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petitioner ask for the Court's permission to do what he will under the law have full power to do? Indeed, the Act does not give the Court jurisdiction, when granting probate or letters of administration under its provisions, to include in such grant authority to dispose of property in respect of which the grant is made.

Attorney for applicant: Babu *Upurbocoomar Gangooly*.

C. E. G.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, and Mr. Justice Macpherson.

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March 4.

IN THE GOODS OF INDRA CHANDRA SINGH (DECEASED.)
SARASWATI DASSI *v.* THE ADMINISTRATOR-GENERAL OF BENGAL. *

Appeal—Letters Patent, High Court, clause 15—Will—Executor—Raising money by mortgage—Permissive order of Court—Probate and Administration Act (V of 1881).

No one but an executor or administrator has power to apply to the Court under section 90 of the Probate and Administration Act (V of 1881).

Where a testator directed his executor to manage the whole of his estate through the Court of Wards:

Held, that there was no restriction on the executor's power of sale, and that the provisions of section 90 of the Probate and Administration Act did not apply to his case.

Held, also, that an order on an application under section 90 of the Probate and Administration Act, at the instance of a beneficiary, where there was no restriction on the power of the executor to sell, was without jurisdiction, and appealable under section 15 of the Letters Patent.

Hurrish Chunder Chowdhry v. *Kali Sundari Debi* (1) applied.

INDRA CHANDRA SINGH died on the 14th May 1894, having made his last Will on the 13th May 1894, of which he appointed the Administrator-General the executor. He left a widow Srimati Mrinalini Dassi and a daughter, Srimati Saraswati Dassi, by a pre-deceased wife. Both the widow and the daughter were minors. The executor obtained probate of the Will on the 30th June 1894. The testator directed his executor to have the whole of his estate managed by the Court of Wards. The income of the testator's estate was about 2 lakhs per annum, less expenses for repairs, &c.

* Original Civil Appeal No. 42 of 1895.

(1) I. L. R., 9 Calc., at pp. 493, 494.

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The debts due from the estate amounted, on the 6th September 1895, to about 14 lakhs. The principal debt was due under a mortgage, dated the 15th March 1887, for 10 lakhs bearing interest at 6¾ per cent., with half-yearly rests, the due date fixed by the mortgage being the 15th September 1895. Early in 1895 a correspondence took place between the Administrator-General and Babu Lolit Mohun Ghose, the father of Srimati Mrinalini Dassi and between the Administrator-General and Babu Sarat Chunder Ghose, the husband of Srimati Saraswati Dassi, in which Babu Lolit Mohun Ghose proposed that a sufficient sum (which Maharaja Doorga Churn Law was willing to advance at 5½ per cent. interest), be raised by a mortgage of the estate to pay off the existing debts, and that such mortgage debt should be paid off gradually out of the income of the estate.

Babu Sarat Chunder Ghose, on behalf of his wife, opposed this proposal, on the ground that such a course, if adopted, would defer the enjoyment of his wife's share under the Will for fifteen years or more, during which time she could only receive the Rs. 500 a month allotted for her maintenance under the Will. The Administrator-General declined to accede to the proposal of Babu Lolit Mohun Ghose, unless an order of the Court, authorizing him to do so, should be made. Such an order was, upon notice to all the parties, applied for by Babu Lolit Mohun Ghose on the 9th September 1895, when Sale, J., made an order "that the Administrator-General be at liberty to raise a sufficient sum of money for the purpose of paying off the debts of the estate of the said deceased by mortgage of the immoveable properties belonging to the said estate, or a sufficient portion thereof (such loan to be repayable by instalments with interest at a rate not exceeding 6 per cent. per annum), and thereout to pay off the whole of the said liabilities, and thereafter out of the income of the said estate gradually to pay off the loan so to be raised as aforesaid, by such part-payments as may be proper, having regard to the other demands upon such income."

Against this order Saraswati Dassi appealed.

Mr. *J. T. Woodroffe* and Mr. *Hill* for the appellant.

Mr. *W. C. Bonnerjee* for the respondent.

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Mr. *Bonnerjee* raised the preliminary objection that no appeal lay against the order. The order is not a judgment within section 15 of the Letters Patent; it does not determine any rights as between the parties, and therefore no appeal lies from it—*The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1). It is nothing more than sanctioning something that the Administrator-General had a right to do, if he had power under the Will to raise money by sale or mortgage. Orders not determining any rights or imposing any liability are not appealable—*Lootf Ali Khan* v. *Asgur Reza* (2), *Kishen Pershad Panday* v. *Tiluckdhari Lall* (3). The power sanctioned by the present order is a power not in existence at the time of the Letters Patent, but is the creation of a recent Statute, and is therefore not appealable under section 15 of the Letters Patent—*In the matter of the Petition of Janokey Nath Roy* (4). [The Court then called upon Mr. Woodroffe to argue the question raised by the preliminary objection.]

Mr. *Woodroffe*.—This order affects the rights of the appellant; it interferes with the due administration of the estate. So long as it stands, the appellant is precluded from taking any steps to prevent maladministration of the estate, and from complaining of such maladministration, when committed. The notice of motion is not under section 90 of the Probate and Administration Act (V of 1881), for there is no restriction in the Will on the executor's powers. The learned Judge had no jurisdiction to entertain the application. By section 86 of that Act every order made by a District Judge by virtue of the powers conferred by the Act is made subject to appeal to the High Court; and the definition of "District Judge" in section 3 of the Act is wide enough to include a Judge sitting on the original side of the High Court, whose order is consequently appealable. So far as section 90 applies to the High Court, section 86 applies. On the other hand, if the order is made under the Administrator-General's Act (II of 1874), it is a decretal order under that Act; and orders made by a single Judge under that Act are appealable—*Somasundaram Chetti* v. *The Administrator-General* (5). If a jurisdiction has been usurped, the

(1) 8 B. L. R., 433, 452.
(2) I. L. R., 17 Calc., 455.
(3) I. L. R., 18 Calc., 182.
(4) I. L. R., 2 Calc., 466.
(5) I. L. R., 1 Mad., 148.

order is nevertheless appealable—*Hurrish Chunder Chowdhry* (1). Not only is the order made without jurisdiction, but the appellant is prevented from enjoying more than Rs. 500 a month as long as the Administrator-General chooses to tie up the estate. The mode of paying off the debt is unfair and inequitable, besides being prejudicial to the estate. The application was not made by, or even with the consent of, the Administrator-General; it was made *in invitum* to force his hand.

Mr. *Bonnerjee* in reply,—The definition contained in section 3 of the Probate and Administration Act is, no doubt, wide enough to include a Judge sitting on the Original Side of the High Court; but looking at sections 86 and 87 of that Act, and the corresponding sections 263, 264 of the Succession Act, together with the subsequent sections in each of those Acts, it is clear that an order under section 90 of the Probate and Administration Act is not intended to be the subject of an appeal. The word "hereby" in sections 86, 87 of the Probate and Administration Act means "hereinbefore." Now section 98 of that Act is equivalent to section 277 of the Succession Act; but an order under section 277 does not come within the purview of section 266 of the Act, by virtue of which an appeal has been allowed from the District Judge to the High Court. I submit that this order is not within section 86 of the Probate and Administration Act. If the order is made without jurisdiction and is a nullity, it cannot be the subject of an appeal.

Moreover, it was the only order possible in the interest of the parties. For, if any part of the estate is now sold, the income from that part will be wholly gone, and the shares given to the testator's widow and daughter will be so much diminished. On the other hand, if the mortgage is executed, the income only of the estate is diminished for a time, and then the entire estate would go to the beneficiaries. Thus, this order is not a judgment; it is a mere consideration of a question of expediency.

It is objected that the Administrator-General did not apply for the order. But it was not necessary that he should. Any person interested in an estate may take any steps the law allows

(1) I. L. R., 9 Calc., 482, 493.

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to put an executor in a position to administer the estate properly. If the Legislature requires a trustee himself to apply, if he wants directions, it expressly says so. For instance, section 34 of the Indian Trust Act, 1882, requires the trustee to apply, if he wants the directions of the Court. True, the Act does not apply to Bengal ; but it is nevertheless good as an instance of the principle contended for. Again, in the Trustee Act (XXVII of 1866) in sections 8, 9, 10, 11 and 12 it is provided simply that " it shall be lawful " for the High Court to make the several orders mentioned in those sections ; but in none of them is it enacted that the trustee alone shall apply.

Further, the powers of the Administrator-General are restricted by the Will ; for it requires that he shall have the *whole* estate managed by the Court of Wards. The testator, therefore, did not intend that the Administrator-General should sell any part of his immoveable property. He knew that the Court of Wards would possess, under section 4 of its Act, the power to sell ; and he left it to the Court of Wards to exercise that power, if it thought fit to do so. This cannot be said of the power to mortgage the estate ; for he had himself mortgaged the whole of his estate for 10 lakhs. If the Administrator-General had no power to sell, there was a clear restriction by implication within the meaning of section 90 of the Probate and Administration Act ; and the Court had full jurisdiction to direct the execution of the mortgage.

Mr. *Hill* in reply on the whole case. — There is no restriction in the Will on the executor's powers. The restriction must be an effective obstacle to his action, and one that he cannot get rid of, except under section 90 of the Probate and Administration Act. Besides, it is not consistent with the position and duties of the Court of Wards to take over the estate through the Administrator-General as a mere conduit pipe, nor with the Administrator-General's position as executor.

The order appealed against would be binding upon a Judge in an administration suit, because the Court making it would be a Court of co-ordinate jurisdiction. Unless the order is set aside now, it may be too late to assert our rights even in an administration suit ; for, suppose the mortgage was foreclosed in the mean-

time? Moreover, it might well be that the mortgage would never be paid off. Any judgment, therefore, that places the estate in such jeopardy is a judgment that materially affects or determines the rights of the beneficiaries. Even if the order was made without jurisdiction, it is not necessarily to be treated as an absolute nullity for all purposes—*In the matter of the Petition of Cochrane* (1).

The judgment of the Court (PETHERAM, C.J., MACPHERSON and PIGOT, JJ.) was delivered by

PIGOT, J.—This is an appeal from an order made by one of the learned Judges sitting on the Original Side of the Court. The order is made in the goods of Kumar Indra Chandra Singh, deceased. Neither in the notice of motion upon which the order was made, nor in the order itself, does it expressly appear that the order was in fact made under section 90 of the Probate and Administration Act. But this omission need not be dwelt on. In the argument of the appeal the respondent supported the order as made under section 90, and there is no doubt that the order was really applied for and was made, or supposed to be made, under the authority of that section. Kumar Indra Chandra Singh died on the 14th May 1894, leaving a very large property. By his Will made and published on the 13th May 1894 he made the Administrator-General of Bengal executor. The Will is as follows :—

Written (or executed) by Sri Indra Chunder Singh, son of Rajah Issur Chundra Singh, deceased, residing at No. 1, Harrington Street.

"I make (this) instrument of Will in the manner mentioned below:—

"I by this Will grant permission to my wife, *Srimati Mrinalini, to adopt Dattak Putra.* * She shall, upon the demise of one, be competent to adopt (5) *Dattak Putras* * in succession. Further, my said wife, besides maintenance, shall get from my estate Rs. 10,000 (ten thousand rupees) in one lump sum and Rs. 1,000 (one thousand rupees) per month for her life.

"*My daughter, Srimati Saraswati, shall,* until my debt is paid off, get Rs. 500, five hundred rupees per month, and after my debt is paid off, the said Srimati Saraswati Mata shall get a 4 annas share of my estate (which

* A son given away by his natural parents to persons engaging to adopt him.

(1) 14 B. L. R., 330.

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will descend to her) son, son's son, and so forth in succession. In the event of there being no son (or) son's son the said 4 four annas share shall, upon the demise of Srimati Saraswati, revert to and be included in my estate.

"My cousin, maternal uncle's son, Sri Jotindra Nath Ghose Bhaia (and after him) his son, son's son, and so forth in succession, shall get Rs. 50, fifty rupees per month.

"My son-in-law, Sriman Sarat Chandra Ghose Moulik, shall get Rs. 50, fifty rupees per month.

"My sister and my three nephews (sister's sons) shall each get Rs 3,000, three thousand rupees.

"Gurujee Srijoot Goneshi Prosad Choturvedi shall get Rs. 10,000, ten thousand rupees, and Srijoot Mukundo Choturvedi shall get Rs. 3,000, three thousand rupees, and Sri Jogendro Chunder Singh, *khazanchi* (cashier) shall get Rs. 3,000, three thousand rupees.

"Srimati Hriday Dassi shall get Rs. 250, two hundred and fifty rupees.

"I appoint the Administrator-General of Bengal executor of this my Will. He shall have the whole of my estate managed by the Court of Wards. Finis. I hereby revoke all previous Wills. This is my last Will. Finis. Dated the 31st Baisakh 1301 (Eng.) 13th May 1894."

The two principal legatees under the Will, namely, the widow Srimati Mrinalini and the daughter Srimati Saraswati, are both infants. As to the widow, Lolit Mohun Ghose, her father, has been made guardian of her property by an order of this Court made on the 28th August 1894. For the daughter, Sarat Chandra Ghose Moulik, her husband, acts in this proceeding as representing her interest as her next friend.

The income of the testator's estate is about 2 lakhs less expenses for repairs, etc. There were on the 6th September 1895 debts due amounting to about Rs. 14,00,000. Of these the principal debt is one due under a mortgage dated the 15th March 1887 for 10 lakhs bearing interest at 6¼ per cent. with half-yearly rests, the due date fixed by the mortgage being the 15th September 1895. Upon this mortgage debt interest was due up to the 30th June 1895 to the amount of Rs. 2,03,150-6-3. The unsecured debts were at the above date Rs. 1,78,938, of which Rs. 40,000 was due on a promissory note, carrying interest at 9 per cent., and Rs. 50,000 on a promissory note, carrying interest at 8 per cent.

Probate was granted to the Administrator-General on the 30th June 1894.

In the early part of the year 1895, some correspondence took

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place between the Administrator-General and Babu Lolit Mohun Ghose and the Administrator-General and Babu Sarat Chandra Ghose with respect to the administration of the estate and the steps that should be taken with reference to the payment of the debts due by the estate. In the course of that correspondence the circumstances of the estate were fully discussed, and it was proposed by Babu Lolit Mohun Ghose that a sufficient sum, which Maharaja Doorga Churn Law was willing to advance at 5½ per cent. interest, be raised by mortgage of the estate sufficient to pay off the existing debts, and that thereafter such mortgage debt should be paid off gradually out of the income of the estate. This proposal was opposed by Babu Sarat Chandra Ghose on behalf of his wife, the daughter of the testator. On her part it was contended that this course could not properly be taken by the executor; that the payment of debts should not be postponed, but that a sufficient portion of the estate should be sold to pay off the debts as soon as possible, or at least the greater part of them. It was objected on her part that the course proposed would have the effect of deferring her enjoyment of the one-fourth share bequeathed to her for fifteen years or more, during which time she could only receive the Rs. 500 a month allotted for her maintenance under the Will. The Administrator-General felt unable to adopt the proposal of Babu Lolit Mohun Ghose, or to accept the offer of Maharaja Doorga Churn Law to advance on mortgage at 5½ per cent. the sum which would be required to carry it out, because of the opposition made by (or on behalf of) Srimati Saraswati; unless an order of the Court authorizing him to do so should be made.

On the 4th September the notice of motion in this matter was served on the Administrator-General and on Srimati Saraswati and Baboo Sarat Chandra Ghose Moulik.

The Administrator-General, as appears by his letter of 6th September 1895, thought that he could not oppose the motion; that the matter could be left in the hands of the Court, bringing to notice only that the result of the application, if granted, would be to defer for the whole term of the loan the payment of the annuities under the Will, and the daughter her full share of the income, which she might otherwise be able to receive.

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On the date mentioned in the notice, the matter came on and the order appealed against was made. Application was made unsuccessfully on behalf of Srimati Saraswati for further time to enable her to oppose the grant of the order; it may be noticed that the offer of Maharaja Doorga Churn Law made on the 31st August was by his letter of that date only to remain in force while the Court was open up to the beginning of the vacation then close at hand. Srimati Saraswati by her next friend Babu Sarat Chandra appeals against the order as having been made without jurisdiction, and also as being unfair and inequitable to her and to the pecuniary legatees under the Will, and also as being inexpedient and likely to result in loss to the estate and to be prejudicial to the interests of the estate.

It was objected that no appeal lay against the order; it was also contended that, whether an appeal lay or not, the order was one within the jurisdiction of the Court under section 90 of the Act, and was a perfectly proper order, and one which should not be interfered with in appeal. It was contended that the order was not appealable under the Charter; that it was not a judgment within the meaning of clause 15, inasmuch as it did not adjudicate upon any right of any of the parties before us.

No doubt the order was made or must be taken as having purported to be made under section 90 of the Act. That section as it now stands was introduced into the Probate and Administration Act by section 14 of Act VI of 1889, in substitution for section 90, as it stood originally in the Probate and Administration Act. Act V of 1881, section 90, as it now stands, is as follows:—

"90. (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4.

"(2) The power of an executor to dispose of immoveable 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 immoveable property specified in the order in a manner permitted by the order.

"(3) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,—

"(*a*) mortgage, charge, or transfer by sale, gift, exchange or otherwise, any immoveable property for the time being vested in him under section 4; or

"(b) lease any such property for a term exceeding five years.

"(4) 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.

"(5) Before any probate or letters of administration is or are granted under this Act, there shall be endorsed thereon or annexed thereto a copy of sub-sections (1), (2) and (4) or of sub-sections (1), (3) and (4) as the case may be.

"(6) A probate or letters of administration shall not be rendered invalid by reason of the indorsement or annexure required by the last foregoing sub-section not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section."

So that, unless there be such a restriction imposed in this behalf by the Will appointing him, the executor does not need the permission of the Court to dispose, as he thinks fit, of all or any of the property vested in him. He is, save when such a restriction is imposed, clothed with as full authority as is given by section 269 of the Succession Act.

There is no such restriction imposed by the Will of Indra Chandra Singh. It was contended that the provision in the Will that the estate should be managed by the Court of Wards created by implication such a restriction; but the Court of Wards Act gives full power of selling or disposing of the estate to the Court of Wards, so that this provision in the Will cannot be taken as raising such implication.

No order therefore under section 90 appears to have been required in this case; as, indeed, the learned Judge remarks in the concluding sentence of his judgment.

But it does not follow from this that the order which was in fact made is not appealable.

No doubt, the order in its terms does not follow the terms of the notice. It is in its terms permissive. Whereas the notice contemplated an order requiring the Administrator-General as executor to raise a loan by mortgage to pay off the debts and thereafter out of the income to pay off the loan by part-payments, the order is limited to giving him liberty to do so, although the judgment is that an order should be made in the terms of the notice of motion.

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But the order, though permissive only, is none the less an order of the Court directing, in certain important respects, what it shall be lawful to do by the executor in course of administration. It may be that, what it authorizes him to do, is not in the usual course of administration: but this need not be considered with reference to the matter now under consideration. It is an adjudication after a hearing, upon the question whether or not a particular mode, or as the judgment says "scheme," of administration shall be adopted. It is impossible, in judging of the effect and operation of the order, to leave out of consideration the judgment deciding that the order should be made. It is an order in administration of the estate. It is one which, as long as it subsists, must be binding upon the parties, who appeared on the motion, in subsequent proceedings between them in administration. It is therefore an order from which an appeal must lie under clause 15 of the Charter.

Nor does it at all follow that, if the order was made without jurisdiction, an appeal does not lie from it: see the observations of the Judicial Committee in *Hurrish Chunder Chowdhry* v. *Kali Sundari Debi* (1).

As to the validity of the order, it was, we think, made without jurisdiction. Section 90 does not give the Court power to intervene in the administration of the estate in the hands of the executor, save so far as to judge whether, under the circumstances brought before it, it may seem right that he should have power under the Court's order to act in contravention of a restriction imposed in the Will by disposing of any immoveable property specified in the order, in a manner permitted by the order. No such case existed here, so that the Court's power to make an order at all did not arise; and if it had, this would not have empowered the Court to authorise a special mode of administration affecting the interests of the legatees under the Will in respect of the time at which they should come into possession and enjoyment of the legacies bequeathed to them.

Further, the section is not intended to be invoked on the application of persons other than the executor. The permission

(1) I. L. R., 9 Calc., at pp. 493, 494.

is to be granted to him to assist him, if he needs such assistance, in carrying out the administration of the estate. It is not a legitimate use of its provisions to apply them so as to allow any of the persons interested under the Will to come in, perhaps at great cost to the estate, and, under the form of seeking for him a permission for which he has not asked, to institute what are practically, however imperfect and limited, proceedings in administration. It is not necessary, for the reasons just referred to, to consider whether or not the scheme approved of is one which, upon the merits of it, were it possible to make an effectual order founded on them, ought to be adopted. For the reasons just mentioned, that would not be possible. But notwithstanding the great respect due to the opinion of the learned Judge who sanctioned it and to that of the Administrator-General, who appears to have been disposed to approve of it, it does seem open to very serious doubt whether, having regard to the circumstances of the family and the magnitude of the debt which burdens this great estate, the scheme suggested would in the end be most likely to keep the estate together and to save it from the ruin of complicated litigation.

The appeal is allowed, the order set aside ; the respondent must pay all costs in the Court below, and of this appeal ; no costs out of the estate can be allowed in such a case.

As to the costs of the Administrator-General the present order giving him only costs as between party and party is subject to any right which he may have and may hereafter assert to his costs upon the higher scale as between solicitor and client.

We express no opinion whether an order properly made under section 90 of the Probate and Administration Act on the application of an executor is or is not appealable.

Attorney for the appellant : Mr. *C. W. Foley.*

Attorneys for the respondent : *Kally Nath Mitter* and *Surbadhicarry.*

H. W. *Appeal allowed.*