

Shew Bux Mohato & Ors.

Vs

Ajit Nath Dutta

Civil Appeal No. 196 of 1964

(K. N. Wanchoo, J. M. Shelat, R. S. Bachawat JJ)

24.08.1966

JUDGMENT

BACHAWAT, J.

The only question arising in this certificate appeal is whether the will of Nursingdas Seal imposed any restriction on the power of the executrix appointed by the will to dispose of his immovable properties vested in her as the executrix.

Nursingdas Seal was the owner of garden land measuring 31 bighas and known as premises Nos. 26, 27 and 28, Dum Dum Cossipore Road, Ghooghoodanga. He died in December, 1888, leaving a will dated December 11, 1888 whereby he appointed his widow, Sukheswari, as the executrix and bequeathed his estate to Sukheswari for her natural life and thereafter to his son, Nilkantha absolutely by way of vested remainder.

On September 9, 1899 one Sewdas Mohata purchased the interest of Nilkantha in the garden lands at an auction sale held in execution of a decree passed in a suit to enforce a mortgage dated September 7, 1893 executed by Nilkantha. Nilkantha became an insolvent and his estate vested in the Official Assignee of Bengal. Sewdas's title to the property subject to the life interest of Sukheswari was confirmed by a compromise decree dated February 17, 1904 passed in Suit No. 595 of 1901 and a conveyance dated August 17, 1904 executed by Sukheswari and the Official Assignee of Bengal as the assignee of the estate of Nilkantha. On April 20, 1933, Sukheswari died. The title of Sewdas to the property subsequently devolved on the plaintiffs.

On July 30, 1901 one Upendra Nath Addey obtained from Sukheswari a Mourashi Mokrari lease of 6 bighas out of the aforesaid 31 bighas of garden land on payment of Rs. 1,300/- by way of salami or premium. The leased property is comprised in C.S. Dags Nos. 144-150. The lease was executed by Sukheswari in pursuance of a decree passed against her on September 2, 1899 in a suit for specific performance of an agreement executed by her in or about 1891. The leasehold interest of Upendra Nath became subsequently vested in the third defendant.

On September 15, 1945, the plaintiffs instituted the present suit claiming a declaration of their title and recovery of khas possession of the garden lands and for other reliefs. The trial Court decreed the suit. The decree passed against the defendants other than the third defendant was confirmed by the High Court, and has now become final. In the appeal filed by the third defendant, the High Court confirmed the decree of the trial Court declaring the plaintiffs' title to 6 bighas of land comprised in C.S. Dags Nos. 144-150, but it set aside the decree for recovery of khas possession and mesne profits, and instead passed a decree for 3 years' rent in respect of the property. The correctness of

this decree is challenged by the plaintiffs.

If Sukheswari had power to lease C.S. Dags Nos. 144 to 150 to Upendra Nath Addy, it is not disputed that the plaintiffs cannot recover Khas possession of the property from the third defendant this suit. Counsel for the plaintiffs, however, submitted that Sukheswari had no power to grant the lease. This contention was accepted by the trial Court, but it was rejected by the High Court. Under s. 90 of the Probate and Administration Act, 1881 (Act No. 5 of 1881), Sukheswari had power to lease the property unless this power was restricted by Nursingdas's will. Counsel submitted that cl. 4 of the will imposed such a restriction. The operative part of the will consisted of five clauses, which were in these terms :

- "1. I appoint my wife Sm. Sooleswari alias Begum as the Executrix.
2. After my death aforesaid wife being vested with my title will enjoy and possess all the movable and immovable properties etc. which will be left by me as long as she will be alive and after her death my son Shree Nilakantha Seal will come to be vested with the same title.
3. My wife will make payment in the same manner in which I have been paying the maintenance (Kheraki) to my revered mother and stepmother and will make the house-hold expenses etc. in the same manner in which I have been making.
4. My second daughter and the aforesaid son, Nilkantha Seal have not been married as yet. My wife will spend a reasonable sum from my Estate on account of their marriage. If for that purpose a portion of my Estate has to be sold out, then my said wife will sell any portion of my estate whatever and will perform the said marriages. I gave her absolute power in that behalf.
5. My Executor will repay my debts on my death and realise my dues."

It is to be noticed that clause 4 of the will authorised Sukheswari to sell a portion of the estate for meeting the expenses of the marriages of Nilkantha and his sister. Counsel for the appellant submitted that the specific authority in clause 4 to deal with the estate in a particular way negated any authority to deal with it in other ways. We are unable to accept this contention. Clause 5 directed the executrix to pay the testator's debts. Clause 3 directed her to pay maintenance to the mother and stepmother of the testator. The testator could not have intended to impose any restriction on the power of the executrix to dispose of the estate for the payment of the debts and the maintenance. Clause 4 cannot be regarded as a general restriction on the power of Sukheswari to dispose of the properties in due course of administration.

Counsel submitted that the lease was executed by Sukheswari for the purpose of raising money to meet the expenses of the marriage of the daughter. He argued that in view of clause 4 of the will, Sukheswari could raise money for this purpose by selling a portion of the estate and in no other manner. The materials on the record do not clearly indicate why Sukheswari granted the lease. But we shall assume that the purpose of the lease was to raise moneys for meeting the marriage expenses. In our opinion, clause 4 did not fetter the power of the executrix to grant this lease. Clear language was required for restricting the power of the executrix to deal with the property under s. 90(1) of the Probate and Administration Act, 1881. The will contained no such language. There was no provision in the will with regard to the power of the executrix to lease the property and the

principle expressum facit cessare tacitum has no application.

In *Purna Chandra Bakshi v. Nobin Chandra Gangopadhyaya* ((1903) 8 C.W.N. 362.) the Calcutta High Court held that a provision in a will authorising the executor to sell the testator's property to pay off his debts could not be regarded as an implied prohibition against mortgaging the property. The executor had power under s. 90 of the Probate and Administration Act, 1881 to mortgage the property for paying the debts. The express power to sell the property did not imply a restriction on her to dispose of it in any other way under s. 90. We agree with this decision. In our opinion, clause 4 of the will of Nursingdas did not impose any restriction on the power of the executrix to lease the property in due course of administration. The lease is binding on the plaintiffs, and they cannot recover khas possession of the property in this suit.

This finding is sufficient for the disposal of the appeal. We, therefore, express no opinion on the question whether the title of the appellants to the property has now vested in the State of West Bengal under the West Bengal Estate Acquisition Act, 1953 and the notifications issued thereunder.

The appeal is dismissed with costs.

R.K.P.S.

Appeal dismissed.

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