

**In Re: Indra Chandra Singh**

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**SooperKanoon Citation :** [sooperkanoon.com/862773](http://sooperkanoon.com/862773)

**Court :** Kolkata

**Decided On :** Mar-04-1896

**Reported in :** (1896)ILR23Cal580

**Judge :** W. Comer Petheram, C.J., ;Pigot and ;Macpherson, JJ.

**Appellant :** In Re: Indra Chandra Singh;saraswati Dassi

**Respondent :** ;The Administrator-general of Bengal

**Judgement :**

**Pigot, J.**

1. 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 Putras\*. 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 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 G-hose 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. 8,000, (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.

2. 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.

3. 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 6  $\frac{3}{4}$  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.

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

5. In the early part of the year 1895, some correspondence took 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 5i 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 Ghoso, or to accept the offer of Maharaja Doorga Churn Law to advance on mortgage at 5 1/2 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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 1.

(2) The power of an executor to dispose of immovable 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 immovable 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 immovable 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 (i) 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.

11. 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.

12. 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.

13. 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.

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

15. 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.

16. 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.

17. 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* I.L.R. 9 Cal. at pp. 493, 494.

18. 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.

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

20. 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.

21. 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.

22. 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.

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