PRIVY COUNCIL.

J.C.*
1933,
March 14.

THE OFFICIAL ASSIGNEE OF MADRAS, APPELLANT,

v.

KRISHNAJI BHAT, RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Insolvency—Property held on trust—Fund properly invested in insolvents' business—Charge on assets—Following trust fund—Indian Trusts Act (II of 1882), ss. 63, 66—Presidency-towns Insolvency Act (III of 1909), sec. 52, sub-sec. 1 (a).

In 1919 a sum of Rs. 10,000 was left in the hands of a firm of jewellers for investment in their business at a fixed rate of interest in the name of the respondent, to whom the Rs. 10,000 was to be paid on his attaining twenty-one years. In 1925 the members of the firm were adjudicated insolvents under the Presidency-towns Insolvency Act, 1909. By section 52, sub-section 1 (*a*), of that Act, property held in trust by an insolvent is excluded from the divisible assets. It had been admitted that the transaction of 1919 constituted a trust in favour of the respondent, and it was not alleged that the Rs. 10,000 had not been invested in the business, or that it had been lost, or ceased to exist before the insolvency.

Held, that the assets of the firm vested in the Official Assignee subject to a charge for the Rs. 10,000 in favour of the respondent. The right of a beneficiary to follow a trust fund does not depend upon whether the fund has been properly or improperly disposed of.

Pennell v. *Deffell*, (1853) 43 E.R. 551, and *In re Hallett's Estate*, (1879) 13 Ch. D. 696, applied.

Judgment of the High Court, *The Official Assignee of Madras* v. *Krishnaji Bhat*, (1929) 59 M.L.J. 718, affirmed.

APPEAL (No. 67 of 1931) from a decree of the High Court in its appellate jurisdiction (December 6, 1929), affirming a decree of the Court in its original jurisdiction (August 18, 1926).

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* *Present:*—Lord BLANESBURGH, Sir GEORGE LOWNDE and Sir DINSHAH MULLA.

The respondent brought a suit in the High Court against eight defendants, who constituted a joint Hindu family carrying on business as jewellers under the firm name T. R. Tawker & Sons. Before the trial the defendants were adjudicated insolvents under the Presidency-towns Insolvency Act, III of 1909, and the appellant, the Official Assignee, was joined as a defendant and filed a written statement; the original defendants did not appear at the trial.

The question arising on the appeal was whether, in the circumstances stated in the judgment of the Judicial Committee, the respondent was entitled to a charge upon assets in the hands of the appellant, those assets consisting of the proceeds of sale of stock amounting to about Rs. 22,000.

The appellate Court (REILLY and CORNISH JJ.) affirming the decision of the trial Judge (KUMARASWAMI SASTRI J.) held that the respondent was entitled to a charge for Rs. 10,000 and certain interest.

REILLY J. said that at the trial the existence of a trust was admitted but no wrongful disposal of the trust fund had been shown, nor any wrongful mixing of the trust property with other property such as would make section 66 of the Indian Trusts Act apply. That being so, could the plaintiff get a charge? He could do so under section 63 of that Act if he could trace the trust property into the assets in the hands of the Official Assignee. Upon a consideration of English cases referred to in the present judgment, the learned Judge held that the Rs. 10,000 had been sufficiently traced to the assets and that the plaintiff was entitled to a charge thereon. CORNISH J. delivered judgment to the same effect. The appeal is reported as *The Official Assignee of Madras* v. *Krishnaji Bhat*(1).

(1) (1929) 59 M.L.J. 718.

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DeGruyther K. C. and *Sidney Smith* for the appellant.—Although the original defendants by their written statement appear to admit that there was a trust they did not admit that they were the trustees, and the appellant by his written statement denies that there was a trust. If there was a trust, the trustee was Sadasiva Tawker, not the firm, some of the members of which were minors. He was authorized to invest the fund in the business and upon its insolvency the only right of the appellant was to prove, in the name of the trustee, for the debt.

[Lord BLANESBURGH.—As the Rs. 10,000 was invested with the firm in the name of the respondent, the firm held as trustees for him.]

Even so the fund was to be used in the business which consisted of buying and selling goods and at the date of the adjudication the fund could not be traced into the existing assets; *James Roscoe (Bolton), Limited* v. *Winder*(1).

[Sir GEORGE LOWNDES.—It was not shown that the assets of the firm ever fell below Rs. 10,000 in value.]

In any case the investment not being a disposition contrary to the terms of the trust, or wrongful, neither section 63 nor section 66 of the Indian Trusts Act gives the respondent a right to a charge upon the assets. The appellate Court relied upon observations in *Pennell* v. *Deffell*(2) and *In re Hallett's Estate*(3), but in both these cases the disposition of the fund had been unauthorized. If the English authorities support the view that there is a right to a charge although the investment was in accordance with the terms of the trust, they go further than the Indian Trusts Act, and to that extent do not apply. The judgment in the present case was considered in *Nagappa Chettiar* v. *Official Assignee of Madras*(4) and was not followed; the Court there followed *Official Assignee of Madras* v. *Krishnaswami Naidu*(5), which supports the appellant. [Reference was made also to *Ex parte Hardcastle*(6); *In re Sykes*(7); Williams on Bankruptcy, fourteenth edition, page 242; Lewin on Trusts, thirteenth edition, page 930.]

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(1) [1915] 1 Ch. 62.
(2) (1853) 43 E.R. 551.
(3) (1879) 13 Ch. D. 696.
(4) (1931) 60 M.L.J. 355.
(5) (1909) I.L.R. 33 Mad. 154.
(6) (1881) 44 L.T. 523.
(7) [1909] 2 Ch. 241.

Dunne K. C. and *Narasimham* for the respondent.—That the insolvents were trustees of the fund for the respondent was admitted at the trial, and is clear from the terms of the receipt given by the firm. By section 52, sub-section 1 (*a*), of the Presidency-towns Insolvency Act, property held in trust was excluded from the divisible assets vesting in the Official Assignee under section 17. The only question, therefore, is whether the Rs. 10,000 can be traced into the assets of the firm. Expenditure by the firm is to be regarded as having been made first out of its assets not affected by the trust; *In re Hallett's Estate*(1). As it is not suggested that the assets ever fell below Rs. 10,000 in value, the Rs. 10,000 are necessarily to be found in the existing assets. In *James Roscoe (Bolton), Limited* v. *Winder*(2) the mixed fund into which the trust fund had been paid had become exhausted at one period save as to a sum of £39. The beneficiary there was held entitled to a charge upon the £39. The case therefore supports the respondent so far as it is not distinguishable. In the present case the insolvents were themselves the trustees and the trust fund was properly invested in their business. It is not really a case of a disposition of the fund by the trustees or an improper mixing with their own funds. The respondent has not to rely upon either section 63 or 66 of the Indian Trusts Act. That Act is not exhaustive of all the rights attaching to a trust. It is not correct to say that the decision in the present case was not followed in *Nagappa Chettiar* v. *Official Assignee of Madras*(3); the Court agreed with the principles applied, but rightly distinguished the case upon the facts. [Reference was made also to *Official Assignee, Madras* v. *Minakshi Vidyasalai Sangam*(4).]

DeGruyther K.C. in reply.—The case last mentioned was one of wrongful mixing of a trust fund with the trustees' funds and section 66 of the Act therefore applied.

The JUDGMENT of their Lordships was delivered by

SIR GEORGE LOWNDES.—On the 5th October 1919, one T. Sivasankar Bhat, the father of the respondent, instructed his uncle Sadasiva Tawker by letter to invest in his firm T. R. Tawker & Sons a sum of Rs. 10,000 lying with the firm, such investment to be

(1) (1879) 13 Ch. D. 696.
(2) [1915] 1 Ch. 62.
(3) (1931) 60 M.L.J. 355.
(4) (1929) I.L.R. 52 Mad. 919.

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made in the name of the respondent, who was then a minor, the money to be handed over to him on attaining 21, and the interest in the meanwhile to be paid to the father. On the 22nd October following the firm gave him a receipt in the following terms :

"Received from Mr. T. Sivasankar Bhat, the sum of rupees ten thousand only through Mr. T. Sadasiva Tawker, as fixed deposit in the name of his minor son T. Krishnaji Bhat as per instructions contained in Mr. Sivasankar Bhat's letter, dated 5th instant, carrying interest at 9 per cent per annum.

"Rs. 10,000.

T. R. TAWKER & SONS."

The interest was duly paid to the end of 1923, when apparently the firm, which carried on business as jewellers in Madras, got into difficulties.

On the 22nd November 1923 a suit was instituted in the name of the minor against the members of the firm, alleging that they were trustees of the fund and claiming their removal from the trust and the appointment of new trustees in their place, with a direction to hand over to the latter the Rs. 10,000. The defendants put in a written statement by which in effect the trust was admitted, but the suit was charged as premature inasmuch as the plaintiff was still a minor and no breach of trust had been committed.

In January 1925, while the suit, which was filed on the original side of the Madras High Court, was still pending, the defendants were adjudicated insolvents, and the present appellant as the Official Assignee in whom their estate and effects were vested was brought on the record. He filed a written statement putting the plaintiff to the proof of the factum and validity of the trust and denying that the plaintiff was entitled to any preferential claim over other creditors.

The suit came to trial in August 1926. The insolvents did not appear, and the principal question

debated was as to the plaintiff's right to preferential payment out of a sum of about Rs. 22,000 which had been realized by the appellant by sale of a portion of the stock in trade.

The trial Judge affirmed the plaintiff's claim and made a decree declaring his right to be paid out of the Rs. 22,000 in the hands of the appellant with Rs. 1,949 for interest, and ordering the appellant to bring these sums into Court to be held to the credit of the plaintiff.

The Official Assignee appealed and the decree was confirmed. A further appeal is now brought to His Majesty in Council on a certificate that a substantial question of law is involved. The respondent is now of full age and is personally represented before the Board.

It was suggested before their Lordships that the transaction of October 1919 did not constitute a trust at all but a mere deposit in respect of which the respondent would only be entitled to rank with the other creditors. Their Lordships are however unable to accept this contention. No issue on this question was raised at the trial, and it is clear that the trust was admitted by the defendants both before the original Court and in the appellate Court, and apparently also in the printed case of the appellant. In their Lordships' opinion therefore the appeal must be dealt with on this basis and the only possible question is whether the trust fund can be found in the assets of the trustee firm which have come to the appellant.

The trial Judge held on the evidence that the trust fund could be traced into the stock from the sale of which the Rs. 22,000 was realized. The learned Judges of the appellate Court were not satisfied that this was established, but they thought that the investment of the trust money in the general assets of the business

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was sufficient to give the respondent a charge upon the sale proceeds in the hands of the appellant, and in their Lordships' opinion the conclusion to which they came was right.

Under section 52 (1) (*a*) of the Presidency-towns Insolvency Act, 1909, property held by an insolvent on trust for any other person is excluded from the assets divisible among the creditors. The Rs. 10,000 was received by the insolvent firm for investment in their business and there is no suggestion that it was not so invested in fact. Nor is it suggested that there were any assets of the business which were not taken over by the appellant. If it was there when the Official Assignee came in, what he took was a mixed fund only part of which was divisible among the creditors, the Rs. 10,000 being in his hands as much the property of the respondent as it was before the insolvency. There was no allegation that it had been lost or ceased to exist before the insolvency. If this had been proved the case might possibly have been different; see *James Roscoe* (*Bolton*), *Limited* v. *Winder*(1). Their Lordships offer no opinion upon this question as the necessary facts have not been pleaded or put in evidence and the burden of proving them would clearly be upon the appellant.

Assuming then that the whole assets of the business, including the Rs. 10,000 as invested in it, passed into the hands of the appellant on the insolvency, their Lordships think that they so passed subject to any charge in favour of the respondent to which they may have been subject before the insolvency.

Much argument was expended in the lower appellate Court and before the Board on the doctrine of following

(1) [1915] 1 Ch. 62.

trust funds, and it seemed to be suggested that though, if the fund in the present case had been improperly employed in the business of the trustees, the beneficiary would be entitled to a charge upon the whole of the assets (*see* section 66 of the Indian Trusts Act, 1882), no such right could be accorded to him if the employment of the funds in this way was in pursuance of the terms of the trust. Their Lordships think there is no substance in this contention. In the words of Sir GEORGE JESSEL [*In re Hallett's Estate*(1)],

"there is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds."

In their Lordships' view the passages quoted by the learned Judges of the appellate Court from the well-known judgment of TURNER L.J. in *Pennell* v. *Deffell*(2) are directly in point, and show the length to which the modern doctrines of equity have gone in this direction. Their Lordships would in particular refer to the following passage in the judgment:

"It is, I apprehend, an undoubted principle of this Court, that as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

So too Lord ELLENBOROUGH in *Taylor* v. *Plumer*(3), speaking of property entrusted to a factor, says:—

"It makes no difference in reason or law into what other form, different from the original, the change may have been made . . . for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such."

(1) (1879) 13 Ch.D. 696, 709. (2) (1853) 43 E.R. 551, 558.
(3) (1815) 105 E.R. 721, 726.

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In the present case once it was admitted that the Rs. 10,000 was a trust in the hands of T. R. Tawker & Sons to be invested in their business and was so invested, it must be taken to have remained a part of the assets of that business and to have been there at the date of their insolvency, the beneficiaries being entitled at all times to a charge upon such assets in the hands of the firm. Upon the insolvency the assets passed to the appellant but passed subject to the charge.

For these reasons their Lordships are of opinion that the judgment of the appellate Court in Madras was right and that this appeal should be dismissed and they will humbly advise His Majesty to this effect. The appellant must pay the costs of the respondent before this Board.

Solicitors for appellant: *H. S. L. Polak & Co.*

Solicitors for respondent: *T. L. Wilson & Co.*

A.M.T.