

1896  
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 BEHARY  
 DUTT  
 v.  
 THACOMONEY  
 DASSEE.

directed by a mortgage decree, the rule of *damdupat* has been rightly applied in disallowing interest in excess of the principal sum, such application of the rule *before the decree has become final*, operates to prevent effect being given to the direction contained in the decree for the calculation of further interest on the aggregate amount certified to be due by the report.

The cases decided by Wilson, J., shew that when the rule of *damdupat* is not applicable at the time the decree becomes final, the direction that the aggregate amount shown to be due by the report is to carry interest at 6 per cent. must be given effect to. Applying, therefore, the principle laid down by Wilson, J., I must hold that the defendant is not entitled to the order asked for, and that this application must be refused with costs.

Attorney for plaintiff: Babu *Gonesh Chunder Chunder*.

Attorneys for defendant: Babus *Kally Nath Mitter & Surbadhi-carry*.

C. E. G.

## TESTAMENTARY JURISDICTION.

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 May 19.

*Before Mr. Justice Sale.*

IN THE GOODS OF NUNDO LALL MULLICK (DECEASED).

*Probate and Administration Act (V of 1881), section 90—Administrator-General's Act (II of 1874), section 31—Transfer to Administrator-General—Executor, Power of disposition by.*

Where the executors of a Will transfer their interest in the estate of the deceased under section 31 of the Administrator-General's Act to the Administrator-General :

*Held :—*

(1) Such a transfer would only transfer such powers of disposition over the estate as the executors themselves possessed.

(2) Under section 90 of the Probate and Administration Act, the power of an executor to dispose of any property is subject to any restriction imposed by the will appointing him.

(3) Where there is no such restriction, the power to dispose is not dependent on the permission of the Court, and the Court has no jurisdiction in the matter.

THE Administrator-General of Bengal applied, under section 90 of the Probate and Administration Act, 1881, for leave to sell certain premises, No. 4 to No. 6 Prankissen Mookerjee's Street, Chitpore Canal Side, in Calcutta, forming part of the estate of Nundo Lall Mullick, deceased.

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The Administrator-General had become Administrator of the estate by a deed of transfer, dated 14th of August 1893, executed by the executors of the Will of the deceased under the provisions of section 31 of the Administrator-General's Act (II of 1874).

The following questions were raised in the course of the argument :—

*First*, what were the powers of disposition over the property possessed at this time by the Administrator-General ;

*Secondly*, whether under section 90 of the Probate and Administration Act, 1881, his power to dispose of the property was dependent upon the permission of the Court, apart from cases where a restriction is imposed by the Will ; and,

*Thirdly*, whether the terms of the Will relating to the disposition of the property amounted to a restriction on the powers of the executors to sell the properties for the purpose of paying the debts of the estate.

By the terms of his Will the testator devised—

“ All the real or immoveable and personal or moveable estate whatsoever and wheresoever situate, of which he should be possessed or to which he should be entitled at the time of his decease unto the executors, their heirs, representatives, executors, administrators and assigns, to the uses and subject to the trusts, provisions and declarations thereafter expressed (that is to say, as to all those two several messuages, tenements or dwelling-houses and appurtenances thereto, belonging and situate, being and respectively numbered 128 and 152, Bolloram Dey's Street, in Calcutta aforesaid, to the use of the said testator's wife, Trigasoondry Dossee, and her assigns, for and during the term of her natural life, keeping the same in good and tenantable repair and order, and as to the same messuages and other premises from and immediately after the decease of his said wife, and as to the other real or immoveable personal or moveable estate from and immediately after the testator's own decease, upon trust either to retain the same in their then present state of investment, or, at the discretion of the executors, to sell the same or any part thereof, except the family dwelling-house in Calcutta, and the garden house known as the Seven Tanks Garden in the Dum-Dum Road, in the 24-Per-gunnahs, and to invest the money to arise from such sale, as in the said will declared.”

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Mr. *Henderson* for the Administrator-General.

Mr. *Haldar* for Rajranee Dossee.

Mrs *Bonnerjee* for Trigasoondry Dossee.

SALE, J.—This is an application by the Administrator-General as the Administrator of the estate of Nundo Lall Mullick, deceased, for permission, under section 90 of the Probate and Administration Act, to sell property belonging to the estate for the purpose of paying off certain pressing claims against the estate.

The Administrator-General is the Administrator of the estate by virtue of a deed of transfer executed by the executors of the Will of the deceased under the provisions of section 31 of the Administrator-General's Act.

The question raised is whether the Administrator-General, for the purposes of section 90 of the Probate and Administration Act, is an executor or an administrator in respect of the properties vested in him by the deed of transfer. The deed of transfer is dated the 14th August 1893, and section 31 of the Administrator-General's Act provides that on the transfer being made by a private executor, "the Administrator-General for the time being shall have the rights and be subject to the liabilities which he would have had and to which he would have been subject if the probate had been granted to him by his name of office at the date aforesaid."

The effect, therefore, of a deed of transfer executed in pursuance of this section is to substitute the Administrator-General, for the original executor in all respects and for all purposes connected with the estate of the testator. The Administrator-General therefore, by the deed of transfer, acquired the power of disposition which the original executors possessed under section 90 of the Probate and Administration Act. This section does not make an executor's power to dispose of property dependent upon the permission of the Court, except where a restriction is imposed by the Will. In that case the section provides that the power of the executor is subject to such restriction, "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 immoveable property specified in the order in a manner permitted by the order."

Now looking to the terms of the Will appointing the original executors, it appears that the testator does not authorize, or contemplate, the sale of any property for the payment of debts. There is a discretion given to the executors' to sell, but it is given for the purpose of enabling the executors, who are also appointed trustees, to change the investment if desirable, for the benefit of the trust, and the property in its new form is to be held subject to the same trusts as the property in its original form. It may be said, therefore, that the discretion to sell was impliedly only to be used for the purposes of the trust, and for no other purpose.

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These provisions in the Will do not, however, in my opinion, amount to a *restriction* on the powers of the executors to dispose of properties vested in them for the purpose of paying the debts of the estate. There being, therefore, no restriction on the executor's power of disposition within the meaning of section 90 of the *Probate and Administration Act*, this Court has no jurisdiction to make the order asked for. I was asked, if I came to the conclusion that the Administrator-General's application could not be granted, to disallow him his costs; but I do not think I ought to adopt that course. Having regard to the terms of the Will, and the fact that this is admittedly the first time that the question as to the effect of section 31 of the Administrator-General's Act, when read with section 90 of the *Probate and Administration Act*, has arisen for consideration, I cannot say that there was no element of doubt in the case; and that the application was unnecessary and improper. There will be liberty to the Administrator-General to pay out of the estate the costs of the parties appearing on this application.

Attorneys for the Administrator-General: Messrs. *Carruthers & Co.*

Attorney for Rajranee Dossee: Babu *N. C. Bose.*

Attorney for Trigasoondry Dossee: Babu *Gonesh Chunder Chunder.*

C. E. G.