

Banwarilal Jalan Vs. Pramod Kumar Jalan

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Court : Kolkata

Decided On : Jan-25-2011

Judge : Bhaskar Bhattacharya, J.

Appeal No. : G.A. No.3725 of 2010; A.P.O.T. No.657 of 2010; A.O.R.C. No.1 of 2010; A.O.R.C. No.2 of 2010

Appellant : Banwarilal Jalan

Respondent : Pramod Kumar Jalan

Advocate for Def. : Mr. S. P. Sarkar; Mr. D. N. Sharma; Mr. Ajoy Chowdhury, Advs.

Advocate for Pet/Ap. : Mr. S. N. Mukherjee; Mr. Jayjit Ganguly; Mr. Joy Surana; Mr. Sayenta Basu; Mr. Ashish Chowdhury, Advs.

Judgement :

1. This appeal is at the instance of an executor in a proceeding for grant of Probate where the Probate has already been granted and is directed against an order dated 10th December, 2010 passed by a learned Single Judge of this Court by which His Lordship disposed of two applications, one filed by the executor for direction under Section 302 of the Indian Succession Act, and the other, filed by the legatees for removal of the executor.

2. By the order impugned in this appeal, the learned Single Judge was of the view that although the conduct of the executor would warrant his immediate removal, a

chance should be given to the executor to carry out the mandate of the testator in respect of the particular item of the bequest within a period of four weeks from the date of the order, and in default, liberty was given to the grandson/legatee of the testator to seek the immediate removal of the executor. The learned Single Judge directed the executor to give effect to that part of the bequest by which the testator bequeathed his tenancy right in respect of a property situated in Kolkata in favour of his grandson without unduly concerning himself with the consequence thereof.

3. Being dissatisfied, the executor has come up with the present appeal and a cross-objection has been filed by the grandson/legatee against some of the findings.

4. The following facts are not in dispute:

a) The executor is a son of the executants of a joint and mutual Will dated 30th July, 2001. The subject-matter of the present proceedings is the bequest relating to the tenancy right in respect of the north-west ground floor flat at premises No. 10, Lower Rawdon Street, Calcutta- 700 020, which the father of the executor held as a monthly tenant under a trust. The Will stipulated that such tenancy should go to a grandson of the testators through another son. The Probate of the joint and mutual Will was granted to the executor on September 06, 2007.

b) The grandson/legatee, by filing AORC No. 1 of 2010, complained that the uncle/executor refused to implement the relevant provision of the Will and thus, prayed for removal of the executor and even for impounding the legacy of the executor and the executors share in the residuary bequest.

c) Clause 4.3 of the Will makes the relevant bequest:

4.3. The tenancy right in the said Flat at No. 10, Lower Rawdon Street, Calcutta, shall stand bequeathed to our grandson Promod Kumar Jalan, son of our son Shree Gopal Jalan, subject to the condition that in case our younger son Om Prakash Jalan and his family consisting of his wife, son, daughter-in-law, daughter or his any other relative etc., who are presently residing at Hyderabad or elsewhere come to visit Calcutta on business or for any other work then they shall

be entitled to stay in the said Flat without any hindrance or obstruction on the part of Promod Kumar Jalan or any other person/persons occupying the said Flat.

d) According to the grandson/legatee, despite demands made by him to the executor, the latter has refused to give assent to such legacy in favour of the rightful legatee or to make over possession of the said flat to the legatee. The grandson claimed that the executor in his other role as the trustee of the landlord/trust was trying to surrender the tenancy to the landlord with a view to frustrate the bequest.

e) The grandson instituted a suit before the Alipore Civil Court in the year 2009 against the executor and the trustee of the landlord/trust seeking a declaration that he was entitled to the tenancy rights in respect of the flat and for perpetual injunction restraining the defendant and their agents from effecting surrender of the said flat to the landlord or preventing the plaintiff from taking possession thereof. A further injunction was prayed for restraining the defendant Nos. 2 to 4 in that suit from acting in a manner inconsistent with the plaintiffs entitlement to the tenancy right and a decree for recovery of possession from the landlord/trust in the event of possession of the flat had already been made over to it.

f) On an interlocutory application filed in the said suit, an order was made on May 4, 2009 directing the parties to maintain status quo in respect of the nature, character and possession of the suit property for certain duration. The interim order was subsequently extended and was subsisting. The executor applied in the said suit on behalf of the first and fourth defendants for permission to appoint security guards at the suit premises to protect his possession thereof. On dismissal of such application, the executor carried the order dated February 8, 2010 to this Court by way of a revisional application under Article 227 of the Constitution of India but such revisional application was dismissed and the Special Leave Application from the resultant order was also dismissed on May 4, 2010. The revisional court, by order dated April 21, 2010, directed the executor to make over possession of the flat to the grandson/legatee as the beneficiary in respect thereof under the Will and directed the beneficiary to hold the same as special officer for protecting and preserving the possession of the flat. An application for

review of the said order is, however, pending.

g) The case of the executor, on the other hand, is that the testators were not entitled to bequeath the tenancy right in the flat as the provisions of the West Bengal Premises Tenancy Act, 1997 prohibit the transfer or assignment of any tenancy right. In other words, according to the executor, the provisions contained in West Bengal Premises Tenancy Act, 1997, do not permit the transfer of a tenancy right by testamentary disposition and on the death of a testator, the devolution of his tenancy right will be guided by the provisions contained in the Act itself.

5. The learned Single Judge, however, has turned down the aforesaid contention and has held that the executor is bound to carry out the desire of the testator and when testator has decided to bequeath his tenancy right in favour of his grandson, it is the duty of the executor to carry out that desire without considering the consequence thereof. His Lordship further held that by the provisions of West Bengal Premises Tenancy Act, 1997, the transfer of tenancy is not prohibited although such transfer without consent of the landlord will give a ground of eviction to the landlord.

6. As pointed out earlier, the learned Single Judge, by the order impugned, directed the executor to hand over the legacy in respect of the said flat within specified time.

7. Mukherjee, the learned senior advocate appearing on behalf of the executor, has strenuously contended before us that in terms of the definition of tenant as provided in the West Bengal Premises Tenancy Act, 1997, on the death of a tenant the tenancy will devolve for a limited period upon the specified heirs mentioned therein and not on others. By referring to the said provision, Mr. Mukherjee contends that law, therefore, prohibits the bequeath of a tenancy right in favour of a third party as a tenancy right held by a person devolves in accordance with the provision of the West Bengal Premises Tenancy Act on particular heirs specified therein. According to Mr. Mukherjee, in view of the said provision of the Statute, if any bequest in respect of a tenancy is made, it should be presumed that the testator had no right over the said item of bequest at the

time of his death by operation of law and as such, to pass a direction upon the executor to hand over the said tenancy to the grandson will amount to passing a direction upon the executor to deal with the property which is not the subjectmatter of a lawful bequest. Mr. Mukherjee, therefore, prayed for setting aside of the order impugned and for declaration that the said tenancy is not the subjectmatter of bequest and over which the executor has no right of dealing. Mr. S. P. Sarkar, the learned senior advocate appearing on behalf of the respondent, has, on the other hand, opposed the aforesaid contention and at the same time has also raised the question of maintainability of the present appeal.

8. According to Mr. Sarkar, the order impugned having been passed on an application under Section 302 of the Indian Succession Act, is not an appealable one under the Indian Succession Act and at the same time, it has also not decided any of the personal rights of the executor and, therefore, the appeal is not maintainable either under the Indian Succession Act or Clause 15 of the Letters Patent.

9. On merit, Mr. Sarkar submits that transfer of a tenancy right by itself is not prohibited under the West Bengal Premises Tenancy Act, 1997 but the consequence of such transfer without the consent of the landlord would afford a ground of eviction in favour of landlord. Mr. Sarkar contends that an executor is not competent to act against the wish of the testator. If the testator decided to bequeath the property which will be perilous to the estate, the executor has nothing to do but to implement the said desire. In support of such contention, Mr. Sarkar relies upon the following decisions:

- a) In the Goods of Akshoy K. Ghose, deceased reported in AIR 1949 Calcutta 462;
- b) Jai Krishna Srivastava vs. Rajeshwar Dayal (Executive) and others reported in AIR 1997 Allahabad 419;
- c) Th. Dwarka Nath Singh & Ors. vs. Thakurain Raj Rani & Ors. reported in AIR 1945 Oudh 54;

d) Ramamurthy vs. President, Attur Cooperative Society Attur, reported in AIR 1955 Madras 417;

e) Basudeo Narain Singh and others vs. Prayag Dutt Narain Sahi and others reported in AIR 1962 Patna 69;

f) Kenneth Solomon vs. Dan Singh Bawa reported in AIR 1986 Delhi 1;

g) Satyabrata Banerjee & Anr. vs. Ushaprobha Sarakar & Ors. reported in 79 CWN 632;

h) State of West Bengal & Anr. vs. Kailash Chandra Kapur & Ors. reported in AIR 1997 SC 1348. Mr. Mukherjee, the learned advocate appearing on behalf of the appellant, has, however, relied upon a three-judge-bench decision of this Court in the Goods of Indra Chandra Singh (Deceased), Saraswati Dassi vs. The Administrator-General of Bengal reported in ILR 23 Calcutta 580 in opposing the contention of Mr. Sarkar that this appeal is not maintainable. Therefore, the first question that arises for determination in this appeal is whether the present appeal is maintainable at the instance of the executor against the order directing him to hand over the legacy of the tenancy to the grandson.

10. It appears from record that order impugned is a common order passed while disposing of two applications, one filed by the executor seeking direction under Section 302 of the Indian Succession Act and other, filed by the grandson/legatee seeking removal of the executor.

11. The learned Single Judge, although has not removed the executor, yet has imposed a condition that if the legacy of that particular item of the bequest is not transferred within a specified period, the grandson will be entitled to file application for his immediate removal. Similarly, on the application filed by the executor, the learned Judge has passed direction to hand over the legacy in favour of the grandson.

12. Although an order under Section 302 is in the nature of an administrative order and does not decide any title and consequently, is not appealable, the question before us is whether a Probate Court can pass direction upon the executor to deal

with a property which cannot form subject-matter of a bequest in accordance with law of the land and if such a direction is given, whether such direction amounts to passing a wrong direction upon the executor to deal with somebody else's property. Such a decision by the Probate Court in one way or the other is, in our opinion, appealable at the instance of the aggrieved party. Similarly, a direction upon an executor, the non-compliance of which entails the removal of the executor, definitely affects the right of the executor and in such a case, such order is appealable under Clause 15 of the Letters Patent.

13. As held in the goods of Indra Chandra Singh (Supra), an order in administration of the estate binds the parties, who appeared on the motion and in subsequent proceedings between them in administration and therefore, against such an order an appeal must lie under Clause 15 of the Letters Patent. In the case before us, if no appeal is preferred, the executor will be bound by that order and will be required to deal with a property which is somebody else's property and thus, in our view, this appeal is quite maintainable. Moreover, if a Probate Court passes a direction upon the executor to deal with a property over which, according to the executor, the testator had no right of disposition by way of a testamentary instrument, with further direction that in default of compliance of such order, the executor would be removed, such order affects the right of the executor in lawful discharge of his duties and such decision is appealable under Clause 15 of the Letters Patent.

14. The next question is whether the learned Single Judge was justified in passing direction upon the executor to hand over the legacy in respect of the tenancy of the testators in question. It is now a settled law that a Probate court cannot enquire into the question as to whether the testator had really right, title and interest over the subject-matter of the bequest which he claimed as his own property in the Will.

15. In the case before us, nobody is disputing the tenancy right of the testator in that particular item of bequest. But an executor and at the same time the Probate Court can surely take into consideration any statutory law of the land which prohibits disposition of a particular nature of property by way of testamentary

disposition and in that event, the Probate Court will not pass any direction upon the executor to confer the legacy of such an item of property upon the nominated person by the Will but will follow the law of the land to take care of such property.

16. In this connection, we may profitably refer to the decision of the Supreme Court in the case of Jayamma vs. Maria Bai (deceased by L.Rs.) and another reported in AIR 2004 SC 3957, where, in view of embargo on the transfer of land under Section 61(3) of Karnataka Land Reforms Act 1961, the transfer of agricultural land with occupancy right is permissible only in favour of one of the heirs who would be entitled to claim partition of land and not others having regard to the definition of 'family' as contained in Section 2(12) and 'joint family' as contained in Section 2(17) of the said Act. In a proceeding for grant of letters of administration with the copy of the Will annexed, the Trial Court granted letters of administration holding, inter alia that the testator executed the Will with full knowledge, having sound state of mind and it was not obtained by practising fraud, misrepresentation or duress. On an appeal being preferred against such grant, the High Court while exercising its appellate jurisdiction under Section 299 of the Indian Succession Act, allowed the appeal holding that the application for grant of letters of administration with a copy of the Will was not maintainable in view of Section 61 of the said Act, inasmuch as the subjectmatter of the Will being agricultural land with occupancy right could not have been assigned. The High Court also rejected the contention raised on behalf of the propounder, the appellant before the Supreme Court, that a disputed question of title cannot be gone into in an application for grant of Letters of Administration. In that context, the Apex Court made the following observations:

The Court empowered to grant a Letter of Administration although ordinarily may not go into the question of title in respect of property sought to be bequeathed by the testator, the situation would be different where the authority of the testator to execute a Will in relation to the subject-matter thereof is in question. When a statutory embargo exists on execution of a Will, the Court shall not refuse to determine the question as regard validity thereof, as in terms of the provisions of a statute, the same would be void ab initio.

17. Therefore, it was within the province of the executor to point out to the Probate Court that a portion of the bequest was against the law of the land and thus, was void ab initio and, therefore, he should not be asked to give assent to such legacy. Now, the next question is whether the West Bengal Premises Tenancy Act, 1997 really prohibits the disposition of a tenancy right by testamentary disposition.

18. In order to appreciate the aforesaid question, it will be profitable to refer to the definition of tenant as given in Section 2(g), and the prohibition of transfer etc. contained in Sections 5(5) and 5(6) and the ground of eviction indicated in Section 6(1) (a) of the West Bengal Premises Tenancy Act, which are quoted below:

2g) "tenant" means any person by whom or on whose account or behalf the rent of any premises is or, but for a special contract, would be payable, and includes any person continuing in possession after termination of his tenancy and, in the event of death of any tenant, also includes, for a period not exceeding five years from the date of death of such tenant or from the date of coming into force of this Act, whichever is later, his spouse, son, daughter, parent and the widow of his predeceased son, who were ordinarily living with the tenant up to the date of death of the tenant as the members of his family and were dependent on him and who do not own or occupy any residential premises and in respect of premises let out for non-residential purpose his spouse, son, daughter and parent who were ordinarily living with the tenant up to the date of his death as members of his family and were dependant on him or a person authorised by the tenant who is in possession of such premises, but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction: Provided that the time-limit of five years shall not apply to the spouse of the tenant who was ordinarily living with the tenant up to his death as a member of his family and was dependent on him and who does not own or occupy any residential premises:

Provided further that the son, daughter, parent or the widow of the predeceased son of the tenant who was ordinarily residing with the tenant in the said premises up to the date of death of the tenant as a member of his family and was dependent on him and who does not own or occupy any residential premises, shall have a

right of preference for tenancy in a fresh agreement in respect of such premises on condition of payment of fair rent].

19. This proviso shall apply mutatis mutandis to premises let out for nonresidential purpose.

5. Obligations of tenant.

(5) No tenant shall sublet the premises without consent of the landlord in writing.

(6) No tenant shall, without the previous consent in writing of the landlord, transfer or assign his right in the tenancy or any part thereof.

6. Protection of tenant against eviction.(1) Notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract, no order or decree for the recovery of the possession of any premises shall be made by the Civil Judge having jurisdiction] in favour of the landlord against the tenant, except on a suit being instituted by such landlord] on one or more of the following grounds:

(a) where the tenant has sublet, assigned or otherwise parted with the possession of whole or any part of the premises without obtaining the consent in writing of the landlord or the tenant has used the premises for a purpose other than that for which it was let out without obtaining the consent in writing of the landlord; (Emphasis supplied by us). From the combined reading of the aforesaid provisions of the West Bengal Premises Tenancy Act, 1997 it is clear that a tenant governed by the said Act can transfer, assign or sublet his tenancy right during his lifetime only after obtaining previous consent in writing of the landlord and if he does so without taking such previous consent in writing, such an act will afford a ground of eviction in favour of the landlord. At this stage, we cannot lose sight of the position of law that mere execution of a Will proposing to bequeath a particular property in favour of a person does not amount to transfer or assignment or subletting in favour of such a person nor can such execution of a Will confer any right upon such a person by virtue of such execution because such a Will can at any stage during the lifetime of the tenant be revoked or substituted by another Will. A right

created by way of a Will really confers right if that Will ultimately becomes the last Will of the testator in respect of that property. So far devolution of interest in immovable property situated in West Bengal by a Will is concerned, in order to confer right upon the beneficiaries, such Will must be probated by a competent court of law as provided in Sections 57 and 213 of the Succession Act.

Thus, if a tenant governed by the Act of 1997 merely executes a Will bequeathing the tenancy right in favour of a third party, such fact will not afford any right in favour of the landlord to evict the tenant because such act on the part of the deceased tenant does not amount to either transfer or assignment or subletting of his tenancy right and from the very moment of the death of the tenant, the tenancy right will lawfully vest in the persons mentioned in Section 2(g) of the Act.

20. The moment a tenant governed by the aforesaid Act dies, his right in tenancy will devolve upon the persons as indicated in the definition of tenant given in Section 2(g) of the Act by operation of law. The framing of the definition of tenant in the Act is mandatory in nature as would appear from the initial phrase tenant means employed therein. We have already indicated that by a Will a right in a property can be conveyed only if the law of the land permits such disposition. In the case before us, the Act of 1997 has laid down the specific line of succession in favour of limited heirs of a tenant and that too, to a limited extent as indicated in Section 2(g) of the Act. Thus, a tenant by way of testamentary disposition cannot overcome the rigour of the provisions contained in Section 2(g) of the Act quoted above.

We, therefore, hold that the testator himself having admitted his right of tenancy which is undisputedly governed by the provisions of the West Bengal Premises Tenancy Act was not competent to bequeath such tenancy right in favour of his particular grandson in violation of the line of succession laid down in the Act of 1997 and the learned Single Judge by the order impugned has erroneously directed the executor to assent to the legacy of the tenancy right in favour of the grandson.

We now propose to deal with the decisions cited by Mr. Sarkar. So far as the cases of Th. Dwarka Nath Singh & Ors. vs. Thakurain Raj Rani & Ors. (Supra), In

the Goods of Akshoy K. Ghose, deceased (Supra), Ramamurthy vs. President, Attur Cooperative Society Attur, (Supra), Jai Krishna Srivastava vs. Rajeshwar Dayal (Executive) and others (Supra) and Basudeo Narain Singh and others vs. Prayag Dutt Narain Sahi and others (Supra), relied upon by Mr. Sarkar are concerned, we do not for a moment dispute with the proposition that under Section 301 or Section 302 of the Succession Act a Court does not decide any right of the executor or beneficiary and an order those Sections of the Succession Act is not an appealable one. In the case before us, merely because the appellant filed an application under Section 302 of the Act, for that reason the direction impugned in this appeal would not come within the purview of that Section. In order to decide the nature of the order, the Court must consider the substance of the same. It is now a settled law that if an application is made under a wrong caption of a statute or the Court mentions a wrong statutory provision while passing an order, the question whether such order is really appealable will depend upon the substance of the order and not upon the statutory provision mentioned in the application upon which it is passed or upon the provisions quoted in the order. For instance, if a Court really passes an order of injunction within the meaning of Order 39 Rule 1 or 2 of the Code but the application on which such order is passed is erroneously described as one under Section 151 of the Code, for that reason, one cannot lawfully contend that the order does not come within the purview of Order 43 Rule 1 (r) of the Code of Civil Procedure and should be a Revisable one. Similarly the authority to pass an order does not depend upon the wrong quotation of a Section of a Statute (See State of Karnataka vs. Muniyalla, reported in AIR 1985 SC 470; State of Karnataka vs. Krishnaji Srinivasa Kulkarni, reported in (1994) 2 SCC 558.) In the case before us, the effect of the order impugned is the passing of a direction upon an executor to give assent of legacy to a property which is not capable of testamentary disposition with further threat of removal of the executor if the direction is not complied with within a specified period. This definitely affects the lawful right of an executor to deal with only the conveyable property of the testator and thus, is appealable under clause 15 of the Letters Patent. Therefore, those decisions do not help the respondent in anyway.

21. In the case of Kenneth Solomon vs. Dan Singh Bawa (supra), the Delhi High Court was considering a question as to whether mere execution of a Will

bequeathing tenancy right would confer a right upon the landlord to get eviction on the ground mentioned in the provision to Section 14(1) of the Delhi Rent Control Act (59 of 1958). In that context, the Court made the following observations:

The act of making a will in itself would not attract the provisions contained in proviso (b). No landlord can claim eviction, during the lifetime of the tenant, on the ground that the tenant had made a will disposing the tenancy rights. It is for the simple reason that it can be revoked at any time. By itself it does not vest the legal possession in the devisee. However, there is no escape from the conclusion that by his voluntary act the tenant parts with the possession of the tenancy premises though from the date of his death in case the will remains unrevoked. Dr. Sury by her act of bequeathing the tenancy rights by means of the will in favour of the petitioner and his brother had parted with possession within the meaning of proviso (b).

22. In the Delhi Act there was no restriction of inheritance as provided in Section 2(g) of the Act of 1997 which amounts to implied bar of disposition of tenancy right by Will and tenancy right will automatically vest in the persons mentioned in Section 2(g) of the Act from the moment of death of the tenant and that right will be subject to the limitation contained in the said Section; moreover, in view of Section 57 and Section 213 of the Succession Act, the property in West Bengal is affected by a Will only on getting probate such Will and not on the death of the testator if no application for Probate is applied. Thus, the said observations do not help the respondent in this case.

23. In the case of State of W.B. and another vs. Kailash Chandra Kapur and others (supra), a lease for 999 years was granted by the Governor of West Bengal to one Tapan Kumar Mullick on July 28, 1983, assigning a plot of land No. CL- 104 is Section II admeasuring 4.195 cottahs in Bindhannagar (Salt Lake) in Calcutta. The lessee had executed a Will in favour of the first respondent, a stranger to the family on July 22, 1992 of the lease-hold premises. The lessee died on May 22, 1993. Thereafter, the first respondent had applied for and was granted without any contest by the legal representatives of the lessee the probate to the Will by order of the Court dated May 19, 1994. Thereafter, the legatee had applied for mutation

of his name in the record as lessee which was objected to and met with rejection. As a consequence, the respondent had filed writ-petition under Article 226 of the Constitution. The learned Single Judge directed to mutate the name of the first respondent as a lessee under the testamentary disposition made by the original lessee which was confirmed by the Division Bench of Calcutta High Court in Appeal by judgment dated January 19, 1996. The matter, thus, came into the Apex Court at the instance of the State. In that context, the Supreme Court made the following observations:

It is seen that the object of assignment of the Government land in favour of the lessee is to provide him right to residence. If any such transfer is made contrary to the policy, obviously it would be defeating the public purpose. But it would be open to the Government to regulate by appropriate covenants in the lease deed or appropriate statutory orders as per law or to make a law in this behalf. But so long as that is not done and in the light of the permissive language used in cl. (12) of the lease deed, it cannot be said that the bequest in favour of strangers inducting a stranger into the demised premises or the building erected thereon is not governed by the provisions of the regulation or that prior permission should be required in that behalf. However, the stranger legatee should be bound by all the covenants or any new covenants or statutory base so as to bind all the existing lessees.

24. In the case before us, there is specific restriction of inheritance of tenancy right under the Act of 1997 unlike the case before the Supreme Court in the above case where the lease is governed by the provisions of the Transfer of Property Act and thus, the said observations are of no avail to the respondent. In the case of *Deabrata Mukherjee vs. Kalyan Kumar Roy* (supra), a Division Bench of this Court while construing the provisions of Section 14 (1) of the West Bengal Premises Tenancy Act, 1956 held that a sub-tenancy without permission in writing of the landlord affords a ground of eviction and is not binding upon the landlord but such sub-tenancy by itself is not prohibited. We fail to appreciate how the said decision is applicable for deciding the issue before us as to whether a tenancy right is bequeathable notwithstanding the fact that the Statute governing the tenancy itself makes the line of succession of tenancy specified therein.

Similarly, the decision of the Division Bench in the case of Stayabrata Banerjee and another vs. Ushaprobha Sarkar and others (supra) does not help us in anyway because in the Act of 1956 there was no restriction of inheritance as provided in Section 2(g) of the Act of 1997.

25. The decisions cited by Mr. Sarkar, thus, do not help his clients in anyway.

We, therefore, allow this appeal by setting aside the order impugned and holding that the item of the tenancy right covered by the Will should not be dealt with by the executor being a property incapable of bequeath in view of the implied bar created by the Act of 1997. In view of our aforesaid finding, the Cross-Objection made by the respondent against the refusal of the prayer of immediate removal of the executor has become redundant and the same is also disposed of by this order. In the facts and circumstances of the case there will be, however, no order of costs.

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