

Narandas Ramji Vs. Narandas Ramji

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Court : Mumbai

Decided On : Feb-12-1907

Reported in : (1907)9BOMLR287

Judge : Russell, J.

Appeal No. : Original Suit No. 120 of 1906

Appellant : Narandas Ramji

Respondent : Narandas Ramji

Judgement :

Russell, J.

1. In this case the two plaintiffs, Narandas Ramji and Cursonadas Ramdas Bhanji, the executors of the last will of Ladhoo Kara, herein after referred to as L.K., sue the defendants (1) the said Narandas Ramji, (2) Damodar Ramji, (3) Nagindas Doolabdas and (4) Rattonji Cursetji Wadia, the executors of the last will of Ramji Lukhmidas hereinafter referred to as R.L.

2. It appears that L.K. and his uncle R.L. carried on business in Bombay and elsewhere in partnership in. the name of R.L. from 1884 to 1900, L.K's share beingf (sic) the and R.L.'s share (sic)

3. In 1891 the said firm of R.L. became entitled to 1/4 share in a Mill called the Hongkong Mills, other sharers, being Gordhandas Cursonadas and Govindjee Thakorsey and Co., hereinafter referred to as G. T. and Co.

4. In 1894 R.L., Gordhandas Cursonadas and G. T and Co. converted the said Mill partnership into a Joint Stock Company with 750 shares, capital of Rs. 1000 each and the said R.L. took 187 shares in the said Company, of which 177 were in his own name, five in the name of L.K. and five in the name of his son the first plaintiff. The said 187 shares belonged beneficially to the said firm of R.L. The firm of G. T. and Co. were appointed Agents of the Mill which was called Hongkong Spinning and Manufacturing Co. Ltd. The partners in the said agency firm were the said G. T. and Co., R.L. and Gordhandas Cursonadas who entered into an agreement, dated the 19th of June 1895, a copy whereof is annexed to the plaint and marked A. The share of the said R.L. in the Agent's commission was three anna share and the plaint states that he held the same as trustee for the said firm of R.L. The three anna share of the commission was thereafter credited in the profit and loss account in the said firm of R.L. down to the 3rd of October 1900, when the said R.L. and the said L.K. dissolved partnership. The material clauses of the said agreement of the 19th June 1905 are the following :-

1. That the said Govindji Thakersey and Company Ramji Lakhmidas and Gordhandas Cursonadas shall and do hereby become partners and as such shall carry on business of the Secretaries Treasurers and Agents of the Hongkong Spinning and Manufacturing Company Limited.

2. That the name of the said co-partnership shall be Govindjee Thakersay Moolji and Company.

3. The conduct and management of the co-partnership business shall be absolutely under the direction and control (subject to the provisions of these presents) of the said Govindji Thakersey and Company exclusively and the said Ramji Lakhmidas and Gordhandas Cursonadas shall not be at liberty to sign or use the name of the Partnership or act in the name or on behalf of the partnership for any purpose but the said (sic) Lakhmidas and Gordhandas Cursonadas may at all times see, inspect and examine all the account books, papers, plans, works and

transactions of the partnership provided also that it shall be competent for all the partners for the time being with one accord to make such changes in the management of the business as they think fit.

4. The shares of the partners in the profits or losses of the partnership shall be as follows :-Namely the share of the said Govindji Thakersey and Company will be annas eight in the rupee, the share of the said Ramji Lukhmidas annas four in the rupee and the share of the said Gordhundadas Cursonadas annas four in the rupee.

5. The commission to be paid by the said Company to the co-partnership for carrying on the business of the Secretaries Treasurers and Agents shall be divided between the parties hereto in manner following that is to say one equal fourth share to be paid to the said Govindji Thakersey and Company and the remaining three-fourths to be distributed between the partners according to their respective shares.

8. The parties hereto shall get the whole number of shares of the proposed Company subscribed in proportion to the respective shares in the partnership namely the said Govindjee Thakersey and Company shall get shares subscribed to the extent of one-half the total number of shares, the said Ramji Lukhmidas to the extent of one-fourth and the said Gordhundadas Cursonadas to the extent of one-fourth.

5. On the dissolution of the firm of E.L. above-mentioned, two documents, which are Exhibits B and C in the case were executed.

6. Three-sixteenths of 187 shares are 35 $\frac{1}{16}$ shares and it is material to notice that under clause 8 of the above agreement of the 19th June 1895, R.L. underwrote $\frac{1}{4}$ of 750 shares in the Mill namely 187 shares, the result being that L.K. underwrote 35 shares being $\frac{3}{16}$ the of R.L.'s 187. At the time of the dissolution of R.L. it was arranged that the $\frac{3}{16}$ the of the said L.K. in the three anna share of the commission earned in the Hongkong Mill should be continued and that the said R.L. should receive the said three anna share of the commission as aforesaid and on receipt thereof hold $\frac{3}{16}$ the for L.K. It was also arranged that L.K. should be debited with the full face value of the said 35 shares in the said

Hongkong S. and M. Co. although the estimated marked value was about Rs. 300 per share and that the said L.K. should hold the said shares subject to the conditions specified in the said agreement of the 19th of June 1895.

7. Mr. Robertson for the defendants argued that oral evidence as to the above arrangement could not be given having regard to the terms of the document Ex. B. above-mentioned because, as he said, such an arrangement was contrary to the terms of that document.

8. In my opinion, however, that is not so and the arrangement in question comes under provisos 2 and 4 of Section 92 of the Evidence Act. And it must be observed that there was full consideration for the arrangement inasmuch as, as I have pointed out above, L.K. was to underwrite 35 shares at their full face or par value.

9. It appears that L.K. drafted his will in his own handwriting, in which he referred to the 35 shares in the said Mill, retained by him and his 3/16 of the said commission and gave the said draft to the first plaintiff for making a fair draft which the first plaintiff did with certain alterations and additions as directed by the said L.K. In the said fair draft reference was made to the said 3/16 of L.K. in the commission as an item of his property and to the arrangement made as regards such commission and to the conditions on which the said 35 shares were to be held by him. L.K. was at the time living in the same house as the said R.L. and the said fair draft of the will was shown to the latter, of which he approved and the same was subsequently engrossed and duly executed by L.K.

10. L.K. died shortly after the arrangement was made and before any commission was received by R.L. since the date of the arrangement.

11. The plaintiffs proved L.K.'s will on the 1st of April 1902 and a copy thereof is annexed to the plaint as B thereto. Exhibit C to the plaint are the particulars of the plaintiffs' claim which gives the details of the amounts received in respect of the three anna commission by R.L. from the Mill and after his death by his executors the defendants and 3/16 thereof comes to Rupees 4,808-7-0 to which L.K.'s estate is entitled.

12. R.L. died on the 21st June 1904, having left a will, whereof the defendants are the executors as aforesaid and they proved the said will on the 17th of May 1905.

13. Narrandas Ramji, the plaintiff and the first defendant, who as above stated, is the son of the said R.L. and who was personally aware of the arrangement as to L.K's share in the said commission, requested the said R.L. to pay to the plaintiffs as executors, as aforesaid, the share of L.K. in the said commission and the said R.L. agreed to do so as soon as the accounts were made up and closed. R.L., however, died before the accounts for the year were made up and so no payments were made to the plaintiffs.

14. The plaintiffs submit that under the arrangement aforesaid the said R.L. was a trustee of the said L.K. in the 3/16 of the said commission.

15. The first plaintiff is executor both of L.K.'s will and of R.L.'s will and was willing, as executor of R.L., to pay the 3/16 share of L.K. in the said commission to the plaintiffs, but his co-executors, the other defendants, made some difficulty about doing so and this suit became necessary.

16. The defendants, other than the first defendant, by their written statement take up no contentious attitude with reference to the plaintiffs' claim but submit to the Court the question whether the plaintiffs are entitled to recover the share in any commission received by R.L. three years before the institution of the suit and inasmuch as one of the beneficiaries under the will of R.L. is a minor. These defendants under the circumstances submit that the plaintiffs should be put to the strict proof of their claim.

17. The following were the issues raised :-

(1) Whether it was arranged at the time of dissolution of partnership between Ramji L. and L. Kara that the latter was entitled to receive three-sixteenth of the three anna share in the Agency Commission in H. and S. S. and M. Company received by the firm as in para 5 of plaint.

(2) Whether Ramji L. was shown the draft of Ladha Kara and whether he approved of the same as in para 6 of plaint.

(3) Whether the allegations in para 10 of plaint are true.

(4) Whether the claim for commission in 1900-1901 and 1902 are not barred by limitation.

(5) General Issue.

18. In support of the arrangement whereby L.K. was to receive 1/3 of R.L.'s share of the commission in the Mill, evidence was given by the plaintiff and one Choonilal Chhotalal and although no doubt, as pointed out by Mr. Robertson for the defendants, the plaintiffs' evidence acquired strength as he proceeded, still I see no reason for disbelieving it, supported as it is by Choonilal Chhotalal.

19. The plaintiffs demanded the amount by their attorney's letter of July 1905(Ex. E) to which no reply was sent.

20. It is contended for the defendants that in any event the plaintiffs cannot recover the commission for any period prior to three years before the filing of the plaint. This will depend upon the question whether R.L. can be said to have been an express trustee for L.K. in respect of L.K.'s share of the commission.

21. In the first place according to the plaintiff in the moneys subscribed for the 187 shares of the Mill was the money of the firm of R.L. I see no reason to doubt this. In the next place according to Choonilal 'He (Choonilal) wanted R.L. to take up the shares at Rs. 600 or Rs. 700 each together with the commission. R.L. declined to do so. L.K. was to keep the shares at par and was to get the 3 annas in the commission from the shop-as it was to be credited in the profit and loss account and he was to get it from that account. There is no doubt the share of L.K. in the commission was not credited to him in the firm's books but was included in the profit and loss account, but it was credited to him as I am told in his own account.

22. It seems to me that R.L. under the circumstances of the case may be said to have occupied a fiduciary position towards L.K. with regard to the latter's share of the commission. As far as we know L.K.'s right to the 35 shares in the Company carried with it his right to 3/16 of the commission. It does not appear whether the 35 shares were actually transferred to him or whether they remained with R.L. As

to the shares themselves it must, I think, be held that R.L. if they remained in his hands was an express trustee for L.K. Looking at the evidence of Choonilal above set out, in my opinion, it must be held that R.L. was an express trustee also in respect of L.K.'s share of the commission. The trust was express-and was created in expressed terms.

23. The case of *Soar v. Ashwell* [1893] 2 Q.B. 393 contains a reference to all the cases on this point. Bowen, L. J., says :-' The principle which clothes those who receive property in their fiduciary position with the liabilities of express or direct trustees was clearly laid down in *Burdich v. Garrick* (1870) 1, R. 1 Ch. 233 ' I do not say, ' says Hatherley L. C, ' that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply; but in all cases where the bill is filed against an agent, on the ground of his being in a fiduciary relation, I think, it would be right to say that the statute has no application.' ' I do not hesitate to say,' says Giffard L. J., ' that, where the duty of persons is to receive property and to hold it for another and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time.' It is with reference to this language that Kay, J., said in *Banner v. Berridge* (1881) 18 Ch. D. 254 'That obviously enlarges the definition which Kindersley, V.C., gave and points out that a man may be bound by an express trust where moneys, which in no sense belong to him and in which he has no kind of interest, or goods, plate, or jewels, are placed in his hands by the real owner as deposittee of them and that without any writing or even expression in words that it was to be a trust. That would come, according to Lord Hatherley's dictum here, within the definition of express trust.' This view was followed by Wickens, V.C, in *Gray v. Bateman* (1872) 21 W. R. 137 and by Chitty, J., in *re Bell, Lake v. Bell* (1886) 34 Ch. D.462 and has never since been impeached.

24. If this view is correct Section 10 of the Limitation Act applies and Limitation is no bar to any part of the plaintiffs claim.

25. In addition to this, there is the fact that R.L. approved of the contents of L.K.'s will in which L.K. treated himself as the absolute owner of the commission and dealt with it as such.

26. Assuming however that no express trust was created, I am of opinion that upon other grounds it can be correctly said that the statute of Limitations has no application, although the point is a novel one as Mr. Lowndes said.

27. L.K. died in 1900. The plaintiffs were his executors and by Section 4 of the Probate and Administration Act all his estate vested in the plaintiffs as such. This Court has held Section 4 applicable before probate. See *Simile Mossa v. Shaik Essa* I L R (1884) 8 Bom. 241 approved in *Mathumdas Lawji v. Goculdas Madhaoji* I L R (1886) 10 Bom. 468. And in *Bai Harlor v. Manecklal Rasihdas* I L R (1887) 12 Bom. 621 it seems to have been assumed that the effect of Section 4 would have been to vest the property in the executor of a will made before the passing of the Act and not governed by the Hindu law, although probate had not been granted. In *Komollochun Butt v. Nulruttun Mundle* I L R (1878) Cal,360 Markby J. says 'The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor. The grant of probate is the method which the law specially provides for establishing the will. The commission due to R.L. which included L.K.'s share was not received till 26th August 1901 and it vested in the plaintiffs as his executors from that date. By Section 100 of the Probate and Administration Act it was the duty of the plaintiffs to collect the estate of L.K. with all reasonable speed, although probate was not granted to them till 1st April 1902.

28. R.L. died on 21st June 1904, within three months of the commission having been received and by Section 103 of the Probate and Administration Act it was the duty of his executors to pay his debts which included that due to L.K. in respect of his share in the commission, although probate of his will was not taken out till 17th May 1905. In my opinion the executors of R.L. cannot rely on the Statute of Limitation when the non-payment of L.K.'s share of the commission within three years from the receipt thereof was occasioned by their own default. Again I am of opinion that the principle stated in *Binns v. Nichols* (1866) L.R. 2Eq. 257 applies, viz., "where the person liable for the payment of a legacy and the person entitled to receive it are the same, no question of limitation under the Statute can arise.' The first plaintiff, as one of L.K.'s executors, was entitled to receive L.K.'s share from the 21st August 1901, the date when it was received from the Mill. And from

21st June 1904, the date of L.K.'s death, was one of the persons liable to pay, i. e. as one of R.L.'s executors. This debt due by R.L.'s estate to the estate of L.K. was (to use V. C. Page Wood's expression) "at home" i. e. (in the present case) would have been paid even had R.L.'s other executors not raised objections. Hence no question of limitation can arise. I find therefore the issues as follows:--

(1) Affirmative.

(2) Affirmative.

(3) Affirmative

(4) Negative.

(5) General.

29. I, therefore, pass a decree in favour of the plaintiffs in the terms of para 13 of the plaint save that 4 1/2 per cent interest will be charged instead of 6 per cent.

30. I direct the costs of both parties as between attorney and client to come out of the amount of the commission herein claimed, or hereinafter to be claimed, as the point was not a clear one.

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