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Court : Mumbai

Decided On : Nov-29-1922

Reported in : (1943)45BOMLR46

Judge : Pratt, J.

Appeal No. : O.C.J. Suit No. 4896 of 1922

Appellant : E.D. Sassoon and Co. Ltd.

Respondent : K.A. Patch

Judgement :

Pratt J.

1. Plaintiff No. 1, a private limited company, purchased a large number of shares of the David Mills Co, Ltd., and after receiving their vendors' share certificates and transfer forms applied 'for transfer of the shares in the David Mills Company register to the names of their nominees, plaintiffs Nos. 2 and 3. The directors of the company, however, refused to accept the transfers, and the plaintiffs now desire to alter the articles of association so as to limit the discretion of the directors with the object of eventually becoming registered shareholders.

2. Among the shares so purchased by the first plaintiff company are seventeen shares of which the defendant is the registered holder, and the plaintiffs ask in this suit for a mandatory injunction requiring the defendant to vote according to the

plaintiffs' wishes and to sign a proxy form in favour of the plaintiffs.

3. The plaintiffs' contention is that the defendant is in the position of a trustee of the shares for them. This seems both according to Indian law and the English authorities to be correct.

4. Under Section 28 of the Indian Companies Act, 1913, shares are moveable property transferable in the manner provided by the articles of association. By Article 32 of the articles of association, the shares are transferable by an instrument in writing in the prescribed form. Under Article 33 the transferor is deemed to remain the holder of such share until the name of the transferee is entered in the register of shareholders.

5. Thus, in spite of the sale and purchase, the defendant is still the holder of the shares. The legal title to the shares is in him although the beneficial interest has been transferred to the plaintiffs.

6. This severance of interest leads to the result enacted in Section 94 of the Indian Trusts Act, 1882, which is as follows :-

In any case not coming within the scope of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be) to the extent necessary to satisfy their just demands.

7. The preceding Sections 81 to 93 have no application and refer to other instances of constructive trust. There is no trust as defined in Section 3 of the Act. Nevertheless the section enacts that when the holder of the legal estate has not the beneficial interest, he is a constructive trustee for the beneficiary.

8. The English law is stated in *Hardoon v. Belilios* [1901] A.C. 118. In that case, a firm of brokers subscribed for shares in the plaintiff's name; the plaintiff never had the beneficial interest, which passed from the brokers' firm to a syndicate speculating in shares, and when that syndicate failed, to the defendant. On these facts, Lord Lindley said (p. 123) :-

It appears from the evidence as it stands that the defendant became in October, 1892, the sole beneficial owner of these shares, the legal title to which was vested in the plaintiff. Assuming this to be established, their Lordships are at a loss to understand what more was required to create the relation of trustee and cestui que trust between the plaintiff and the defendant. The facts that they never stood in the relation of vendor and purchaser, that there was no contract between them, that the defendant never requested the plaintiff to become his trustee, are quite immaterial. All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in the plaintiff and the equitable title in the defendant. This might be proved in many ways. The mode of proof is quite immaterial. Being proved, no matter how, the relation of trustee and cestui que trust was thereby established.

9. The law as enunciated by Lord Lindley is exactly in accordance with Section 94 of the Indian Trusts Act and leads to the same conclusion.

10. In the case of *Evans v. Wood* (1867) L.R. 5 Eq. 9 the defendant purchased shares from the plaintiff, executed the transfer form, but was prevented by accidental absence from home from sending the transfer for registration until after the company had stopped payment. The plaintiff's name therefore remained on the register and he paid a call on the shares. The plaintiff sued to recover the amount of call paid by him and for an indemnity against future liability for calls. Lord Romilly decreed the plaintiff's claim and the judgment concludes with the words (p. 15):-

Of course the plaintiff must act in respect of the shares exactly as the Defendant may desire.

This sentence shows that the Court found that the plaintiff held the shares as trustee for the defendant and this is made quite clear by the minutes of the decree at p. 16 of the report:-

Order that the plaintiff do, in all things, relating to the said shares, act as the defendant shall reasonably direct, and as if the plaintiff were a trustee for the defendant of the shares.

11. Again in *Shepherd v. Gillespie* (1867) L.R. 5 Eq. 293 the plaintiff was given a decree for specific performance of an agreement by the defendant to purchase two hundred and fifty shares; the decree gave directions for transfer of the shares in the register to the defendant's name and in the meantime gave the plaintiff an indemnity for calls and embodied the following order (p. 299) :-

And let the plaintiff in all things relating to the said 250 shares act at the expense of the said defendant, as the said defendant shall reasonably direct, and as if the said plaintiff were trustee of the said defendant for the same shares.

12. It seems clear, therefore, that the transferor whose name remains on the register is a trustee for the transferee.

13. Under Section 94 of the Indian Trusts Act the transferor holds the shares for the benefit of the transferee to the extent necessary to satisfy his demands. Accordingly as the transferee holds the whole beneficial interest and the transferor has none, the transferor must comply with all reasonable directions that the transferee may give. The reason for this is plain, for the equitable interest of the beneficiary is brought into existence by the Court of Chancery for the purpose of promoting fair dealing. It would be most unconscionable for the seller of the shares to take advantage of non-registration and to deal with the shares as his own after taking the price from the purchaser. Equity therefore treats the purchaser as if he was the real owner and compels the registered holder to act as the agent of the beneficiary. For this reason, the beneficiary has a right to control the exercise by the trustee of the right to vote.

14. Again, the subject of the right to vote may be approached from a different stand-point. As trustee of shares, the holder is also trustee of all property rights annexed to the shares. He is trustee not only of the corpus but also of the income. He is trustee of dividends that he may receive and he must pay them to the beneficiary. This was recognised by Lord Lindley, for at p. 126 of the judgment in *Hardoon v. Belilios* occurs the following passage :-

By this acceptance (i.e. a transfer of the beneficial interest) the defendant created the trust for himself. Having done so, the defendant as the beneficial owner of the

shares demanded from the plaintiff and obtained dividends declared in respect of them.

15. There is also express authority as to dividends in the Scotch case of *Stevenson v. Wilson* [1907] Sc Cas. 447. If he is a trustee of dividends, he is also a trustee of the right to vote because the right to vote is a right of property annexed to the shares : *Fender v. Lushington* (1877) 6 Ch. D. 70.

16. I shall now deal with the contentions advanced by the defendant. I think, it was suggested that a share could not be the subject of a trust. That is, quite contrary to Section 33 of the Indian Companies Act, which when it forbids notice of a trust to be received on the register implies that there can be a trust of shares. It is also so contrary to well-established practice and settled authorities that the contention must be limited to the shares in suit, because under Article 35 the directors have an unrestricted right to refuse registration. The contention is supported by a reference to Section 8 of the Indian Trusts Act which enacts that the subject-matter of a trust must be property transferable to the beneficiary. But this section refers to property such as is defined in Section 6 of the Transfer of Property Act, 1882, like an English peerage which cannot be the subject of a legal conveyance or of an equitable assignment. The shares in suit are, notwithstanding Article 35 of the articles of association, capable of equitable assignment, and can, therefore, be the subject of a trust.

17. It is then argued that the right to vote is a right personal to the shareholder, that it is, therefore, not transferable under Section 6 of the Transfer of Property Act, 1882, and cannot be the subject of a trust under Section 8 of the Indian Trusts Act. But the right to vote has no connection with the personality of the shareholder. It is suggested that the company has a right that the shareholder shall exercise his own personal judgment on matters considered at meetings. That is not so. The company cannot inquire into a shareholder's motives or invalidate his vote on the ground that he has a private interest : *East Pant Du United Lead Mining Company (Limited) v. Merryweather* (1864) 2 H.& M. 254. A shareholder may bind himself by contract not to vote or to vote in a particular way : *Greenwell v. Porter* [1902] 1 Ch. 530. If he can be so bound by contract, it follows he can be bound by the

directions of his beneficiary. The truth is that the right to vote is a right of property annexed to the shares and transferable or assignable with the share.

18. The plaintiffs have admitted that the contract for sale is subject to the rules of the local stock exchange, under which the price is payable on delivery of the scrip and transfer form signed in blank by the transferor, and the purchaser takes upon himself the duty of getting the transfer completed. On this admission it is said that the defendant did not contract to procure registration and the buyer has no right to ask him to vote for an alteration of the articles which would facilitate registration, for this is a requisition to do indirectly that which he did not contract to do directly. It is true that the defendant did not contract to procure registration, and the authority of *Hooper v. Herts* [1906] 1 Ch. 549 does not go further than this, that such a contract implies an obligation not to prevent or delay registration. That is not an obligation implied in the contract. But the liability sought to be enforced is not one arising out of the contract at all. It is the effect of the severance of the legal and beneficial estates which has been effected by the performance of the contract and which continues after the contract is dead and buried. The passage cited from Lord Lindley's judgment shows that the relation of trustee and cestui que trust may exist even in a case where there was no contract between the parties. The contract makes no provision for the payment of future dividends, but it cannot be denied that defendant will receive such dividends as trustee and will be under an obligation to pay them to the plaintiffs. This is because it is the duty of the trustee to transfer corpus and income to the cestui que trust. He will give the dividend as income. He cannot transfer the corpus because of the directors' veto. Is there anything unreasonable in the beneficiary requiring him to bring about a state of things which will remove that obstacle? Certainly not-for if he holds the shares for the benefit of the plaintiffs, he must act for their benefit. It is said that the plaintiffs' ultimate object is to secure agency and displace the present agents. Very likely it is-but as the defendant has no interest in the company, that is no concern of his. So that I can see no justification, either legal or moral, for his siding with the present agents against the interests of the cestui que trust.

19. Next, it is said that the control of the vote of the shareholder would render nugatory Section 33 of the Indian Companies Act and Article 94 of the articles of

association under which no notice of trust is entered in the register, and the registered holder alone is entitled to vote. But the position is really quite simple. As between the company and the trustee, the trustee is the shareholder; but as between the trustee and the beneficiary, it is the beneficiary who is the shareholder. These provisions are merely administrative. The legislature has not declared trusts of shares to be invalid; on the contrary, as I have already said, Section 33 of the Indian Companies Act recognises such a trust.

20. Another argument put forward is that the plaintiffs having by the terms of the deed of transfer taken the shares subject to the articles of association have no right to take steps with a view to alter those articles. I am rather surprised at so specious an argument being seriously put forward. The answer to this, of course, is that the articles of association are under Section 20 of the Indian Companies Act subject to alterations; the transferee takes subject to these articles and after he has so taken he has the statutory right to have them altered.

21. It may seem hard that the transferor who remains on the register should have to be a trustee in invitum; but he ought to have known the difficulty not only when he acquired the shares but when he parted with them. By selling shares of which he cannot enforce complete transfer, he himself creates the trust. Persons who deal in shares that are not readily transferable must take this risk. The defendant, however, is entitled to no sympathy on this ground, for the object of the suit is to relieve him from his liability as trustee.

22. Then as to injunction. The beneficiary has a right under Section 61 of the Indian Trusts Act not only to restrain a contemplated breach of trust but also to compel a trustee to perform any particular act. The right to a mandatory as well as a restrictive injunction is therefore clear, and in the case of the exercise of a right to vote was recognised in *Puddephatt v. Leith*. [1916] 1 Ch. 200

23. As to this, it is suggested that such an injunction might place the trustee in an ambiguous position if he were the holder of other shares. On a show of hands he cannot split his vote between his own shares and the shares of the beneficiary and in the event of a reconstruction he might be debarred from expressing dissent and might have to vote for a resolution giving him partly paid shares in another

company with a further liability for calls. These are purely hypothetical cases, for the defendant holds no shares in his own right. But neither case presents any real difficulty in the first case, the injunction would be to demand a poll and then to exercise his right at the direction of the beneficiary only in regard to the trust shares; and in the second case, the injunction would be subject to an indemnity by) the beneficiary.

24. The last contention of the defendant is that Article 104 of the company's articles of association would render the injunction as regards proxy nugatory, as the defendant would not be allowed to vote. That article is as follows :-

A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death of the principal or revocation of proxy or transfer of the share in respect of which the vote is given provided no intimation in writing of the death, revocation or transfer shall have been received at the office before the meeting.

25. It is said that the effect of this article is to prevent a shareholder who has executed a transfer of his shares from giving a proxy. Such a construction would lead to this absurd result, that while he can vote under Article 97 on a show of hands if present, he cannot give a proxy if absent. The article must refer to a transfer occurring in the same interval of time as the other events referred to, namely, death and revocation that is, between the date of the proxy and the date of the meeting. It means that a transfer subsequent to the proxy would not imply revocation unless intimation is received before the meeting. It has no reference to transfers prior to proxy.

26. As to the form of injunction, the defendant has no interest in the company and it would be oppressive to require him to attend meetings and vote. The most suitable injunctions are therefore (1) restrictive to restrain him from attending meetings of the company and (2) mandatory enjoining him to sign a proxy with regard to the shares to the plaintiffs. Liberty to apply in case the defendant becomes the holder of other shares in his own right.

27. Defendant to pay plaintiffs' costs of the suit.

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