Brown Vs. A.L. Seale

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Court : Allahabad

Decided On : Dec-31-1969

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Judge : Robert Stuart, C.J., ;Pearson, ;Turner and ;Spankie, JJ.

Appellant : Brown

Respondent : A.L. Seale

Judgement :

Robert Stuart, C.J.

1. I am of opinion that, by the power-of attorney given by the executors to Mr. Beresford, the Manager of the Delhi and London Bank, they delegated their authority to sell to that gentleman, but that the sale to the plaintiff was and is invalid. I would therefore allow this appeal for the seventh reason assigned, and reverse the judgment of the Court below with costs. I have arrived at this conclusion after anxious consideration of the case, and of the legal principles on which its determination depends. If I have not found any decision or dictum exactly in point, there appears to be in the books the recognition and application of principles and analogies all going to show that the sale by Mr. Beresford to Mrs. Brown was not valid as against the defendant, and that therefore the judgment of the Court below ought to have been for the defendant. Viewed, indeed, in any light, the question thus before us for decision is, in principle, a most serious one,

for if what was here done was validly done, then undoubtedly executors and trustees have much larger powers than is generally understood by lawyers, while if these executors have exceeded the limits of their authority, we should be told so by the Court in the last resort. I therefore trust that this ease may go further, and that the Judges of the Privy Council may have an opportunity of instructing us on the subject. The case is one of pure technical law, having nothing whatever to do with the legal customs and usages of India, nor does even the Indian Succession Act, in my opinion, affect it in the slightest degree. The three documents which are material to the case are fully set out in the order of reference by Mr. Justice Spankie and myself; and just let us see how the case stands on these. First, there is the testator s will, in which, with the exception of charging his estate, real and personal, with the payment of all his just and lawful debts, there is no express provision for, or, indeed, any special recognition of the necessity of such a sale as we have to consider; on the contrary, there is only one special trust to sell, and that for a totally different purpose than for the payment of debts, and appearing to show, too, that in the testator's mind at least there would be no necessity for such a sale as this so-called sale to the plaintiff, viz., one for the personal benefit of one of his sons in consequence of his infirmity and inability to earn a competency, and otherwise for the benefit of the rest of his children. It is also to be considered that the debts for the payment of which the sale to Mrs. Brown was made were not debts incurred by the testator himself and left by him to be paid out of his estates, but debts incurred by the executors themselves in the course of their administration. Then we have the second document mentioned in the reference, viz., the power-of-attorney by which the executors 'constitute and appoint the Manager for the time being of the Delhi and London Bank, Mussoorie, our true and lawful attorney for us and in our names, and as our act and deed, to sell and negotiate the sale of the houses and property situate in Landour, &c;, and to perfect all or other act or matter or thing whatsoever which shall or may be necessary or requisite for effecting the premises, we, &c.;, hereby ratifying and confirming whatsoever the Manager for the time being of the said Delhi and London Bank, Limited, shall lawfully do or cause to be done for us or on our behalf in or about the aforesaid premises by virtue of these presents.' Here it will be observed there is no recital of the will or the discretion in it to pay the testator's

debts, nor of the fact that there were any such debts existing, and of the necessity of paying those debts by means of a sale of a portion of the estate, and that such estate should be the particular property mentioned, but the Manager of the Bank is simply, and without any reason assigned, directed to sell and negotiate the sale of the houses and property. There is no direction simply to make a subsidiary contract, or to receive offers, which offers are to be communicated to, and considered by, the executors, but a power to negotiate and conclude a sale, and to sell, in the largest and most unqualified sense of the term: and as if this was not enough, the instrument goes on to empower the Manager 'to do and to perfect all or any other act or matter or thing whatsoever which shall or may he necessary or requisite for effecting the premises;' that is to say, the Manager is to effect the sale on any terms he pleases, and in effect, to deal with the property directed to be sold as if he himself was an executor or trustee of the will. If this is not a delegation of their office, and, pro tanto, of their estate, by the executors, I cannot imagine what delegation can possibly mean. One tiling is certain, that Mr. Beresford, the Manager, evidently considered it was complete so far as he was concerned, and that he had, by means of it, acquired absolute control over the property which it had been determined to sell, for he proceeds himself, of his own authority, to sell the property, and he executes a conveyance to Mrs. Brown as if the transaction were a matter exclusively personal to him and her. This conveyance or deed of sale, no doubt, contains recitals which go to justify the arrangements to some extent as between the executors and him, but from beginning to end there is not the slightest recognition in this deed of the rights and interests under the will of the cestui que trust and legatees as parties and beneficiaries who are in any wise to be accounted to. The operative part of this deed of sale is remarkable as showing the merely personal character of both seller and purchaser. It is preceded by the following singular recital:--' And whereas I (the Manager) being desirous of effecting a sale, &c;, under the power hereinbefore recited' (by which he means the general direction in the will to pay the testator's debts), 'have for a great length of time advertised the sale in the public newspapers, and have at last received an offer, &c;, of Rs. 35,000 to be paid on the execution, registration and delivery of these presents' (and of certain other instruments, none of which contained any recognition whatever of the executors, &c;), 'and having communicated the offer to

the said executors' (it is not stated that the executors gave any answer about the offer, or in any way gave their assent to its acceptance directly or indirectly), 'and being satisfied' (that is, the manager being satisfied) 'that it is unlikely any higher offer for the said estate will be made, etc., etc., have decided upon accepting the said offer, and have duly communicated my acceptance of it' (to the purchaser, Mrs. Brown). 'Now therefore know ye that I the said Charles Edward Beresford, in exercise of the said power of sale' (that is, the power of sale given by the will to the executors), ''and for the purpose of re-imbursing to the said Delhi and London Bank, Limited, the moneys advanced by and due to it' (that is, the manager's own Bank), 'and in consideration of the sum of Rs. 35,000 to be paid by the said Mrs. Brown' (it is not said to whom, to the executors or to Mr. Beresford himself), 'do by these presents grant unto the said Mrs. Brown, her heirs and assigns all those lands, forests, and houses, and hereditaments.' It is unnecessary to go further with this deed of sale, which, it will be observed, contains not only the most absolute and complete, but the most thoroughly independent conveyance, by the Delhi and London Bank, Limited, of all the property comprised in it, and this solely in the interest of the Bank itself, and without the slightest reference to the rights of the defendant as a beneficiary under the will.

2. Now if all this does not amount to a delegation by these executors to Mr. Beresford not only of the control of the property and its sale, but of their discretion and of the confidence reposed in them by the will, I do not know what possible arrangement of this kind can have that effect. These executors undoubtedly, in my judgment, delegated their office, and, in doing so, took no sufficient measures, indeed, no measures at all, to protect the estate, and all that was done in virtue of that delegation was of course illegal, and the sale to Mrs. Brown was and is invalid. The legal estate remained in the executors, and they undoubtedly did not divest themselves of it by the power-of-attorney to the manager, and the right and title to the property remains in the executors still. Although retaining therefore complete dominion over the property under the will, and bound in all transactions relating to it to exercise their own discretion, they left everything to the discretion of their attorney, who appears to have dealt with Mrs. Brown as if the property had become his own or the Bank's independent estate. This they could not do--Rugden on Powers, 8th ed., pp. 179, 180--and the result therefore is that as against the

defendant Alfred Seale there has been no sale to the plaintiff'.

3. As to Section 269 * of the Indian Succession Act, that enactment, as I have said, has nothing to do with the case. It relates solely to direct dealing with, or on account of, the estate by the executor or administrator himself, and not by means of delegation to any other person, or by means of any other intermediary. The case of a mortgage under this section is quite different from a sale out and out, for a mortgagor in that case retains in his own person not only the equity of redemption, but the right to pay up the debt on the contract made by it, such contract being the contract of the mortgagor himself, and not that of any delegated agent or attorney. For these reasons my answer to this reference is that the sale-deed is not a good and binding conveyance of the property it purports to sell.

Pearson and Turner, JJ.

4. Concurring.(After stating the facts of the case as already set out, the judgment continued:) The questions addressed to this Bench we understand to be the following:--Whether the execution of the sale-deed by Mr. Beresford selling under a power of sale created by the executor of a will executed by an Englishman domiciled in India, after the Indian Succession Act came into operation, is valid, and whether, in the absence of other defects, such a conveyance operates to transfer the property sold to the purchaser. We do not understand that our opinion is sought on the question whether the deed of mortgage and the power-of-attorney are invalid by reason that Mrs. M.V. Read was no party thereto, or whether any objection on that ground is not answered by the 271st section of the Indian Succession Act, which declares that, when there are several executors or administrators, the powers of all may, in the absence of any declaration to the contrary, be exercised by any one of them who has proved the will or taken out administration. The three instruments executed on the 20th July 1874 must be regarded as parts of the same transaction. The mortgage was intended to be a collateral security for the bond. The power-of-attorney was intended to give effect to the power of sale in the mortgage. The questions then put to us resolve themselves into these : Are executors under a will to which the Succession Act applies competent to execute a mortgage of immoveable property, to create a

power of sale in favour of the mortgagee, and to appoint the agent of the mortgagee their attorney to give effect to the power of sale.

5. In the case before us the testator charged his debts on his moveable and immoveable property, and in addition to this power executors have, under the Indian Succession Act, Section 269, which makes no difference between moveable and immoveable property, power to dispose of the property of the testator either wholly or in part in such manner as they think fit. It has, we are aware, been held in England that, before a power of sale has been given to executors, they cannot sell by attorney, but it has also been held by the Courts in that country that an executor may mortgage with a power of sale property which by the law of England wholly vests in him. In Russell v. Plaice 18 Beav. 21 : 18 Jur. 251 : 23 L.J.Chanc. 441, Lord Romilly, when Master of the Rolls, held that a purchaser was bound to accept an assignment of leaseholds executed by a mortgagee under power of sale created by an executor. 'The power,' said His Lordship, 'which an executor, or administrator possesses of making a valid mortgage includes in it a power to give all that is properly incidental to that species of alienation * * The power of sale given to the mortgagee must he considered not as the delegation of a power intrusted to the executor, which is a power to sell, for the benefit of the cestui que trust, but as the creation of a new power not for the benefit of the persons interested in the testator's estate, but for the benefit of the persons interested in the mortgage; it is a power to render the mortgage effectual, and the right to create that power is incidental to the authority of the executor to mortgage.' In Bridges v. Longman 24 Beav. 27 it was held that a power to raise money by sale or mortgage authorises a mortgage with a power of sale (see also In re Chawuer's Will, L.R. 8 Eq. 569). We have cited these rulings because the learned Counsel for the appellant relied in support of his argument on English authorities. But the points raised must be decided by the law of India. The charge of debts on the real and personal estate would probably be held sufficient by itself to authorise a sale or mortgage by the executor for the payment of debts. There is, it is true, no express devise of the estate to the executors, but there is a direction for the application of the rents and profits during the life of the testator's widow, or until her remarriage, and then a direction for sale, and it may be taken that the testator was aware that by law his estate would vest in his executors, and that he

intended the powers and trusts created and declared by his will should be exercised and performed by the executors.

6. The respondent is not, however, constrained to rely on the charge created by the will. She is entitled to rest the validity of the sale on the power given to executors by the Succession Act, and it is impossible that any power could be conferred in larger terms. The executors may dispose of the property of the deceased 'in such manner as they may think fit.' This language, in our judgment, authorises an executor to execute a mortgage with a power of sale. It is true that a power of sale is unusual in mortgages made by natives of this country, but it is not an unusual power in mortgages drawn after English precedents, and executed by and in favour of Englishmen resident in India, and, if it were unusual, we are not prepared to hold, having regard to the wide language in which the power to dispose of property is by law given to executors, that a power of sale created in a mortgage by executors would be invalid. For the purpose of his office an executor is by the law of India invested with the same powers of conveying a testator's estate as the owner himself possessed. It is of course his duty to mortgage or sell the estate only when there is necessity for it. But in creating a power of sale in a mortgage he does not, as Lord Romilly pointed out, delegate the duty imposed on him. In the exercise of the discretion conferred on him he has decided that a mortgage is necessary, and as a power of sale increases the value of the security and facilitates the procuring of the required fund at the lowest rate of interest, he for the benefit of those interested under the will creates a new power to be exercised for the benefit of the mortgagee. The power-of-attorney is simply auxiliary to the power of sale and almost invariably is conferred by the same deed as the power of sale. It is not invalidated by being created by a separate instrument. We, therefore, reply that the conveyance to the purchaser is not invalid on any of the grounds suggested in the referring order.

Spankie, J.

7. The executors in this case were acting under the authority vested in them by Section 269 of Act X of 1865, and not under any power of sale delegated to them as a trust by the testator relying on the exercise of their own personal discretion

and judgment in effecting a sale. The power given by Section 269 of the Succession Act is unqualified. They may dispose of the property of the testator, real and personal, as they think fit. They have the same power to deal with the property that the owner himself would have had. If he could have empowered his agent or attorney to sell the whole or any portion of the property, the executors can do the same by virtue of the large authority given to them by the Act. It would appear that we are not called upon to look to English law in replying to the reference made to us. I would say that the attorney in this case could give a valid title to the purchaser acting as he was under the authority given to him by the executors.

8. When the case was returned to the Division Court (Stuart, C.J., and Spankie, J.), in disposing of the appeal, the following further observations were made by Stuart, C.J., on the question referred to the Full Bench:

Robert Stuart, C.J.

9. This case was referred by us to a Full Bench as to whether the sale-deed not being under the hands of the executors, but by and in the name of the person to whom they delegated their authority under the power-of-attorney, is valid, and is a good and binding conveyance of the property it purports to sell. All the Judges consulted have now returned their opinions, and, with the exception of myself, they have answered the reference in the affirmative, that is, they are all of opinion that the sale-deed to the plaintiff' is a valid conveyance of the property to her.

10. Having fully considered all that has been recorded by my colleagues, I regret to say that I find myself wholly unable to adopt their reasoning, and I remain of the opinion expressed by me in my judgment in the reference. I am quite clear that Section 269 of the Indian Succession Act has nothing whatever to do with this case. That section provides that '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.' Now this is a proposition which, properly understood, it never occurred to me to controvert. But the question raised in the present case is a very different one, and it is not whether any executor has power to dispose of any portion of the testator's estate as he thinks fit, but whether he can refuse or abstain

from disposing of the property himself by handing over the duty, the power, and the discretion to another party, a stranger to the estate and who as a creditor has an interest, not in its profitable or just administration, but an interest of a nature which is necessarily adverse to the interests of the legatees and others who take under the will. The Succession Act in this section appears to me to assum'e that the power to deal with the testator's estate is a power that must be exercised by the executors themselves directly, and not by a person delegated or authorised by them to act on their behalf, much less a person whose only interest is to obtain satisfaction of his own claims on the estate. As to the case of a mortgage, I have sufficiently expressed my opinion at the conclusion of my answer to the reference.

11. I may now add that, my attention having been directed by one of my colleagues to the fact, that there is evidence by letters addressed by one of the Scales to the Manager of the Bank showing that the family were extremely anxious to save the property in 1874 and 1875, and that a proposal for the management of the estate in the interest of all concerned was made, and that this proposition was in due course communicated to the Directors of the Bank in London--not a very competent body one would imagine to decide such a question--but that these gentlemen declined to entertain the offer, thinking no doubt more about the assets of the Bank and their responsibility to account for them than of any considerations or favour to the appellant's family being allowed a chance of saving the property. Be that as it may, the fact that the family were willing at the last moment to prevent the sale, adds considerable force, I think, to my contention that Mr. Beresford had no authority to exercise the power and the discretion reposed in the executors, and that neither could the executors place him in such a position, nor, if they did so place him, could he legally and effectually accept such authority at their hands, so as of himself to give a good title to the plaintiff as purchaser.

12. I also desire to point out that I never suggested that the bond to the Bank was executed for the purpose of discharging private debts personal to the executors themselves. What I meant to convey was that the deht to the Bank had been incurred, not by the testator himself, but by the executors in the course of their administration of the estate; and although they could have sold the property themselves, that is, by a deed of sale under their own hands, subject to their

liability afterwards to account for the transaction to the defendant or others concerned, they could not delegate or otherwise transfer the power to do so to a stranger, much less to a creditor of the estate, and who had become such by means of their own administration.

13. In my judgment in the reference I referred to, although I did not quote from, the well-known work of Sugden on Powers, but I had better give the words of that great authority. In the chapter (Ch. vi, 8th ed., pp. 179, 180) on the 'Transfer of Powers,' the learned author lays down the law as follows:--'Wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for delegatus non potest delegare,' Therefore, where a power of sale is given to trustees or executors, they cannot sell by attorney. So where a father had a power of appointment to his children over a real estate, and he delegated the power to his wife, Lord Hardwicke said that this must be considered as a power of attorney which could be executed only by the husband, to whom it was solely confined, and was not in its nature transmissible or delcgatory to a third person. Again, where personal estate was given to such charitable use as A should appoint, and he directed the money to be applied as B should appoint, Lord Hardwicke held the delegation void. So where a testator gave his wife a power to appoint personally amongst their children, and she delegated this power by her will to others, Sir Thomas Clarke determined that the delegation was void; and this is now a settled point. On the same ground a person whose consent is made requisite to the due execution of a power, cannot authorise another as his attorney to consent to any execution of it. This is doctrine, the application of which to the present case derives increased force from the fact to which I have already alluded, that the donee of the power was a creditor and claimant against the estate for which the executors were responsible, and had therefore a direct interest opposed to that of the legatees and beneficiaries under the will. On the other hand the author points out that it is the delegation of the confidence and discretion reposed in executors and other donees of powers that the law refuses to recognise. He says: 'It is frequently contended in practice that the donee of a power cannot execute a deed

of appointment by attorney. But the cases by no means authorise this position. They merely establish that the donee cannot delegate the confidence and discretion reposed in him to another. Where the deed of appointment is actually prepared, or the donee points out the precise appointment which he is desirous should be made, there no confidence, no discretion, is delegated. The appointment is in every respect an exercise of his own judgment, and there cannot be any reason why he should not be permitted to execute the deed of appointment by attorney (at p. 180).' The meaning of this as applied to the present case is simply that, where the executors or donees themselves make the contract, its execution and completion by deed may be by attorney; that attorney, however, exercising no confidence or discretion or judgment, but merely being the agent or officer deputed to carry the contract already made into effect. Now, in the present case everything was left to Mr. Beresford, the confidence and discretion of the executors was delegated or transferred to him, and he was left to his own judgment to make such bargain as he thought fit for the sale of the estate, a state of flings which, if countenanced by any authoritative reading of the law, would, it is easy to understand, lead to the most pernicious consequences.

14. On all these grounds my judgment is that the sale to the plaintiff was and is wholly illegal. But the Judges consulted in the reference being differently minded, we must for the present hold, as matter of law, that the executors acted within their powers, that therefore the Manager of the Bank acted within his, and that the plaintiff has got a good title to the estate.

15. It only now remains for me to notice the reasons of appeal in the original memorandum. (The learned Judge then proceeded to dispose of the remaining grounds of appeal.)

*Power of executor or administrator of dispose of deceased's property.

[Section 269:--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.]