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EMPEROR v. RAM CHANDRA ROY.

Maniruddin, he is apparently a servant acting under the influence of the other two. In his case, we inflict a sentence of six months' rigorous imprisonment under section 147, I. P. C. The accused must surrender to their bail to serve out the sentences.

GREGORY J. I agree.

A. C. R. C. *Reference accepted.*

APPELLATE CIVIL.

Before B. B. Ghose and Cammiade JJ.

TARAKESWAR DAS GUPTA

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Dec. 8.

v.

AMBICA CHARAN BHATTACHARJEE.*

Will—Administrator, authority of—Power to dispose of property, how far restricted—Probate and Administration Act (V of 1881)—Hindu Wills Act (XXI of 1870), s. 2—Indian Succession Act (X of 1865), s. 269.

Before the passing of the Probate and Administration Act, an administrator acting under the Hindu Wills Act, had the same authority as an executor under section 269 of the Indian Succession Act which was made applicable to Hindus by section 2 of the Hindu Wills Act.

An executor or administrator has no absolute power to dispose of the property of the deceased if it is not necessary for the purpose of administration of the estate, but a *bona fide* purchaser may be protected in certain cases where a transfer is not for that purpose.

Preonath Karar v. *Surja Coomar Goswami* (1), *Solomon* v. *Attenborough* (2) and *Ricketts* v. *Lewis* (3), discussed and followed.

* Appeal from Original decree, No. 227 of 1925, against the decree of Hem Chandra Das Gupta, offg. Subordinate Judge of Chittagong, dated Sep. 15, 1925.

(1) (1891) I. L. R. 19 Calc. 26. (2) [1912] 1 Ch. 451.
(3) (1882) 20 Ch. D. 745.

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APPEAL by Tarakeswar Das Gupta and others, the defendants.

This appeal arose out of a suit for recovery of possession of certain property which the plaintiffs claimed as reversionary heirs of one Bhowani Das Bhattacharjee who died testate leaving a widow Bamasundari. Bama Sundari was granted letters of administration of the will by the Court. She executed two permanent leases in favour of one Gour Hari Das, the predecessor-in-interest of defendants Nos. 7 to 15 and the properties covered by these two leases were the only subject matter of dispute in this appeal. The lower Court decreed the suit in favour of the plaintiffs. The defendants appealed to the High Court.

Dr. Sarat Chandra Basak (with him *Babu Chandra Sekhar Sen* and *Babu Nikunja Bihari Roy*), for the appellants, contended that the learned trial Judge was clearly in error with regard to the powers of the executor or administrator after the Hindu Wills Act came into force. Under section 2 of the Hindu Wills Act, section 269 of the Indian Succession Act is applicable to Hindus and under that section the administrator has power to dispose of the property of the deceased in such a manner as he thinks fit. The lease was executed in 1875 before the passing of the Probate and Administration Act. That Act curtailed the power of the administrator to dispose of the property by lease or sale. He further contended that the suit is barred by limitation. The widow incurred forfeiture under the provisions of the will. The suit not having been instituted within 12 years from the date of forfeiture it is barred.

Babu Jogesh Chandra Roy (with him *Babu Narendra Kumar Das*, *Babu Nripendra Chandra*

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Das and *Babu Jaineswar Majumdar*), for the respondents, contended that the lease was not a *bona fide* lease. In order to be effective and binding the lease must be executed in the course of administration. There is no finding that the lease was executed in order to pay any debt of the testator or for any other like causes.

Babu Chandra Sekhar Sen, in reply. The lease was granted in the course of administration. In the plaint the plaintiffs had admitted that the lease was granted as administratrix. Merely because the lease does not describe in what capacity the lease was granted that would not in any way affect the validity of the lease : *Preonath Karar* v. *Surja Coomar Goswami* (1). No question of *bona fide* or otherwise of the transaction has been raised in the trial Court: *Corser* v. *Cartwright* (2).

GHOSE J. This is an appeal by some of the defendants, that is, defendants Nos. 7, 10, 16 and the representatives of the original defendant No. 14, against the judgment and decree of the Subordinate Judge, second Court, Chittagong, dated the 15th September 1925.

The suit was orginally brought by the plaintiff No. 1 only by making the plaintiff No. 2 a *pro forma* defendant who was subsequently transferred on his own application to the category of plaintiffs. These two plaintiffs claimed the property in suit as the reversionary heirs of one Bhabani Das Bhattacharjee who died in October or November 1874, leaving a widow Bama Sundari surviving him. Bhabani had previously executed a will, dated the 28th July, 1874, by which he had appointed several executors. The executors renounced their executorship and the widow

(1) (1891) I. L. R. 19 Calc. 26. (2) (1875) L. R. 7 H. L. 731.

applied for letters of administration with a copy of the will annexed which was granted to her on the 8th of February, 1875. It appears that on the 6th May, 1879, the widow Bama Sundari executed two permanent leases in favour of one Gour Hari Das (Choudhury), the predecessor-in-interest of defendants Nos. 7 to 15 and the properties covered by these two leases are the only subject matter of dispute in this appeal. The Subordinate Judge has made a decree for possession in favour of the plaintiffs making the defendants liable for mesne profits. From that decrees these defendants have appealed to this Court.

The history after the grant of the letters of administration is that the agnates of Bhabani Das oppressed his widow in various ways so that she was obliged to leave the family dwelling house of her husband and had to go to live in her father's residence. In September, 1899 she applied to the District Judge for permission to sell certain properties. This permission was refused and in that order the District Judge made certain observations about the revocation of the letters granted to her. In November, 1899, two of the executors applied for letters of administration with the will annexed of Bhabani Das and the plaintiff No. 1 also made a similar application. In the meantime on the 28th September, 1899, Bama Sundari sold her right to all the properties to the predecessor-in-interest of defendants Nos. 1 to 6. The learned District Judge granted letters of administration to one of the executors named Kebal Krishna Bhattacharji. On appeal the High Court set aside that order, and the result was that the original grant to Bama Sundari was not interfered with. In September, 1906, Bama Sundari brought the properties covered by the two *Pattas* of 1879 to sale after having obtained a decree for rent. It will be noticed that this was after she had

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parted with all her interest in the properties left by her husband. The disputed properties were purchased by the predecessor-in-interest of the defendants Nos. 16 to 19, who has been found to be a *benamidar* of the original lessee Gour Hari. Bama Sundari died on the 10th January, 1921, and this suit was brought by the plaintiffs to recover possession of the properties left by their maternal uncle Bhabani Das, of which the properties subject to the aforesaid leases are now the subject matter of this appeal. The ground urged by them is that there was no legal necessity for the permanent leases. The Subordinate Judge in his judgment discusses various points and has come to the conclusion that the leases were not granted for legal necessity. He has further held that the widow had only limited powers of alienation as administratrix and had not the power before the passing of the Probate and Administration Act, 1881, to grant permanent leases without the sanction of the District Judge. He has also held that the transaction entered into by the widow in granting permanent leases was not a *bona fide* one. He appears to have been of opinion that the *Selami* which was said to have been paid to the lady before the Sub-Registrar was not actually received by her, but that there was only a show of payment. In that view he has decreed the suit.

The first contention on behalf of the appellants is that the Subordinate Judge has misread the law as regards the powers of an administrator governed by the Hindu Wills Act before the passing of the Probate and Administration Act as stated in Philips and Trevelyan's book on Hindu Wills (2nd Edition, page 225), by omitting a "not" in the quotation made by him. This is true. Their argument is that before the passing of the Probate and Administration Act, an administrator acting under the Hindu Wills Act had

the same authority as an executor under section 269 of the Indian Succession Act which was made applicable to Hindus by section 2 of the Hindu Wills Act. Section 269 of the Succession Act of 1865 runs thus :—

"An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit."

I am of opinion that the Subordinate Judge was wrong in his view of the law as regards the powers of an administrator under the Hindu Wills Act before the passing of the Probate and Administration Act of 1881. Whether the leases are binding on the plaintiffs or not will depend on other considerations and the matter will be dealt with later on.

The next point urged is that in any view of the case under the terms of the will, it should be held that the widow forfeited her right to succeed to the property by the sale of all her properties inherited from her husband on the 28th September, 1899, and that the plaintiffs were entitled to come in as heirs under the Hindu Law on that date; and the suit having been brought in January 1924 was barred by limitation. With regard to this point we are of opinion that the appellants' argument cannot be sustained. Even assuming that the sale would work a forfeiture of the right of the widow, which we are not prepared to hold, there is no subsequent disposition of the property under the will and the result would be an intestacy. The widow was the heir under the Hindu Law and she would be entitled to hold the property as the heir of the testator Bhabani Das under any circumstances when there was no gift over under the will; and so long as Bama Sundari was alive, the plaintiffs would have no title to the property left by Bhabani.

The first point is a more substantial one and requires careful consideration. It is contended on

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behalf of the respondents that Bama Sundari did not give the permanent leases of the property in question in the course of the administration of her husband's estate, and therefore the power conferred upon an administrator under section 269 of the Succession Act of 1865 does not come into play. Letters of administration were granted to her in 1875. The finding of the Subordinate Jude is that there were no debts to be paid by the administrator. It was not necessary for the administrator to alienate the property for the purpose of administration; nor does it appear that the administration had not already come to an end at the time when the permanent leases were given. The leases therefore granted by the lady were not granted by her as administratrix but should be taken as granted by her as a Hiudu widow and not being supported by legal necessity are not binding on the plaintiffs. It is further argued that on the finding of the Subordinate Judge that the leases were not *bona fide* they are not binding on the plaintiffs under any circumstances.

The lease, Exhibit B (16), shows the reason why it was given. The other lease, we are told, was in the same terms. There the lady describes herself as the widow of Bhabani. It is stated that the *Istemrari Mokarari Kaemi Daemi patta* was given for the purpose of her husband's Gaya *Sradh*, for the expenses of her residence at Benares and other necessary expenses. These are matters which cannot be held to be for the purpose of the proper administration of the estate of her deceased husband, and she does not describe herself in granting the leases as administratrix nor does it anywhere appear that the lessee was aware that she was given letters of administration of her husband's estate.

I apprehend that the powers given to an executor under section 269 of the Succession Act of 1865 were for the purpose of conversion of the testator's estate into money for the payment of debts to the creditors and for the facility of division of the legacies. The powers granted under that Act were the same for all cases of administration, whether the testator died after leaving a will or died intestate. Where it is clear that no debt has to be paid and no legacies have to be divided, it would be difficult to say that an administrator has an unlimited power of sale for his own purposes. No authority in point has been cited at the Bar with regard to any restriction on the exercise of the power of an executor or administrator under section 269 of the Succession Act, but as that section was taken from the English law, I think it is permissible to refer to English authorities in order to explain the nature of the power, which I shall presently do.

It was contended by Mr. Chandra Sekhar Sen in reply that the fact that the lady did not describe herself as administrator did not affect the right of the lessee and he relied on the case of *Preonath Karar* v. *Surja Coomar Goswami* (1) where the Court held that the fact that the vendors did not describe themselves as administrators but described themselves as heirs did not affect the case, because either as administrators or as heirs they were entitled to sell, though as heirs they could not sell anything more than their own shares. This would be applicable only to the case of *bona fide* purchasers who had no knowledge that the money was to be applied otherwise than for the payment of the testator's debts. (See *Corser* v. *Cartwright* (2) referred to in the above case.) In *Solomon* v. *Attenborough* (3)

(1) (1891) I. L. R. 19 Calc. 26. (2) (1875) L. R. 7 H. L. 731.
(3) [1912] 1 Ch. 451.

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one of two executors without the knowledge of his co-executor pawned articles of plate belonging to the testator's estate with certain pawn-brokers, who had no notice that he was not the absolute owner thereof, and he misapplied the money advanced upon them for his own purposes. At the date of the pledge all the testator's legacies and debts so far as they were known had been paid, but the residuary estate had not been completely realised and distributed. On the death of the pledgor the transaction was discovered, and an action was brought by his co-executor and a new trustee against the pawn-brokers to recover the plate. The Court of Appeal held, reversing the trial Court, that inasmuch as the pledgor had not purported to act as executor, and the defendants had no notice that he was executor, the latter had no title to the plate and must deliver it up to the plaintiffs. The House of Lords affirmed the decision on appeal on the ground that the proper inference from the facts was that the executors at the time held the plate not as executors but as trustees and therefore the deceased executor had no power to pledge the plate. *Attenborough* v. *Solomon* (1). In *Ricketts* v. *Lewis* (2) it was held that an administrator had no power to mortgage leaseholds of an intestate under leases not containing repairing covenants in order to raise money for repairing the property. And such a mortgage will be set aside as against a mortgagee who has notice of the purpose for which the money is raised. Fry J. (as he then was) observed :—

"What authority had the administratrix to raise money for the purpose of repairing the property ? It may be that she was liable to repair by virtue of covenants in the lease, but having regard to the length of the terms and time when they were granted that does not appear probable, and the onus of proving that there was such a liability is on the

(1) [1913] A. C. 76. (2) (1882) 20 Ch. D. 745.

mortgagee, and he has not discharged it. It comes then, shortly, to this that at the date of the mortgage Mrs. Lewis did not require the money for any purpose which it was her duty to perform as administratrix, and that she did require it for the purposes of her own beneficial enjoyment."

Applying the principles laid down in these cases there cannot be any doubt, in my judgment, that the leases in dispute cannot be sustained. There was no debt to pay of the testator; the lessor did not purport to grant the leases as administratrix, she did so rather as the widow of Bhabani Das; the lessee does not appear to have any knowledge that letters of administration had been granted to the lessor; there was clear notice in the lease to the lessee that the money was required for purposes quite different from what it was the duty of the lessor to perform as an administratrix—all these circumstances establish that the leases are not binding on the estate left by Bhabani Das, even assuming that the lessee did actually pay the premium to the lady as stated in the leases. An executor or administrator does not appear to have, according to the law, an absolute power to dispose of the property of the deceased if it is not necessary for the purpose of administration of the estate, but a *bona fide* purchaser may be protected in certain cases where a transfer is not for that purpose.

There can be no doubt that she could make alienations for necessity as a Hindu widow. But the Subordinate Judge has found that there was no necessity for such alienation and no attempt has been made to show that that finding is incorrect. It is further argued on behalf of the respondents that the will itself does not give a free power of alienation by way of leases even to the executors. Paragraph (8) of the will says :—

"In case it becomes necessary to grant any permanent leases to tenants, the executors shall be competent to grant them under the signature of my wife, and at the end of each year, they shall submit and explain an account of the income and expenditure to her."

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It is urged that it cannot be reasonably said that when the executors had renounced, the widow would, according to the will itself, get an unfettered power of making alienation by way of permanent leases by taking letters of administration with the will annexed. I am not quite sure that if it was necessary for the purpose of administration the widow could not grant a permanent lease by reason of these provisions. But on the grounds already stated we are of opinion that the leases which were granted by the lady were granted by her in the exercise of her right as the owner of a widow's estate as heir of Bhabani, and, as such, not being supported by legal necessity, the reversioners are entitled to recover possession after the death of the widow.

On these grounds the appeal must be dismissed with costs.

CAMMIADE J. I agree.

Appeal dismissed.

B. M. S.