90, and voidable at the instance of a "person interested in the property;" and in our opinion the plaintiff does not come within this last-mentioned description. The words "any other person interested in the property "in Sub-section (4) of Section

90 must mean any person interested in the property independently of the executor whose alienation he seeks to avoid. In the present case the plaintiff derives his right, not independently of the defendant No. 2, but as a creditor of the defendant No. 2 in his personal capacity. The plaintiff is not a creditor of the estate of the testator; he has no claim to the property of the testator, and he is not therefore in our opinion entitled to avoid the alienation, even if the alienation had been open to question by reason of its contravening the provisions of Section 90.

7. The appeal must therefore be allowed, the decree of the lower Court set aside, and that of the first Court restored with costs.