

Official Trustee Vs. L. Chippendale

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Court : Kolkata

Decided On : Feb-17-1943

Reported in : AIR1944Cal335

Appellant : Official Trustee

Respondent : L. Chippendale

Judgement :

Gentle, J.

1. This suit arises out of a deed of settlement dated 11th June 1928 purporting to create a trust, which deed was executed by the late Thomas Sansoni to whom reference hereafter can conveniently be made as 'the settlor'. The settlor was twice married. By his first marriage he had two daughters,, the defendant and Miss Phyllis Anne Sansoni, and one son named Paul. The issue by his second marriage was one daughter, Hope Enid, now Mrs. Douglas. The settlor separated from his second wife about 30 years, ago. It has been stated that the second wife died in. July 1939, a few weeks after the death of the settlor. After he had separated from his wife he lived, with a Miss Daisy Mackintosh, who was known, as Mrs. Thomas, and by whom he had three children. Miss Mackintosh lived in Calcutta, and the relationship between her and the settlor continued for about 30 years. For the major portion of this time the settlor stayed each week end with Miss Mackintosh,|but from the year 1935, about the period he retired from his

occupation,, until his death in 1939, he lived entirely with Miss Mackintosh. He died intestate on 12th June 1935, at. the age of 74. His death took place at Miss Mackintosh's house, and all the children of his two marriages survived him. The settlor made no provision for the. maintenance of Miss Mackintosh and her children; although he had maintained them entirely during the period of his association with this lady. Some time, before his death he told Miss Mackintosh that he intended to make, or he had made, a deed by which he would leave her with provision for the future. He kept his documents in a despatch box, and upon his death and when the box was opened, a typed copy of the deed was found, amongst other papers, upon which he had written in pencil 'On my death body to be cremated.'

2. The settlor was over 50 years in the employment of the India General Navigation & Railway Co., Ltd., hereinafter called 'the company.' This Company has a Provident Fund Institution (which I will conveniently call 'the Fund') of which the members are the servants of the company. The settlor was a member, and had been a member, for more than 19 years prior to the year 1928. Upon his retirement from ser vice with the company in 1935 he was paid a sum of Rs. 72,468, being the amount due to him and as credited in his account in the books of the Fund. Of this sum, Rs. 10,865 was the amount of his own contributions, the balance being represented by contributions made by the company, profits and interest. It is perhaps convenient to record that on 11th June 1928, the date of the deed, to which reference will be made later, the amount credited in his favour was a sum of Rs. 35,165, of which Rs. 9828 represented his own contribution, Rs. 7752 the amount of the company's contribution, of the balance of about Rs. 17,500, the profits and interest upon the two contributions.

3. Between the dates when he received the Provident Fund monies and his death the settlor purchased securities of the total value of about Rs. 53,000. When he died he also had a credit bank balance of Rs.

708. It is common ground that these investments and the bank balance represented part of the monies which were paid to him by the fund, and it would seem he had spent the balance. It is now convenient to refer to the deed of 11th

June 1928. This is made between the settlor (who therein is so described) on the one part, and the settlor again and one Nelson Mayhew Vaughan (therein described as the trustees). The deed recites that the settlor was desirous of settling the amount to which he would be entitled as a member of the Provident Fund of the Company, which amount he estimated at Rupees 33,000 or thereabouts, and the household furniture belonging to him at his death, which he valued at Rs. 1000 and all additions according to the Fund or which might otherwise become payable to him by the Company upon the trusts thereafter declared. It was witnessed that in consideration of natural love and affection and other good causes and consideration the settlor did thereby assign and transfer unto the trustees all that sum of Rs. 33,000 or thereabouts and any other monies to which on his retirement from the service of company he might become entitled as a subscriber or member of the Fund and also household furniture then or thereafter belonging to him. And all the estate, right, title, interest, claim and demand whatsoever of the settlor into and upon the said monies and furniture to have and to hold the same unto the trustees upon the trusts thereafter declared, namely:

(1) The trustees should collect and receive the said Provident Fund money and any additions or accretions thereto;

(2) the trustees should pay the interest or income thereof to the settlor and should allow him the undisturbed free use of the furniture during his life;

(3) after his death and after payment of his funeral expenses and debts, pay out of the capital and income of the trust monies Rs. 18,000 to Miss Mackintosh absolutely, and the balance of the capital and income to the settlor's daughter, Miss Phyllis Anne Sansoni and make over the furniture to her absolutely. The deed also provided that it should be lawful for the settlor at all times by any deed to alter or revoke all or any of the trusts declared by those presents and to declare any new or other trusts.

4. In the written statement the factum of execution of the deed was either not admitted or denied. The two executants are the settlor and Mr. Vaughan, the two attesting witnesses being Mr. McNair, a solicitor, and Mr. P. B. Das, his clerk. The two executants and one attesting witness, Mr. McNair, are dead, and the

whereabouts of the other attesting witness are unknown. I am satisfied from the evidence of Miss Mackintosh and of Mr. Roy Chowdhury that the deed bears the signatures of the two executants and the two attesting witnesses, and that the deed was properly executed. Learned counsel in his address to me on behalf of the defendant did not direct any argument to the contrary. Some letters written by the defendant and Miss Sansoni and a record of the attendance of these two ladies and others at a solicitor's office shortly after the death of the settlor have been exhibited, from which it would seem that these ladies, at that time, were not intending to dispute or attack the validity of the deed of settlement. Another letter which was written by the son of the settlor by his first marriage has also been filed in which he requests that the validity of the deed should be disputed. These documents, in my view, do not effect in any way the matters which come before me for consideration.

5. Letters of administration of the settlor's estate were granted to the defendant on 30th May 1940, and in this suit she is sued as the administratrix of the estate of her deceased father, and in that representative capacity. At the time the suit was instituted Mr. Vaughan, the co-trustee with the settlor, was still alive and he instituted the present proceedings as trustee. He died in December 1941, and by orders of this Court the Official Trustee of Bengal has been substituted as the trustee of the trust, if there is a trust, created by the deed of settlement and also as the plaintiff in the suit in the place of Mr. Vaughan. No question now arises regarding the substitution, and the contention on behalf of the defendant was abandoned by learned counsel, Mr. Chowdhury, that the suit had abated before the substitution of the Official Trustee of Bengal as plaintiff in the suit. The plaintiff claims: (1) possession of the cash at the settlor's bank at the date of his death, and the securities purchased by him during his lifetime out of the monies he received from the Provident Fund; (2) a decree for the sum of Rs. 72,468-4-8; alternatively a decree for the sum of Rs. 18,941-11-6; (3) accounts, if necessary; (4) the interest. The defences which are now raised can be summarised as follows:

(1) The deed did not operate to create a valid trust; (2) it was not operative to transfer any property, and none was transferred to the trustees; (3) the settlor did

not divest himself of any property by the deed; (4) the deed was never acted upon, and the trust was never perfected; (5) the deed is not registered, and therefore cannot be enforced. Reference to the relevant rules of the Provident Fund can now conveniently be made:

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(1) Every member shall subscribe a sum of 5 per centum per mensem on the amount of his salary. 5

(2) Any member may subscribe a further sum not exceeding 7 1/2 per centum per mensem on the amount of his salary, which voluntary contribution can be reduced or can cease upon notice given to the Managers;

7. The subscriptions of any member absent on sick leave or furlough shall be assessed on the salary allowed during such absence if desired by the member.

8. In respect of each year in which the profits of the company exceed the sum required to pay interest at the rate of 5 per centum upon the issued Share Capital there shall be contributed by the company to the Provident Fund out of the excess net profits, but not otherwise a sum equal to the aggregate amount of compulsory and voluntary subscriptions of members for such year, such contribution shall not exceed an amount equivalent to 5 per centum of the net profits for the year, and the company shall be at liberty, without any obligation to do so, to make up the deficiency of any of its yearly contribution out of the profits in any subsequent year.

9. All sums contributed by the company under Rule 8 shall be appropriated among the members (i) in the event of the contribution not exceeding the aggregate amount of the compulsory subscriptions the amount should be divided among the members in proportion to the amount of their compulsory subscription; (ii) in the event of the contribution exceeding the aggregate amount of the compulsory subscriptions there shall first be a division amongst the members to the amount of their respective compulsory subscriptions and out of the surplus a second division amongst the members who elected to increase their subscriptions for that particular year beyond the compulsory amount in proportion to the amount of the

voluntary subscriptions, and the managers shall credit the account of each member with his share of the contribution; (iii) for purposes of such appropriations the contributions shall be deemed to have been paid by the company on 31st December in each year, and for purposes of the rules the account of each member, shall be deemed to have been credited with his respective share of the contributions as on 31st December.

11. Except as provided by the rules no member nor any person or persons on his behalf or in respect of his interest shall be entitled to claim any payment of money to him or them.

12. (So far as is material in the present case) upon the termination of the services of the settlor the managers shall pay to him the total amount of the credit standing in his favour in the books of the fund.

14. If the member's services with the company were terminated by reason of misconduct the managers shall pay to him the amount of the subscriptions which he should actually then have paid.

20. No member shall be entitled in any way to assign, transfer or deal with by way of security or otherwise any money standing to his credit in the books of the institution and any attempted assignment, transfer or transaction shall be invalid, and the trustees and managers shall not recognise or be bound by any notice to them of any such attempted assignment, transfer or transaction.

25. The funds and moneys of the institution shall be vested in the trustees.

6. Before proceeding further it is desirable to set out the provisions of Sections 6 and 5, Trusts Act. Section 6 is as follows:

Subject to the provisions of Section 5 a trust is created when the author of the trust indicates with reasonable certainty by any words or acts: (a) an intention on his part to create thereby a trust; (b) the purpose of the trust; (c) the beneficiary, and (d) the trust property; and (unless the trust is declared by will or the author of the trust is himself to be the trustee transfers the trust property to the trustee.

Section 5: 'No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or 'the trustee and registered or by the will of the author of the trust or of the trustee. No trust in relation to moveable property is valid unless declared as aforesaid or unless the ownership of the property is transferred to the trustee.

7. Considerable argument was addressed to me on several aspects arising in the course of this suit. It was contended on behalf of the defendant that the money standing to the credit of the settlor in the Fund was not a debt, either presently or payable in future or upon a contingency. It was argued that the amount of the credit varied from time to time, and the amount which would be due would not be known until either retirement from service of the settlor or his death, and it was not a liquidated sum. The variation in the amount would depend whether the settlor made or continued to make a voluntary contribution in addition to the compulsory contribution; whether the company was able to pay any contribution and the amount of it, which payment is dependent upon its ability to pay a dividend of 5 per cent, upon the issued share capital and having surplus profits thereafter; the decrease in the contributions of the settlor by reason of his absence on account of sickness or furlough and a consequent reduction in his monthly payments; and also if he were dismissed from the company's service on grounds of misconduct, he could claim only the amount of his own contributions to the Fund and not the amounts contributed by the company which stood to his credit in the books.

8. Two authorities were cited: *Sabju v. Noordin* ('99) 22 Mad. 139, *Doraisami v. Vaithilinga* ('18) 5 A.I.R. 1918 Mad. 1145, Those cases considered the meaning of debt in the Succession Certificate Act and Section 25, Contract Act, respectively and it was held in respect of taking of partnership accounts in the first case and taking of accounts by an arbitrator in the second case that the amount which subsequently would become due was not a debt; it was not liquidated, and it was not a sum payable in respect of a money demand recoverable by action.

9. It was further contended that there was no beneficial interest of the settlor in his credit in the Fund which he could assign. Reference was made to Rule 25 which provides that the funds and monies of the Provident Fund institution should be

vested in trustees, and it was therefore, argued that since the rules provided for such vestment, there could be no debt due to the settlor from the Fund.

10. Section 3, T.P. Act, defines an actionable claim as meaning a claim to any debt whether such debt be existent, accruing, conditional or contingent. An actionable claim is transferable with or without consideration by the execution of an instrument in writing under Section 130, T. P. Act. A note to this section in Edn. 2 of Sir Din-shaw Mulla's work upon the Act, p. 690 states that 'both present and future debts are existing debts and are actionable claims.' The monies standing to the credit of the settlor were monies which were payable to him, not immediately or each year whilst the credit was running, but upon the happenings of the events provided in the Rules. The credits were obtained by payments made to the fund by the settlor himself as a member and by him being given the benefit of some of the contributions made by his employers, and profits and interest upon the monies. For the purpose of analogy, reference can be made to a customer of a bank who places a sum upon a fixed deposit account repayable by the bank after the elapse of a specified period. Throughout the time the money is deposited there is a debt due to the customer by the bank, but it is not enforceable and the debt becomes payable only after the agreed period of the deposit. In the same way payment of the amount of a member's credit in Provident Fund could only be demanded, as Rule 12 provides, upon retirement, which is the only event with which we are concerned. Between the making of each deposit and retirement, the debt is accruing and payment is at least conditional or contingent inasmuch as it arises upon the happening of the prescribed event which gives rise to payment being able to be demanded.

11. In my view the credit in favour of each member, including the settlor, in the books of the Provident Fund was an actionable claim as defined by Section 3, T. P. Act. Further, each member has a beneficial interest in his credit in the Fund which is also an actionable claim as defined by the above section of the Transfer of Property Act.

12. The vesting of the monies of the fund in trustees pursuant to Rule 25, does not alter the position. The money must vest in someone while with the fund. In the

same way when a customer pays money into his account in the bank, the money he pays then vests in the bank, but he is entitled, either upon demand or upon the expiration of any specified period to demand payment from the bank. The bank uses the money deposited with it for its own purposes whilst it is in deposit. In the same way the trustees would use the money for investment and to make further profits for the fund.

13. It was argued that the trust property is not indicated with reasonable certainty in the trust deed, and consequently compliance with Section 6 of the Act has not been made. This section, the provisions of which are set out earlier, requires, for a trust to be created, that the author should indicate with reasonable certainty his intention to create a trust, its purpose, the beneficiary, and the trust property. It is conceded that the first three are satisfied, but it is argued that the trust property is not indicated with reasonable certainty.

14. At the date when the deed was executed on 11th June 1928, the settlor was in credit with the fund to the extent of Rs. 35,000; in the deed he estimates this amount as Rs. 33,000 or thereabouts. As mentioned earlier, it was argued that at the date of the deed the amount could not be ascertained which would be payable to him upon retirement since it would depend upon several factors, for example, the ability of the company to make contributions during the intervening years. It was therefore contended that since the amount which the credit would represent at the time when it became payable could not then be determined, the settlor had not indicated, with reasonable certainty, the trust property. There is certainty in every other respect regarding the trust property, its origin, its nature and so on. The only point upon which uncertainty was alleged was the quantum. It is to be noticed that Section 6, Trusts Act, does not use the words 'exact' or 'precise,' or language to that effect. It requires the property to be indicated with reasonable certainty. In Vol. 33 of Halsbury's Laws of England, 2nd Edn., p. 100, para. 164, it is stated as follows:

In Order to raise a trust, the property to be affected by it must be either expressly designated or so defined that it is capable of being ascertained. Otherwise the trust is void for uncertainty. A trust of the residue of a fund after a gift thereof of

an undefined amount for an object which for any cause fails will be an effectual trust of the whole fund.

15. Then para. 165: 'A trust may be declared of a fund contingently on the fund subsequently coming into existence.' Reference is made to *Woods v. Woods* (1836) 1 My. and Cr. 401, Again in *In re Turcan* (1889) 40 Ch. D.5:

A marriage settlement contained a covenant by the settlor to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase, or otherwise.

16. He afterwards effected some policies of insurance on his life and it was held that these policies were property to which the settlor had during the marriage become entitled by purchase within the specific words of the covenant in the marriage settlement and the trust could be enforced as to that property. In that case the description of the trust property was much wider than it is in the deed of settlement executed by the settlor and the amount or value was not indicated.

17. In my view the property has been indicated with reasonable certainty and the trust does not fail, because at the date of the trust deed, the precise amount of the fund over which a trust was then sought to be created was not actually ascertainable. So far as Section 6, Trusts Act, is concerned, I am satisfied and I hold that the deed fully complies with all its provisions.

18. It was further urged that the deed of settlement is an assignment which is prohibited by Rule 20 and the attempt to assign the settlor's credit in the fund is invalid as the Rule so provides. The exact provision of the Rule is required to be considered. It is that no member is entitled to assign any moneys standing to his credit in the books and the trustees and managers shall not recognise or be bound by notice of any attempted assignment. In the operative portion of the deed of settlement, the settlor purports to assign the sum of Rs. 33,000 and other moneys to which he might become entitled as a subscriber or member of the fund upon his retirement. It is an assignment of such sum to which he might become entitled at the date of his retirement; there is no assignment of the sums in credit at the date of the execution of the deed which Rule 20 purports to prohibit and which it

purports to enact shall be void. Further, in the Rule there is also a provision that the trustees and managers shall not recognise or be bound by any notice to them of any attempted assignment. A provision of a somewhat similar nature was contained in a policy of insurance which was considered by the English Courts in *In re Turcan* (1889) 40 Ch. D. 5, In the course of the judgment at p. 10, Cotton L. J. observed as follows:

There was another point argued about which we had some doubt, arising out of the condition annexed to the policy, for 1000 that it should not be in any case assignable. But the policy contains another condition, showing that the insurance office recognised, the right of the insured to part with his interest, for it provided that the company should not be bound by notice of liens and charges on the policy. Would a Court of equity in the lifetime of the covenantor have enforced the covenant to settle this policy notwithstanding the condition against assignment? I think it would.

19. Whether the provisions of Rule 20 of the fund, make an assignment of a credit invalid as against, the assignee, does not require to be examined or decided. The deed is not an assignment which this Rule contemplates and therefore is not voided by the rule.

20. Another argument, on behalf of the defendant,. was that the trust was never acted upon and that it was never perfected. It is correct that upon his retirement the settlor himself received, the moneys payable to him from the fund and it does not appear that the co-trustee, Mr. Vau-ghan, in any way participated or attempted to participate in the management of the trust property or of the investments or the spending of the moneys received from the fund. When a person creates a trust, which trust can be enforced against him, he can be made to carry out the trust; if he fails to abide by his obligation it cannot then be said that the trust has not been acted upon, or in other words that it has been, abandoned and in consequence it has lapsed or ceased to be enforceable. In the trust deed there is a provision which enabled the settlor by deed to alter or revoke all or any of the trusts declared and to declare any new or other trusts. He never executed a deed of alteration or revocation. He died 11 years after the execution of the trust deed, and

amongst the documents which he kept locked in a despatch box, there was found a typewritten copy of the trust deed. Further, he told Miss Mackintosh, and I accept her evidence, that he intended to make or he had made a deed by which he would make provision for her. These factors, particularly the failure to execute a deed of revocation and the retention of a copy of the trust deed, shew the settlor's intention to continue the trusts and that they were to remain in force. Whilst there was not the formality of the purchase, with the provident fund moneys, of trust securities in the names of the settlor and Mr. Vaughan as the trustees, the fact that the settlor received the moneys, invested them or the major portion of them in his own name and received the income therefrom, does not support the contention that the trust was never acted upon. He was entitled, under the trust deed, to enjoy the income from the trust during his life.

21. Section 5, Trusts Act, requires that a trust, in relation to moveable property, shall be declared by a non-testamentary instrument unless the ownership of the property is transferred to the trustee. The question whether a non-testamentary instrument in respect of a trust of moveable property requires registration, need not be discussed. It is conceded that if the ownership in trust property is transferred to the trustee, registration of the instrument is not required. The operative part of the deed of settlement assigns to the trustees the moneys to which the settlor might become entitled to receive upon his retirement from the service of the company. I have already said, and in my view, the money credited to the settlor in the fund was a debt. Further, he had the beneficial interest in that credit. Both the debt and the beneficial interest are actionable claims, as defined by Section 3, T. P. Act, which actionable claims are transferable under Section 130, T. P. Act, and which is effected by the execution of an instrument in writing signed by the transferor. The deed of 11th June 1928, is an instrument within the above section. There was, therefore, in my view a transfer of trust property by this deed, from the settlor to himself and to Mr. Vaughan as trustees.

22. In my opinion, the provisions of the Trusts Act have been fully complied with, and the deed created a trust on the terms and for the benefit of the cestui que trusts mentioned in it and it is an operative and enforceable trust. Having come to the conclusion that the property in the trust was transferred, it is not necessary for

me to express any opinion regarding the necessity or otherwise for the trust deed to have been registered or whether Section 5, Trusts Act, makes it obligatory for a non-testamentary instrument declaring a trust of moveable property to be registered.

23. The result of the above is that there will be a decree for the plaintiff that the defendant will deliver to the plaintiff within two weeks the securities set out in annexure (b) to the plaint and also any moneys coming into her hands belonging to the estate of which she is the administratrix.

24. In my view, this Was a proper case for both parties to contest and that the costs of the plaintiff and the defendant should be paid out of the trust fund. The defendant's costs will include the costs and expenses which have been incurred by her and to which she has been put in obtaining the grant of letters of administration and furnishing security as required by this Court. Both sets of costs will be taxed as between attorney and client. The fees and charges of Government will be a first charge upon the subject-matter of the suit.