**(1910) 03 CAL CK 0054**

**Calcutta High Court**

**Case No:** None

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| Kandarpa Nath Ghose and Others | | APPELLANT |
| | Vs | |
| Jogendra Nath Bose and Others | | RESPONDENT |

**Date of Decision:** March 22, 1910

**Acts Referred:**

- Bengal Tenancy Act, 1885 - Section 83
- Transfer of Property Act, 1882 - Section 51

**Citation:** 6 Ind. Cas. 141

**Hon'ble Judges:** Teunon, J; Mookerjee, J

**Bench:** Division Bench

**Judgement**

1. The suit, out of which the present appeal arises, was commenced by the plaintiffs-appellants for recovery of possession of property, which admittedly formed part of the estate of one Jadu Nath Ghose who died on the 13th January 1889. Some time before his death on the 14th September 1886, Jadu Nath had made a testamentary disposition of his properties, the true effect of which is the subject of controversy in this litigation. The testator died leaving a widow Doorga Tarini, his mother Khether Moni and the plaintiffs, who were the grandsons of his elder brother, as his reversionary heirs. On the 30th September. 1889, the widow applied for probate of the Will, but before the probate had been granted, on the 14th September, she joined her mother-in-law in transferring the disputed property, to the first defendant, who was the principal officer of her brother. Probate was granted to heron the 19th December 1889. The mother of the testator died on the 1.9th August 1899. On the 12th May 1903, the first defendant sold the property to his sister-in-law, the fourth defendant. The widow died on the 18th August 1903. On the 18th June 1906, the plaintiffs commenced the present action fpr declaration of their title as reversionary heirs of the original owner, and for recovery of possession and mesne profits, on the ground, that neither the widow nor the mother were

competent, upon a true construction of the Will of the testator, to alienate the property, and that in any event, there was no legal necessity for the transfer. The Courts below have concurrently dismissed the suit on the ground, that the effect of the Will was to vest an absolute interest in the widow and mother of the testator, who were consequently entitled to transfer the property. The Court of first instance further found that the sale was beneficial to the estate, and was an act of prudent management, as the property was a losing concern. The Subordinate Judge, on this part of the case, however, took a contrary view, and without a full examination of the grounds upon which the conclusion of the Original Court was based, he held that there was no legal necessity for the alienation. The Court of first instance also found that the first defendant had spent a substantial sum in reclaiming the property; upon this point, the Subordinate Judge, however, did not express any opinion. The plaintiffs have now appealed to this Court, and on their behalf, the decision of the Subordinate Judge has been assailed substantially on the ground that upon a true construction of the Will the mother and the widow of the testator did not take an absolute interest in the property, and that whatever the true nature of their interest might be, it was not competent to them to alienate the property, so as to prejudice the rights of the reversionary heirs. This position had been strenuously contested on behalf of the re-spondents, and it has also been argued on their behalf, that even if it be assumed that the widow and the mother of the testator had not an absolute transferable interest, it was competent to the widow as executrix to transfer the property and further, that upon the facts found by the Court of first instance, and not negatived by the Subordinate Judge, the transfer was an act of prudent management binding upon the reversionary heirs.

2. The true nature of the interest, created by the testator in favour of his widow and his mother, must be de''ermined upon a construction of his Will. The preamble states that his wife Durga Tarihi was, after his death, to own and hold possession like himself, of his ancestral properties, and was to conform to the subsequent provisions of the instrument. These provisions are contained in eight paragraphs; but before we deal with them, we must observe that the Courts below have laid much stress on the words of the preamble, that the widow was to hold possession like the testator, which have been taken to indicate that an absolute interest was intended to be created in her favour. As pointed out, however, in the case of Shib Lakshan Bhagat v. Tarangini Dassi 8 C.L.J. 20, importance ought not to be attached to isolated expressions, but the Court must look to all the clauses of the Will, and give effect to all the clauses ignoring none as redundant or contradictory. In the case, to which reference has been made, it was held that although a donee might be declared as the malik, by which term ordinarily a heritable and alienable estate is created, the effect of the word may be modified by the context, and the full proprietary rights imported by the word may be materially restricted by the other provisions of the Will. [See also Punchoomoney Dossee v. Troylucko Mohiney Dossee 10 C. 342; Surajmani v. Rabinath Ojha 30 A. 84 : 5 A.L.J. 67 : 18 M.L.J. 7 : 12

C.W.N. 231 (P.C.) : 10 Bom. L.R. 59 : 7 C.L.J. 131 : 3 M.L.T. 144 and Amarendra Nath Bose v. Shuradhani Dasi 5 Ind. Cas. 73 : 14 C.W.N. 458.] We must, therefore, examine all the provisions of the instrument, before we come to any conclusion upon the question of the interest taken by the widow and the mother in the estate left by the testator, The first clause recites that the testator had no children; it contemplates the possibility of a second wife and of sons or daughters by her, for whom provision is made; but it is expressly stated that the daughters are to take nothing during the life-time of the wife and the mother of the testator. The contingencies mentioned have not, however, happened, and no further reference is needed to this clause. The second clause deals with the management of the estate by the first wife, should the testator take a second wife, and it concludes by authorising her to sell the properties, except the family house, to the extent of an one-fourth share, for the purpose of pious acts. The third clause deals with the maintenance of the mother; it provides that if she desires to perform any pious acts, and if the income of the property proves insufficient to meet the expense, she may sell an oneeighth share of the properties. A proviso, however, is added that if the properties are wasted, none would be competent to sell any share of the properties for the performance of pious acts, so as to affect the right of maintenance of the persons previously mentioned. The fourth clause authorises the wife and the mother, should there be no children, to sell the properties for the performance of pious acts. It further provides that if the wife and the mother did not agree, they might partition the properties, and then sell their respective shares for pious acts of a permanent character. It concludes with the provision that the last survivor among the mother and the vives would become the absolute owner of the properties that might be left, and would be competent to sell them with a view to perform pious acts, that is, to establish a pious institution of a permanent character for commemoration of the name of the testator. The fifth clause speaks of the maintenance of two persons with whom we are not at present concerned. The sixth clause proyides that after the death of the mother and the wives of the testator, the properties would become vested in his fellow villagers, for the performance of pious acts, and if this proved impracticable, the Government might take charge of the properties. The seventh clause lays down that the fellow villagers or the Government may settle a gentleman of good character in the family dwelling house and the attached garden and tank. The clause then concludes with the provision that none of the legatees would be competent to contract illegal debts and waste the property; and that on no account were the legatees to alienate any portion of the properties to the kinsmen and co-sharers of the testator, the present plaintiffs. The central ideas of the testator, when he made the testamentary disposition, were obviously twofold, namely, first, that whatever properties might be left upon the death of his mother and his wife, were to be applied for the establishment of a pious institution of a permanent character for commemoration of his name; and, secondly, that, in no event was the estate to be alienated in favour of the reversionary heirs. In so far as the first of these ideas is concerned, it is absolutely inconsistent with the theory that the

mother and the widow took an absolute alienable interest in the estate. If such was the intention of the testator, it is difficulty to see why he should authorise his widow and his mother, in Clauses 2 and 3 of the Will, to sell certain shares of his properties, for the performance of pious acts. Neither is it easy to perceive why in Clause 4, he should restrict the exercise of such power to cases of alienation for pious acts of a permanent character. It is manifest, in our opinion, from the various provisions of the Will to which reference has been made, that the ''testator had no intention to create an absolute interest in favour of his mother and his widow, and that the utmost power he intended to confer upon them, was that for the performance of certain specified acts of a religious and charitable nature, the mother and the widow might sell a comparatively small portion of the properties. It cannot be disputed that the gift over for a pious institution was void for uncertainty of subject-matter Blair v. Duncan (1902) A.C. 37 : 71 L.J.P.C. 22 : 50 W.R. 369 : 86 L.T. 158. The Government, we understand, has declined to undertake the administration of the trust on account of the small value of the properties left by. the testator; and so far as we are aware, no person interested in the enforcement of the charitable trust has come forward to assert the rights of the public and of the fellow villagers of the deceased. We must consequently hold that neither the mother nor the widow could effect an absolute transfer of the disputed properties, specially as there is no suggestion that the transfer actually made was for the performance of any pious acts, as contemplated by the testator. As regards the second idea of the testator which he had prominently in view, namely, that the reversionary heirs should not obtain the property, no effect can be given to it, because if there was an intestacy after the death of the survivor of the mother and the widow as we hold there was, the reversionary heirs are entitled to take the estate [See Tagore v. Tagore L.R.I.A. Supp. 47 ]. The learned Vakil for the respondents suggested that if the widow and the mother of the testator did not take an absolute interest in the estate, and consequently could not by transfer convey such interest to the defendants, the widow was entitled as executrix to transfer the property absolutely. This argument, in our opinion, is manifestly fallacious for more than one reason. In the first place, the widow did not transfer the property in her characteras executrix; the alienation was by her as donee under the Will and in this transaction, she was joined by her mother-in-law who claimed to be another legatee under the Will. In the second place, the transfer was not even ostensibly for the purposes of administration of the estate, and it was really in no way required to enable her to discharge her duties as executrix. In the third place, the argument is based on the assumption that there was no restriction imposed on the power of alienation of the widow, whereas upon a true construction of the Will, it is clear that her power of alienation was restricted both as regards the quantity of the estate which might be transferred, and the purposes for which such transfer might be made. As a last resource, it was contended by the learned Vakil for the respondents that the transfer was an act of prudent management. But this position cannot be successfully maintained, in view of the facts found by the Subordinate Judge. No doubt, at the time of the death of the testator, the property still remained to be

reclaimed, but there was obviously no legal necessity for its transfer; and we are not satisfied upon the materials, which have been placed before us, that the alienation was needed for the protection of the remainder of the estate left by the testator. We must, consequently, hold that neither the widow nor the mother was competent to sell the disputed property, so as to prejudice the rights of the reversionary heirs and the plaintiffs are consequently entitled to recover possession thereof from the defendants.

3. This leads us to the consideration of another important point in the case, namely, the validity of the claim of the plaintiffs for mesne profits. There is no doubt that the plaintiffs are entitled to claim mesne profits from the date when their title accrued, that is, from the date of the death of the widow, which took place on the 18th August 1903. As the suit was brought within three years from that date, the plaintiffs are entitled to recover mesne profits from the defendants, other than the second and third defendants, who admittedly never had any interest in or possession over the property, and such mesne profits must be calculated for the period between the 18th August 1903 and the date of delivery of possession. The question, however, arises whether the defendants are not entitled to the benefit of the improvements they may have effected on the property. In our opinion, they are entitled to claim the value of the improvements, but it is necessary to indicate briefly the nature and extent of such right. As a general rule, in order to entitle an occupant of land to compensation for improvements, three things must concur; first, he must have held possession under colour of title; secondly, his possession must have been adverse to the title of the true owner, that is, it must not have been possession by mere permission of another whose title he recognises; and, thirdly, he must have acted in good faith, that is, under the honest belief that he has secured good title to the property in question and is the rightful owner thereof, and for this belief, there must be some reasonable grounds such as would lead a man of ordinary prudence to entertain it [Stock v. Starr 1 Sawyer 15, 22 Fed. Cas. 1084]. These principles are substantially recognised in Section 51 of the "Transfer of Property Act", and are based on obvious grounds of justice, equity and good conscience. In re Thakoor Chunder Paramanick (1866) B.L.R. (F.B.) 595, the principle is, as Mr. Justice Story put it in his classical judgment in Bright v. Boyd (1841) 1 Story 478 : 2 Story 608 : 4 Fed. Cas. 127, which has been followed by this Court in Dharmadas Kundu v. Amulya Dhan Kundu 33 C. 1119 : 3 C.L.J. 616 : 10 C.W.N. 765, that no man should be allowed to enrich himself unjustly at the expense of another, and that consequently where the defendant has made the improvements in good faith as a bona fide occupant of the land, and in the belief that the land is his own, the plaintiff, who obtains the benefit of the expenditure which has increased the value of the property, ought to re-imburse the defendant for the expenditure so made (Keener on Quasi Contracts, 379 and Domat on Civil Law 3, 1, 5, 7). The question, therefore, arises, for what improvements are the defendants legitimately entitled to call upon the plaintiffs to pay? Now, it is clear that the plaintiffs are entitled to the property as it stood on the

date of the death of the widow, that is, the 18th August 1903. Whatever the precise extent of the interest of the widow in the estate of her husband might be, she was bound either by herself or her agent or representative to make proper use of the property; the plaintiffs cannot, therefore, be called upon to pay for the improvements effected by the life-tenant. As a general rule, improvements made on property by a life-tenant thereof attach to the estate and pass to the reversioner or remainderman, at the expiration of the life-estate, without any liability on his part to make compensation therefor. The same is true of improvements made by a purchaser from one who holds a limited interest, for it is presumed that such purchaser knows the title which he acquires. The most satisfactory reason, which may be assigned in support of this position, is that the life-tenant, or one holding through or under him, does not hold in any way adversely to the remainderman or reversioner, and, therefore, must be held to have made such improvements merely with the view of enjoying them so long as the life-estates continued, or to have intended them to be for the benefit of the remainderman. It has sometimes been suggested, however, that where the life-tenant improves the property under the belief that he has an absolute title thereto, he may legitimately claim compensation for his improvements; but this view has been maintained, subject to the restriction that a claim for permanent improvement under such circumstances, can be put forward only as a set-off against the mesne profits, and when the remainderman abandons his claim for mesne profits, the transferee is allowed no compensation for the amelioration. In the case before us, the plaintiffs are not entitled to claim any profits for a period antecedent to the death of the widow. Under the ordinary law, they are entitled to take the estate as it stood at that moment. It would not be right, therefore, to make them liable for the costs of any improvement effected during the lifetime of the widow, nor does this involve any real hardship upon the transferee from the widow, because he may be assumed to have been sufficiently remunerated by the income he derived during the life-time of the widow for the sums which he might have spent for the improvement of the property. The defendants are, therefore, entitled to claim the value of any improvements effected by them, subsequent to the death of the widow, and up to the date of the judgment. No doubt, ordinarily the privileges of a holder of property in good faith cease when he has knowledge or notice of an existing title adverse to that under which he claims; but in the present case, that principle is inapplicable, because there was a substantial question in controversy as to the true effect of a testamentary instrument of an ambiguous character, and the occupant ought not to be held disentitled to compensation for improvements, unless they have been made after an adverse decision against him: To determine the value of the improvements, the Court will ascertain the value of the property as it stood at the death of the widow on the 18th August 1903, and deduct it from the value of the property as it stands at the date of this judgment. The difference indicates, if no other causes have meanwhile operated to increase or decrease the value of the property, the increase in value due to improvements made by the occupants. The Court may, on this part

of the case, follow the principle indicated in Section 83 of "The Bengal Tenancy Act." It has been stated to us, however, that if the defendants have improved the property, they have also allowed the rents to accumulate to a considerable extent; it is obvious that any rents due subsequent to the 18th August 1903, which have fallen into arrears, must be deducted from the value of the improvements, because all such rents constitute a charge on the property and diminish its value.

4. The result, therefore, is that this appeal is allowed and the decrees of the Courts below are set aside, A decree will be drawn up in favour of the plaintiffs for possession of the disputed property, as against the defendant and they will be entitled to execute the decree and take possession forthwith. The decree will further direct an enquiry into the mesne profits from the 18th August 1903 to the date of delivery of possession: against the sum thus determined, must be set off the value of the improvements effected after the 18th August 1903 and up to the date of this judgment, diminished by the amount of rent which has accrued due during this period, and has been allowed to accumulate. The decree for the balance will be made as against the first and fourth defendants only. The plaintiffs are entitled to their costs of this litigation, in all the Courts, from those two defendants.