APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mitra.

TARAN SINGH HAZARI
v.
RAMRATAN TEWARI.*

1903
May 26.

Minor, estate of—Court of Wards Act (Bengal IX of 1879) ss. 6, 27 and 35—Court of Wards, power of, to take over a minor's estate—Right of Court of Wards to sue on bonds executed in favour of executor—Minority.

A. died leaving a minor son. By a will he appointed defendant No. 2 executrix to his estate and directed that she should remain in charge of the property during the minority of his son. After the executrix had taken out probate of the will, the Court of Wards took over the estate from her. A suit was brought by the manager under the Court of Wards on behalf of the minor, upon a mortgage bond executed by defendant No. 1 in favor of the defendant No. 2, the executrix. Upon an objection being taken that the Court of Wards could not take over the estate of the minor, and that it had no right to sue:—

Held, that the Court of Wards had full authority to act under the provisions of sections 6, 27 and 35 of the Court of Wards Act and to take possession of the property as guardian of the minor; and a manager under that Court was competent to institute the suit.

SECOND APPEAL by Taran Singh Hazari, defendant No. 1.

This appeal arose out of an action upon a mortgage bond brought by the plaintiff as next friend of Ramratan Tewari, a minor under the Court of Wards. The allegation of the plaintiff was that the father of the minor died, leaving a will under which Gauri Debi, the defendant No. 2, was appointed executrix; that the defendant No. 2 proved the said will and obtained probate thereof; that on the 7th April 1888, the defendant No. 1 executed a registered mortgage bond in favour of the defendant No. 2; and that the defendant No. 2 having become old and unable to manage the minor's estate, the Court of Wards took charge of the said estate.

* Appeal from Appellate Decree No. 1923 of 1899, against the decree of G. Gordon, District Judge of Chittagong, dated Aug. 7, 1899, reversing the decree of Jogendra Nath Roy, Subordinate Judge of that district, dated Feb. 11, 1899.

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The defence, *inter alia*, was that the defendant No. 2 was the executrix appointed under the will, and she having taken out probate was the only person competent to sue, and that the Court of Wards had no right to sue; that by virtue of an agreement entered into between defendant No. 1 and defendant No. 2, the bond having been satisfied, the plaintiff's right to sue was extinguished; that the ward having attained majority the Court of Wards could not bring the suit. There was a clause in the will that the executrix should remain in charge of the property during the minority of the said Ramratan Tewari.

The Court of first instance having overruled the objections of the defendant, decreed the plaintiff's suit.

On appeal, the District Judge of Chittagong affirmed the decision of the first Court.

Babu Promatha Nath Sen for the appellant. Gauri Debi having taken out probate of the will, as executrix, was the only person who could, under the Probate and Administration Act, maintain this suit. The rights of Gauri Debi have not legally devolved upon the plaintiff. The Court of Wards had no legal authority to take over the estate from the hands of Gauri Debi without an administration suit, or until the revocation of the probate. There is no evidence in this case that the administration has been fully carried out. There is nothing in the Probate and Administration Act to show when and in what manner the rights of an executor as such is determined, and I submit that an executor who once takes out probate, continues to be an executor under the Act, until either the will is revoked or an administration suit is brought. In the present will, the executrix was to remain in possession as such, until the minor attained majority. She was bound to carry out the terms of the will, and to remain in possession until such event happened. She had no power to hand over the estate to the Court of Wards. Moreover the bond in the present case having been simply in the name of Gauri Debi, she alone could maintain this suit: see ss. 4, 31, 59 and 89 of the Probate and Administration Act and ss. 6, 27 and 35 of the Court of Wards Act. I further submit that the agreement dated the 29th Falgoon 1253 M.S.

did not require registration, and could be put in evidence to show that the plaintiff was estopped by conduct to bring this suit. A right to obtain specific performance can be claimed in defence to an action.

The Senior Government Pleader (*Babu Ram Charan Mitter*) for the respondent. Gauri Debi having become old, and having applied to the Court of Wards to take over the estate, the Court of Wards had, under the Court of Wards Act, every right to assume charge of the estate, and to maintain the suit: see ss. 6, 27 and 35 of the Court of Wards Act. The agreement purporting to extinguish the debt, requires registration.

Babu Promatha Nath Sen in reply.

BRETT AND MITRA JJ. This suit was brought by the Court of Wards on behalf of Ramratan Tewari, a ward of the Court, to recover from the defendant the amount due on a mortgage bond executed in favour of the guardian of the minor, Gauri Debi, who was also the executrix of the will of the minor's father, Shib Lal Tewari. This bond bears date 7th April 1888.

In his defence the defendant pleaded that the suit could not be brought by the Court of Wards, first because Ramratan Tewari was a major, and secondly because Gauri Debi having taken out probate of the will and being the executrix appointed under the will was the only person legally entitled to sue. A third point was taken that by an agreement made by Gauri Debi with the defendant on 29th Falgoon, 1253 Maghi, whereby it was agreed that she should purchase certain landed property belonging to defendant for Rs. 40,000, and that the money due on mortgage bond in suit and certain other moneys should be accepted as earnest money for the purchase, the right to sue on the mortgage bond had been extinguished. Both lower Courts held that the document which contained the alleged agreement, not being registered, was inadmissible in evidence, and the first Court went so far as to hold that it was not genuine.

Both Courts further held that Ramratan Tewari was a minor, that the Court of Wards had power to bring the suit on his

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behalf, and decreed the plaintiff's claim with costs. Defendant has appealed.

Neither in this Court in support of the appeal, nor in the lower Courts, is there any denial that the money lent to defendant on the mortgage was money belonging to the minor, and that the money has not been repaid.

The defence set up is that the Court of Wards had no authority to sue on behalf of the minor, and that no suit would lie on the mortgage bond.

In support of the appeal it has been argued that Gauri Debi is the only person who could bring the suit, and she could only bring it as executrix under the will of Shib Lal Tewari.

The will itself has not been translated, but it is not disputed on behalf of the plaintiff that Gauri Debi was appointed executrix under it. There is a further clause that she being executrix, should remain in charge of the property during the minority of Ramratan Tewari. On these terms in the will the argument has been advanced that Gauri Debi having once taken out probate of the will, and the estate of the deceased having vested in her, she could not divest herself of the estate, nor could she hand over the property to the Court of Wards on behalf of the minor till the terms of the will had been fulfilled and the minor had attained majority; she was therefore the only person who could sue to recover the debt in suit. It has also been contended that the Court of Wards had no power to proceed under the provisions of sections 6, 27 and 35 of the Court of Wards Act to take over the estate as the property of the minor.

We have heard the learned vakil at great length in support of his contentions, but we are unable to accept them as valid. No doubt, after Gauri Debi had taken out probate of the will, the estate of the deceased would under the law vest in her as executrix for the purpose of carrying out her duties as such, and those duties would be generally to collect the debts due to the estate to pay the debts due from the estate, to pay off legacies and other bequests, etc., and then to make over the property to the residuary legatee. It would be no part of her duties as executrix to manage the property for the benefit of the minor till he attained majority. The position and duties of an executor in this

country are not very well understood, and considerable confusion exists as to duties of the executor in administering the estate. The duties of the executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the will, the executor as such has no an authority to manage the estate on his behalf. Under the will the beneficial interest in the property vested in the minor as soon as the testator died, and Gauri Debi was appointed as executrix to manage the property till the minor attained majority. In describing her as executrix for this purpose there has in our opinion been a confusion or misinterpretation of the term "executrix." What was intended appears to us to be that she should as executrix administer the estate and see that the terms of the will were carried out, and, this being done, that she should manage the property covered by the will, not as executrix under the will and administratrix of the deceased's estate, but as manager for the minor till he attained majority. The intention clearly was to appoint her to be manager of the minor's estate. We think that in interpreting the will we must have regard not merely to the words used but to the evident intention of the testator.

It has been suggested that she could not as executrix make over the property to herself as manager of the infant without an administration suit or without the will being revoked. We cannot accept this contention as correct. It is opposed to the ordinary practice and there is no authority to support it.

We hold, therefore, that Gauri Debi had ceased to manage the property as executrix of the will of the deceased Shib Nath Tewari, and that she was managing it as manager of the infant Ramratan Tewari before she applied to the Court of Wards to take over the estate. We accordingly hold that the Court of Wards had full authority to act under the provisions of sections 6, 27 and 35 of the Court of Wards Act, 1879, and to take possession of the property as guardian of the minor. And such being the case, the manager under the Court of Wards had full power to institute this suit, and the objection raised disputing his power fails.

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The only other point taken on behalf of the appellant is that, after the execution by Gauri Debi of the alleged agreement to purchase certain landed property from the defendant for Rs. 40,000, and after she had agreed that the money under the present mortgage bond should be taken as part of the earnest money for the purchase, no suit on the mortgage bond would lie. Both lower Courts have rejected the document which purports to evidence this agreement as inadmissible in evidence for want of registration, and the very subtle arguments which have been advanced by the learned vakil to controvert this conclusion have failed to convince us that this view is incorrect. Obviously the whole object in offering as evidence the document in question was to prove that the mortgage debt had been paid off and the mortgage extinguished by the agreement set out therein, and we fail to understand the argument of the learned vakil that if the result of the agreement was to extinguish the mortgage debt and to convert the lien under the mortgage bond to one under that document, the document was one of which, under the terms of clause (*b*) or (*c*) of section 17 of the Registration Act (III of 1877), registration was not compulsory. We agree with the lower Courts that the registration of the document was necessary under clause (*c*) of section 17 of the Act, and that the document, not having been registered, was inadmissible in evidence. We do not think it necessary to follow further the arguments of the learned vakil in support of the appeal, as we are against him on these points.

We accordingly confirm the judgment and decree of the lower Court and dismiss the appeal with costs.

S. C. G. *Appeal dismissed.*