

(1909) 02 CAL CK 0025
In the Calcutta High Court

Umamoyi Dassya and Others

APPELLANT

Vs

Raja Janki Ballav Sen and Another

RESPONDENT

Date of Decision : 09-02-1909

Acts Referred:

Citation : (1909) 02 CAL CK 0025

Judgement

1. The, appellants in this case are the daughter and daughter's son of one Nil Chandra Shall a who died in. 1881, having made a Will of which the 1st defendant, one Bhairab Chandra Shaha, was appointed executor, and took probate. The suit was brought on a mortgage bond, dated the 12th December, 1903. and executed by Bhairab Shaha, both for plaintiff and as executor of the Will of Nil Shaha. The Subordinate Judge of Rangpur has decreed the suit. The 1st defendant, who contested the suit in the Lower Court, has not appealed. The appellants are the heirs of Nil Shaha who were made parties to the suit at their own request.

2. The execution of the bond, for consideration is not denied, but for various reasons it is contended that it is not binding on the heirs of Nil Shaha. Several points were taken by the learned pleader for the appellants, but it will not be necessary to deal with them seriatim, as our decisions on the principal points will conclude the appeal. The first question that arises for decision is whether the 1st defendant at the time he executed the bond in suit, was still executor or not. On this question in our opinion there is no room for doubt. The estate has clearly not been completely administered, and one debt at any rate was still unpaid when the suit was instituted. Reliance is placed, however, on certain proceedings taken by the widow of Nil Shaha against the executor. According to the Will the executor was to make over the estate to the two sons of the testator on their attaining majority. No provision was made for the contingency of their dying before coming of age. After one of the sons died the mother applied for revocation of the probate because it had become inoperative with respect to the share that would have gone to the son that died. This was refused. She then sued for accounts and obtained a decree for half the net profits, which the Court

considered that the executor must have received. It is argued that this decree was equivalent to reducing the estate into the possession of the legatees, so far as the share of the deceased son was concerned. We are unable, however, to accept this contention. Probate is granted of the whole Will, and administration of the whole estate of the testator; and no authority has been shown us for supposing that they became ineffectual by degrees, as the various legatees die, or obtain their legacies. Until the estate has been administered and the Will carried into effect, it would seem that the administration must be regarded as incomplete and the executor as clothed with the powers given him by the law.

2. In the second place we are unable to regard the decree for an account, and thereafter for certain moneys found to be due, as reducing the legacy left to the second deceased son into possession. The executor continued to be in possession of the property and to deal with it as before. His position with respect to it remained unchanged and we see no reason for supposing that it was converted from that of an executor to one of a guardian manager of the deceased son's heirs.

3. We think, therefore, that at the time that the bond was executed the 1st defendant was in the position of an executor. We have next to decide whether his acts are binding on the estate.

4. Now we do not propose to deal at length with the question what powers an executor has, which has been very fully discussed, because this is not a suit between the executor and the heirs, but between the mortgagee on the one side and the executor and the heirs on the other, and it is perfectly clear that unless the heirs can show that the mortgagee had notice that the executor has exceeded his powers, or had been put to enquiry he is entitled to a decree against the estate. The powers of an executor of a Hindu Will in Bengal to mortgage the estate are laid down in Section 90 of the Probate and Administration Act, 1881, and Section 269 of the Succession Act, 1865, and cannot be gainsaid. Nor is the mortgagee bound to enquire whether the executor is mortgaging the estate for the proper purposes of administration unless there are special circumstances to put him to enquiry. In this case as we think that the appellants have wholly failed to show that the mortgagee had any reason to suspect that anything was wrong, it is unnecessary to consider whether as a matter of fact anything was wrong or not. But we would guard ourselves from being supposed to admit that the mortgage was in itself without justification.

5. The bond in suit was executed by the 1st defendant, both as executor and also on his own account on the 12th December 1903, The consideration was Rs. 50,000 made up with interest as follows.

Rs. Mortgage in favour of mortgagee ... 23,251 Do. do. mortgagee's wife 4,000 Do. do. Nobin Shaha ... 4,500 Do. do. Mohesh Shaha ... 1,500 Do. do. Ratan Chand ... 5,000 Hand-note to Rant Mul and Moti Chand 1,350

6. The first of these items namely the bond for Rs. 23,251 was executed in 1899.

The money was taken to pay off mortgages and a hand-note of an unspecified amount and also to pay off certain decrees for the rent and premium of a certain patni lease, to which we will refer later. The bond of Rs. 4,000 in favour of the plaintiff's wife, of which he may well be supposed to have been aware, was taken to pay off two hand-notes of Rs. 500 and 600 respectively in favour of the plaintiff and his wife. In the bond, these sums are said to have been borrowed to pay off Government Revenue, but in the hand-notes themselves the money is said to have been taken by the 1st defendant for his own necessity. The bond in favour of Ratan Chand recites a previous mortgage for Rs. 3,000 and this previous mortgage recites that some portion of this amount of Rs. 3,000 had been borrowed, on hand-notes in order to pay off Government Revenue.

7. So far as the liability, of the 1st defendant arises out of hand-notes, it is argued on the strength of the decision in *Debandra Nath Biswas v. Radhika Charon Sen* 8 C.W.N. 135 that the executor could not charge the estate with money borrowed by him on hand-notes, and that, therefore, the plaintiff had notice from the recital of these hand-notes in the mortgages that the executor was exceeding his powers and ought to have enquired into the necessity of the loans. So far as regards the mortgage to Ratan Chand we think that this argument is of no weight. The hand-notes are not recited in the last mortgage and the plaintiff was not bound to examine the whole previous history of the executors' dealings with Ratan Chand. But even as regards the hand-notes recited in the bond in suit we do not think that we are bound by the ruling cited above to hold that if a man lends money to an executor in Bengal to pay off hand-notes said to have been given for money borrowed to pay off Government Revenue or rent he has notice that the executor is dealing wrongfully with the property and is put to enquiry. The ruling is based on the practice in England where summary sales for revenue or rent do not prevail and deals with a very different state of things to the position of the 1st defendant in this case. It would, in our opinion, be dangerous in these provinces to throw any unnecessary obstacles in the way of an executor trying to obtain money to save the estate from sale for arrears of revenue or rent. In the present case the money covered by hand-notes is small compared with that covered by mortgage. Evidence has been given that it was taken to pay off revenue or rent. The whole amount was ultimately covered by the mortgage in suit, and in these circumstances we are not prepared to draw any distinction between the different items in the consideration for the mortgage or to hold that the recital of the fact that part of the consideration money had originally been borrowed on hand-notes was enough to give the mortgagee notice that the executor was exceeding his powers. That an executor may mortgage the estate to pay debts incurred in the course of administration seems clear from the decision *A.L. Seale v. Brown* 1. A. 710.

8. But the appellants principal ground of attack relates to the patni, to which we have already referred. About half the consideration for the bond in suit was the discharge of the previous bond of 1899 in favour of the plaintiff, and the bulk of

the consideration of that bond was taken to pay off decrees for the rent and premium of the patni. It appears that the first defendant took the patni some years after the testator died both as executor and on his own account. The property was one that had belonged to the executor, the testator, and one Jogamohun in equal shares. The executor took the patni under Jogamohan. This transaction is much attacked. It is urged that he was restricted by the Will from taking a lease of property, and that leaving the Will out of consideration an executor is not entitled to take property on lease. It is also urged that the transaction was a ruinous one for the estate.

9. We do not think that there is anything in the Will itself to debar the executor from taking property on lease. Whether he can or cannot take a lease under his general powers as an executor, and whether this particular transaction was or was not to the benefit of the estate may be doubtful, though as to the last point the facts that the executor was equally interested in the lease and that the family have acquiesced in it for many years, though the members have been litigating with each other about the estate, indicate that the lease was not wholly imprudent. It may often be wise for a co-sharer in property to pay a price for another share in the same property, which an outsider could not prudently afford. But be that as it may, the defects, if there are any, of the transaction cannot affect the plaintiff, unless he was aware of them and they were sufficient to give him notice that the executor was misapplying the funds of the estate.

10. Now in the first place, there is no real reason for supposing that the plaintiff know that the patni had been taken after Nil Shaha's death. In the decrees which were satisfied out of the consideration money of the mortgage of 1899 the date of the patni is given. But the plaintiff cannot be held fixed with notice of every detail recited in the decrees. There is nothing to show that he ever saw the decrees and he was not bound to examine them before lending the money. Even if he did see the date of the patni, he might not have known that it was after the death of Nil

11. It is contended that as the decrees were passed against Bhairab Shaha by name and not against Bhairab Shaha its executor, that fact was sufficient to show the plaintiff that Bhairab Shaha's powers had terminated. But this contention also seems to us untenable, as we have said the plaintiff may not and need not have seen the decrees at all. If he did see them the description of the defendants could not possibly have warned him of any thing more than that Bhairab Shaha had ceased to be the executor. But Bhairab Shaha is still executor of the estate, and if the plaintiff had profited by the warning supposed to have been given by the decrees and enquired into the facts, he would only have discovered that Bhairab Shaha was still executor and entitled to exercise the powers vested in executors by Section 90 quoted above. The addition of other parties could not have given the plaintiff, supposing that he saw the decrees at all, any warning that the executor had been dealing wrongfully with the estate funds and would provoke no enquiry on that point. Even in the present suit the appellants have at

their own request been substituted as parties, and are not represented by the executor though in our opinion the testators' estate is still vested in him. We do not think, therefore, that the description of the parties to the decrees paid off by the bond of 1899 benefits the appellants in any way.

12. Nor is the description of the executor in various bonds as guardian of the minors of any importance. We are told that the terms has been mistranslated and should really be rendered as executor. But be that as it may, the use of terms of that kind in Moffusil instruments is much too loose to justify us in construing the term strictly and building an inference upon it.

13. Mention has been made of the facts that the plaintiff's agents made enquiries in the Registration Office before the mortgage was accepted, and it is argued that this must have informed them of the various transactions entered into by the executor. But it cannot possibly be held that this was sufficient to warn the plaintiff that the executor was mismanaging the estate. Finally reference is made to the decision in the case of Tanqueray-Willaume and Landon, In re (1882) 20 Ch. D. 465 and it is argued that as the mortgage was executed more than 20 years after the testator's death that fact should have made the mortgagee enquire into the necessity of the loan. But the principle laid down in that decision is not supported by any authority in this country and the circumstances of that case differ wholly from those of the case under appeal.

14. The result is that in our opinion the mortgage in suit was executed by Bhairab Shaha both on his own account and as an executor at a time when he was clothed with the full powers of an executor u/s 90 of the P. and A. Act 1881. We find no reason for supposing that the plaintiff was aware that the executor was exceeding his powers, assuming for the sake of argument, and for the sake of argument alone, that the executor was exceeding his powers. We think that there was nothing in the circumstances of the case to provoke suspicion or to make an enquiry incumbent on the plaintiff. In this view of the matter the decree of the Subordinate Judge must be affirmed.

15. The 1st defendant has appeared and asks for his costs but we are not inclined to grant this prayer. The Subordinate Judge thinks that he has probably mis-managed the estate and there can be no doubt that he has been grossly dilatory in completing the administration and that this appeal has been rendered possible by his conduct.

16. The appeal is dismissed and the appellants will pay the plaintiffs' costs.