

ORIGINAL CIVIL.

Before Ameer Ali J.

In re trust for ZEBUNNESSA KHATOON.

1939

June 20 ;
July 13.

Life Insurance—Sum secured for wife's benefit—Official Trustee, if payee—*Married Women's Property Act (III of 1874), s. 6*—*Official Trustees Act (XVII of 1864), s. 10*—*Official Trustees Act (II of 1913), s. 7*—*General Clauses Act (X of 1897), s. 8.*

Under the provisions of s. 6 of the Married Women's Property Act, unless other trustees are appointed, the Official Trustee, irrespective of any particular Official Trustees Act under which that office is created, is the person to receive the sum secured by an insurance policy and bound to hold it upon the trusts created.

Even if Act XVII of 1864 had been wholly repealed saving the existence of the Official Trustee, nevertheless s. 6, sub-s. (1), para. 2 of the Married Women's Property Act remains and the Official Trustee appointed under the provision of Act II of 1913 is the payee of the proceeds of an insurance policy.

Hari Dasee Debee v. Manufacturers' Life Insurance Company, Ltd.
(1) dissented from.

APPLICATION by the Official Trustee for directions.

A policy of insurance effected by the husband was expressed to be payable to his wife. On the death of the husband, the insurance company paid the amount of the policy to the Official Trustee under s. 6 of the Married Women's Property Act. Thereafter the insurance company relying on the decision of this Court in the case of *Hari Dasee Debee v. Manufacturers Life Insurance Co., Ltd.* (1), demanded the repayment of the money. The Official Trustee thereupon made this application to the Court asking for directions as to how he should dispose of that sum of money in his hand.

Sir Asoka Roy, Advocate-General, and *S. K. Gupta* for the Official Trustee.

S. B. Sinha for the respondent, Zebunnessa Khatoon.

K. B. Bose for the insurance company.

Cur. adv. vult.

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AMEER ALI J. This is an application by the Official Trustee for directions, the practical question asked being, how he should dispose of the sum of Rs. 4,588 in his hands.

The short facts are as follows:—One Muhammad Ghyasuddin effected a policy of insurance with the Sun Life Insurance Co. of Canada, expressed to be payable to his own wife, Zebunnessa Khatoon. On November 12, 1938, the company paid the amount mentioned to the Official Trustee of Bengal, purporting to do so under s. 6 of the Married Women's Property Act (III of 1874). There was some other claim to this fund by another member of this family, but that claim has now been withdrawn and there is no dispute among the members of the family. On December 15, 1938, the solicitors of the insurance company demanded from the Official Trustee repayment of the amount by reason of a certain decision of this Court in the case of *Hari Dasee Debee v. Manufacturers Life Insurance Company, Ltd.* (1).

The provision of law with which we are concerned is, as I have said, s. 6 of the Married Women's Property Act and I shall discuss this section as if the paragraphs of sub-section (1) of this section were separately numbered.

By virtue of paragraph (1), without a doubt, the effect of this policy is to create a trust in favour of the widow of the assured. Paragraph 2 indicates who shall be the trustee of that trust. It provides, in other words, for the legal ownership of the fund. It reads:—

When the sum secured by a policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold same, be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected, is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.

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Paragraph 3 declares that in reference to such sum, that is, the sum paid to and received by the Official Trustee, he shall stand in the same position in all respects as if he had been appointed trustee thereof by a High Court under Act XVII of 1864, s. 10. That Act is the Act relating to the Official Trustee in force at the time of the Married Women's Property Act. There had been earlier Acts relating to the Official Trustee, as there is now a later Act of 1913.

The decision in the case of *Hari Dasee Debee v. Manufacturers Life Insurance Company, Ltd.* (1), is one which like so many others cannot be appreciated without reference to the peculiar facts. In that case the company's first defence to a suit by a widow, was that as mere beneficiary she could not sue, an objection of non-joinder. Panckridge J. promptly appointed trustees under the first portion of para. (2) of s. 6, sub-s. (1). The company then turned round and took a second objection, namely, that these trustees were not properly appointed and that under the Act it must be the Official Trustee and no other. On this point being taken, Lort-Williams J. was met with a further difficulty, namely, that the Official Trustee refused to act for want of funds. The learned Judge, therefore, in order to do justice, was disposing of a technical objection, and with regard to the Official Trustee, seeking to be embarrassed of an unwilling horse.

The case before me is perfectly simple. Should difficulties, such as were raised before Lort-Williams J., be presented in any other case before me, I will consider myself free to reconsider my decision.

Before I deal with the only point, on which I venture to disagree with the learned Judge's final view, I desire to state the two points (dealt with at p. 71 of the report) on which, although they do not arise before me, it must not be understood that I disagree, namely, the power of this Court to appoint

(1) I. L. R. [1937] 2 Cal. 67.

other trustees under the first portion of s. 6, and, secondly, the beneficiaries' right to sue.

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The only point on which I have to express a different view is that discussed at pp. 69 and 70 of the report, the question being, whether there is in existence an Official Trustee to whom the fund can be paid in pursuance of paragraph (2) of s. 6, sub-s. (1).

The learned Judge finally, and contrary to his first impression, came to the conclusion that there was no such officer. This view was based on a comparison between the Official Trustees Act of 1864 and the Official Trustees Act of 1913. He was impressed by the fact that there is liberty under s. 7 of the latter Act to the Official Trustee either to accept or refuse a trust. He was further impressed by the fact, that, under s. 10 of the former Act, the Official Trustee's consent is required. As regards the latter point, the section appears to be the same.

In the case before Lord-Williams J. the question of consent was from a practical point of view most material. The Official Trustee was either refusing or seeking to impose conditions. The learned Judge was obviously impressed with the inconvenience at least of having an officer appointed by law to receive the money, who might refuse to take action on the ground of want of finance, and who might, and apparently did, contend that he was not bound to act as trustee until he actually received the money.

That question does not arise before me. As I have said the question whether the Official Trustee, being the person made payee by the Act itself, is entitled to refuse to enforce a trust is a question with which I am not called upon to deal. It may be argued that the Act creates him beneficiary of one trust and trustee of another trust in favour of the married woman.

As I say, that difficulty does not arise before me, and on a pure question of construction I feel myself

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at liberty to agree with what the learned Judge has stated to be his first impression.

Shortly put, my view is as follows: Before the Act of 1913, para. (2) of s. 6 of the Married Women's Property Act was quite sufficient. It says that the proceeds of the policy shall be paid and shall be received by the Official Trustee. It is not necessary to proceed to the third clause. In my view, irrespective of any particular Official Trustees Act, if there is now an Official Trustee of Bengal capable of receiving the money under para. (2) s. 6, sub-s. (1) that is sufficient. He is the payee.

But what has the Act of 1913 done? In my view it has not caused a gap in the evolution of the Official Trustee. In my view, the Official Trustee under the old Act is not of a different species of being from the Official Trustee under the later Act of 1913. The Official Trustee of to-day, notwithstanding more elaborate plumage, is but the existing living representative of what is not an extinct race. My own view is that, even if the Act of 1864 had been wholly repealed saving the existence of the Official Trustee, nevertheless s. 6, sub-s. (1), para. 2, remains.

In point of fact, and this point was never argued before the learned Judge, by reason of the General Clauses Act, s. 8, we have to read in the third paragraph of 6, sub-s. (1) of the Married Women's Property Act, for the Act of 1864 the Act of 1913. That is one answer to the theory of break in evolution.

Another answer is to be found in another section, the effect of which is to provide for the continuity of office, I think s. 15.

While, therefore, I should, under ordinary circumstances, have had great hesitation in differing from the learned Judge, I feel myself at liberty to agree with his first impression and to hold that s. 6, sub-s. (1), para. 2, applies and that the Official Trustee, unless the other trustees are appointed, is the person to receive the fund and bound to hold it upon the trusts created.

The directions I, therefore, give are that the Official Trustee do not return the fund but hold it upon trusts created by the insurance policy in question and by operation of law, and do dispose of the fund accordingly.

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With regard to the costs of this application I have been given able and ample assistance. I understand that the costs of this application are not going to fall on the fund. With regard to the costs of the ultimate beneficiary, I think she also should not pay any costs, and I suggest that the costs of her counsel appearing may be set-off against the commission due to the estate in respect of the fund. Certified for counsel. The fund may be made over to the nominee under the policy. The Official Trustee will pay the balance of the money after deducting his commission as aforesaid to Zebunnessa Khatoon. Payment already made by the insurance company operates to discharge the insurance company.

Dr. Gupta has addressed me on the direction to the effect that the costs of Zebunnessa Khatoon may be set-off against the commission due. He has pointed out that this is a dispute in which she need not, strictly speaking, have appeared, and that, as it is, the Official Trustee has incurred costs which are not being thrown upon the fund. Nevertheless, I think she has incurred some costs for appearance. She is the beneficiary. She is interested as to who is to be her trustee, and, in the circumstances of the case, I allow my direction to stand. It is not in any way to form a precedent. The costs in question, no affidavits having been filed by her, are only the fee payable to counsel on a Chamber application.

Attorneys for applicant: *Sanderson & Morgan.*

Attorneys for respondents: *Orr Dignam & Co.,
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A. C. S.