

(1906) 03 CAL CK 0025
In the Calcutta High Court

Gopal Dass Agrawallah

APPELLANT

Vs

Budree Dass Sureka and Another

RESPONDENT

Date of Decision : 22-03-1906

Acts Referred:

Citation : (1906) ILR (Cal) 657

Hon'ble Judges : Woodroffe, J

Bench : Single Bench

Judgement

Woodroffe, J.—The plaintiff originally sued in his personal capacity. An application was made by the plaintiff at the beginning of the hearing to amend the cause title as administrator of the estate of one Radha Bibee referred to in the pleadings. That application was opposed, but I granted it on grounds, which I stated in a separate judgment, which therefore I need not repeat.

2. The suit is brought to declare the plaintiff's title to the premises No. 7 Banstolla street, which were formerly in the possession of the defendant Budree Dass Sureka, and are now vested in the Official Assignee, is the Assignee of Budree Dass Sureka's estate.

3. The way that the plaintiff seeks to make a title to these premises is this : He says that Radha Bibee, to whom I have referred, was the widow of Mukunda Prasad Agarwallah and adoptive mother of the plaintiff's father Purusottam Dass. Radha Bibee, on the 12th June 1876, is said to have purchased the premises in suit from one Chatay Lall. On the 12th March 1885, Radha Bibee is alleged to have executed a will containing among others the following provisions:

As long as I am alive and in existence, I shall remain owner of the whole and part of my properties moveable and Immovable as heretofore. On my demise, Gopal Dass, son of Purusottam Dass (or he and any full brother of Gopal Dass that shall be born, in equal shares, shall become the owner (or owners of the estate left by me, and, until the said Gopal Dass attains majority, Purusottam Dass and Mussamut Binda Bibee, wife of Purusottam Dass, shall remain trustees,

that is, guardians (and) next friends.

4. It is alleged that on the 26th February the plaintiff's father Purusottam Dass, suppressing the existence of this will, applied for and obtained letters of administration to the estate of Radha Bibee, who had died on the 14th March 1885; and that having so obtained letters of administration to the estate of Radha Bibee, the plaintiff's father, Purusottam Dass, on the 6th March 1894, executed as administrator a conveyance of the premises in suit in favour of the defendant for the sum of Rs. 16,500.

5. It was alleged in the plaint that the defendant at the time of the conveyance was fully aware of the existence of the will, and that it was in collusion with him and under his advice that the plaintiff's father applied for and obtained the letters of administration.

6. These charges, however, were withdrawn at the trial. Since the date of the conveyance the defendant has been in possession of the property and states that he had expended bond fide and without notice of the plaintiff's claim sums of money amounting to about Rs. 2,500, and that he, on the 19th September 1903, mortgaged the premises in suit for that sum to Mr. Galstaun.

7. On the 12th March 1902, the plaintiff's father died, and the plaintiff has deposed that about eight months after his death he went to Brindaban and found amongst his father's papers the will of Radha Bibee. After about two years and on the 28th July 1904, the plaintiff obtained letters of administration with copy of will annexed to the estate of Radha Bibee. On the 11th March 1905 he instituted this suit in his personal capacity as alleged devisee under this will, the cause title being amended, as I have stated, to suit in his representative capacity, as the administrator of Radha Bibee's estate, to recover the property in suit.

8. The defendant contends that Budree Dass Sureka acquired a good title to these premises from the administrator, and that in any event he is a bona fide purchaser for value without notice, and as such should be protected. But as regards the latter contention, the defence of purchase for valuable consideration without notice is not available as a defence against the plaintiff, who relies on a legal title, such a defence being only available as a shield to a claim based on an equitable title.

9. The real question in this suit is: Did the defendant acquire a good title under the conveyance executed in his favour by the administrator of Radha Bibee's estate?

10. The contention of learned Counsel for the plaintiff has been that he got nothing, because in the first place the will must be taken to have appointed executors by implication and the rule laid down in the case of *Ellis v. Ellis* (1905) 1 Ch. 613 applies.

11. The short answer to this contention is that the will did not appoint executors either expressly or by implication. In the passage in that portion of the will, in

which it is said that the plaintiff's father Purosottam Dass and the latter's wife shall remain trustees, the testatrix declares herself what is meant by that term by the addition of the words "guardians and next friends". As regards this contention the case of Seshamma v. Chennappa I.L.R.(1897) Mad. 467 may be referred to, in which the learned Judges say: "We are not satisfied that this is a case in which the plaintiffs would be entitled to probate as executors by implication. The duties, which the plaintiffs are directed to perform, are not specifically the duties of an executor. It is not the administration of the estate, which they are told to carry out. But rather it is as guardians of the child, whose adoption is contemplated, that they are intended to act. We think it is quite clear that there was no intention to vest any property in them. They were only directed to protect the property during the minority."

12. In the present case also the will appears to have done nothing more than appoint the two persons I have named guardians and next friends. There being no appointment of executor or executrix in the will, the case comes within the rule laid down in Boxall v. Boxall (1884) 27 Ch. D. 220 in which it was held that a grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void ab initio, and accordingly a sale of leasehold by an administratrix, who had obtained a grant of administration under such circumstances to a purchaser, who was ignorant of the suppression of the will, was upheld by the Court, although the grant was revoked after the sale.

13. It is not now suggested that the defendant knew of the alleged suppression of the will by the plaintiff's father, and, as I have said, all charges of fraud made against the defendant Budree Dass Sureka have been withdrawn.

14. Then it has been said that, if the will did not appoint executors, the act of the plaintiff's father in selling the property was in derogation of vested rights of the beneficiary under this will.

15. The answer to this, however, is that at the date of the conveyance, the estate was vested in the party making the conveyance, unless, as was not the case, there had been an appointment of executors, which would render a grant of letters of administration inoperative.

16. Then it is said that the conveyance was not made in due course of administration. It is sufficient, however, to say, if there be any force in this connection, that there is no evidence before me to show that this was a fact.

17. Under the circumstances therefore and for the reasons I have given, this suit must be dismissed as against the defendant.