APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

MA YAIT AND THREE

v.

MAHOMED EBRAHIM MOOLLA.*

1927

Feb. 7.

Transfer of Property Act (IV of 1882), section 6 (a) and (e)—Spes successionis—Nature of rights of a reversioner after a female heiress under Hindu Law—Chance of an heir-apparent succeeding to an estate under Mahomedan Law—Interest of a person under a deed of settlement—Vested remainder, definition of a—Present right to share of income accrued, due and future, and share of corpus on determination of prior rights under a settlement are vested rights and not spes successionis.

G a Kalai gentleman of mixed Hindu and Burmese blood, made a settlement of his properties in 1908, died in 1911. His son C who was a beneficiary under the settlement filed a suit to set aside the settlement and for the administration of the estate. The settlement was upheld by the Privy Council in 1921. In 1919 during the pendency of the litigation C transferred his rights in the estate of G and also under the settlement to the respondent. In 1925 respondent filed his suit against the appellants who are the widow and daughters respectively of G and also trustees under the settlement to enforce his rights under the transfer. Appellants contended that the transfer by C was invalid as it was only a transfer of a mere *spes successionis* and of a mere right to sue. Under the settlement C was entitled to enjoy a portion of the income of certain settled properties and also had the right to share in the proceeds of the sale of certain settled properties if he was alive when the widow died and the youngest child of G attained the age of 21.

Held, that the property transferred by C to the respondent was not a chance of an heir-apparent succeeding to an estate or the chance of a relation obtaining a legacy but was a vested right in property, and therefore the provisions of section 6 (*a*) and (*e*) did not apply.

Neither the Hindu Law as to the right of a reversioner to succeed a female heir which would be a mere chance of succession, nor the Mahomedan Law as to the chance of an heir-apparent succeeding to an estate which would be neither transferable or releasable were applicable in this case as C's rights were not those of an heir, but were rights under a deed of settlement capable of transfer. C's right to share in the corpus of the estate was in the nature of a vested remainder and was always ready to come into possession the moment the prior estates determined; it was not a mere contingency or possibility. His right to income was not only a vested right but a present right to an estate of which he was enjoying the possession at the time of his transfer to the respondent; and it was not a mere right to sue.

* Civil First Appeal No. 139 of 126 against the judgment of the Original Side in Civil Regular Suit No. 271 of 1925.

1927

MA YAIT AND THREE v. MAHOMED EBRAHIM MOOLLA.

RUTLEDGE, C.J., AND BROWN, J.

Umes Chunder Sircar v. *Zahur Fatima and others*, 18 Cal. 164; *Williams on Real Property*, 24th edition, p. 412—*referred to.*

Annadan Mohan Roy v. *Gour Mohan Mallik*, 48 Cal. 536 and 50 Cal. 929; *Bahadur Singh and others* v. *Mohar Singh and others*, 24 All. 94; *Jai Narayan Pande* v. *Kishun Dutta Misra*, 3 Patna 575; *Sumsuddin Goolam Hoosein and another* v. *Abdul Hoosein Kalimuddin and another*, 31 Bom. 165—*distinguished.*

N. M. Cowasjee—for the Appellants.

N. N. Burjorjee—for the Respondent.

RUTLEDGE, C.J., AND BROWN, J.—On the 5th May 1908 U Ohn Ghine, since deceased, executed a deed of settlement of certain properties belonging to his estate whereby he transferred the properties in question to trustees for the benefit of his wife and children and other relations and descendants, retaining to himself a life interest in the profits. U Ohn Ghine died on the 10th June 1911, and after his death, his son Maung Chit Maung who is one of the beneficiaries under the deed of settlement brought a suit for administration of the estate and claimed that the settlement should be set aside. This suit was filed on the 16th December 1913, and the litigation eventually came to an end with the decision of their Lordships of Privy Council on the 1st August 1921. On the 17th December 1919 Maung Chit Maung executed a deed whereby he purported to transfer to the respondent M. E. Moolla his rights in the estate of U Ohn Ghine including his rights under the deed of settlement if that settlement should ultimately be held to be binding. At the time of the execution of the deed the suit for administration and for the cancellation of the deed of settlement was pending in the Privy Council.

In the suit out of which the present appeal has arisen the respondent M. E. Moolla has sued the trustees under the deed of settlement to enforce his

rights under the instrument of transfer to him of 1919. The chief objection taken to the suit by the trustees was that Maung Chit Maung was not competent to assign his rights under the deed of settlement, and that the transfer purporting to have been made by him to M. E. Moolla was invalid. The learned Judge on the Original Side has held that the transfer was a valid transfer, and has referred the case to the Official Referee for the taking of accounts. The trustees under the settlement have appealed against this order.

It is contended on behalf of the appellants firstly that the transfer is wholly invalid as being the transfer of a mere *spes successionis* or of a mere possibility of a like nature, and secondly that so far as the claim to present income is concerned it is a transfer of a mere right to sue, and is therefore invalid under the provisions of section 6 (*e*) of the Transfer of Property Act. The trustees under the deed of settlement are Ma Yait the widow and Ma Mya and Ma Noo the daughters of the settlor. Maung Chit Maung is the eldest son of the settlor. The deed sets forth that after the death of the settlor certain moveable properties are to be given to certain specified heirs. With this part of the deed we are not now concerned. The deed then dealt with certain immoveable properties which are divided into three classes. The properties in the first class are to be sold on the death of the settlor, and the proceeds to be utilised for the purpose of rebuilding the other houses of the estate. The properties in the second class are to be sold by the trustees after the death of Ma Yait and the attainment of the age of 20 years by the youngest child. The properties in the third class are to be sold by the trustees on the death of Ma Yait and the last surviving child. During the lifetime of Ma Yait and until the youngest

1927

MA YAIT AND THREE v. MAHOMED EBRAHIM MOOLLA.

RUTLEDGE, C.J., AND BROWN, J.

child attains the age of twenty the income derived from the estate is to be divided amongst Ma Yait and the children, Ma Yait to receive Rs. 1,000 a month, and the remainder of the income to be divided equally between the children. On the death of one of the children before the youngest child has attained the age of twenty then if the deceased child has left a child or children, such child or children are to take the share his or their parent would have taken. On the youngest child attaining the age of twenty the proceeds of the immoveable properties of the first and second class are to be divided in equal shares between the children then surviving, and the issue of any child or children who may then be dead.

On the sale of the properties in the third class proceeds of the sale are to be divided in equal shares amongst all the issues.

So far as the proceeds of the property in the third class is concerned it is clear that Maung Chit Maung has no interest whatever, whether contingent or vested, and with those proceeds we are not therefore concerned. Maung Chit Maung's interests in the settlement property are two fold. He has firstly the present right to enjoy the income divided according to the terms of the settlement, and secondly the right to share in the proceeds of the sale of the immoveable properties of the first and second classes if he alive when Ma Yait has died and the youngest child has attained the age of twenty years. The question for our decision is whether Maung Chit Maung had the power to transfer either or both of these interests. In the case of *Annadan Mohan Roy* v. *Gour Mohan Mallik* (1), it was held that so long as under Hindu Law an estate is vested in a female heiress the interest of the reversioner is a mere chance of succession, and

(1) (1921) 48 Cal. 536 ; (1923) 50 Cal. 929.

1927

MA YAIT AND THREE v. MAHOMED EBRAHIM MOOLLA.

RUTLEDGE, C.J., AND BROWN, J.

cannot form the subject of any contract, surrender or disposal. This case subsequently went on appeal to the Privy Council, where the decree of the High Court was confirmed. The question before their Lordships of the Privy Council was whether the rights which formed the subject of the contract before them being merely a *spes successionis*, the contract itself could be enforced. That question does not arise here, and their Lordships' decision is therefore of no assistance to us. The High Court of Calcutta did decide that the right of the reversioner was a mere *spes successionis* following previous decisions on the subject. But that decision was come to with special reference to Hindu Law and the rights of a reversioner under that law. Hindu Law is not applicable in the present case, nor are the rights of Maung Chit Maung the rights of an heir. Whatever the nature of his interest it is an interest under a deed of settlement. In the case of *Bahadur Singh and others* v. *Mohar Singh and others* (2), it was held by their Lordships of the Privy Council that the rights of a Hindu reversioner were merely a *spes successionis*, but that gives us no more assistance in the present case than the decision in *Annadan Mohan Roy's* case. Similar remarks apply to another case which has been cited on behalf of the appellants, the case of *Sumsuddin Goolam Hussein and another* v. *Abdul Hussein Kalimuddin and another* (3), where it was decided that the chance of an heir-apparent succeeding to an estate under the Mahomedan Law was neither transferable nor releasable. The question we have to decide is not whether the right of an heir-apparent is transferable, but whether the interests of Maung Chit Maung under a deed of settlement amount to any thing more than a mere possibility.

(2) (1922) 24 All. 94. (3) (1907) 31 Bom. 165.

1927

MA YAIT AND THREE v. MAHOMED EBRAHIM MOOLLA.

RUTLEDGE, C.J., AND BROWN, J.

We have been referred on behalf of the respondent to the case of *Umes Chunder Sircar* v. *Zahur Fatima and others* (4). In that case one Sultan Ali had granted a lease of certain property for life to his wife Amani Begum at a rent of one rupee. Sultan Ali had two sons by another wife Farzand Ali and Farkut Ali, and the grant of the lease was on the condition that if Amani Begum should not bear any child to him, Farzand Ali and Farkut Ali should succeed, but that if she should have a child living at his death, that child should take the property. During the lifetime of Sultan Ali, the property was attached in execution of a decree against Farzand Ali. It was held by their Lordships of the Privy Council (at page 177) that the rights of Farzand Ali at that time did not amount to a mere expectancy in succession, by survivorship or other merely contingent right or interest, and that they were therefore capable of attachment. This decision seems to us to be very pertinent to the question now before us. In the present case, so far as his interest in the corpus of the estate is concerned it is by no means certain that Maung Chit Maung will ever obtain any estate in possession. His interests will terminate on his death, which may occur before the death of Ma Yait and the attainment of the age of twenty by the youngest child of the settlor. But there was a similar uncertainty in the case of Farzand Ali. At the time of the attachment in that case Sultan Ali was alive, and the possibility still existed of Amani Begum's bearing a child by him, and thus defeating all the rights of Farzand Ali. In defining a vested remainder in Williams on Real Property (24th edition, page 412), the following passage occurs : " In the same way, a grant may be made of a term of years to one person, an estate for life to

(4) (1891) 18 Cal. 164.

another, an estate in tail to a third, and last of all an estate in fee simple to a fourth ; and these grantees may be entitled to possession in any prescribed order except as to the grantee of the estate in fee simple, who must necessarily come last ; for his estate, if not literally interminable, yet carries with it an interminable power of alienation, which would keep all the other grantees for ever out of possession. But the estate tail may come first into possession, then the estate for life, and then the term for years ; or the order may be reversed, and the terms of years come first, then the estate for life, then the estate tail, and lastly the estate in fee simple, which, as we have said, must wait for possession till all the others have been determined. When a remainder comes after an estate tail it is liable to be barred by the tenant in tail as we have already seen. This risk it must run. But if any estate, be it ever so small, is always ready from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine,—it is then a *vested remainder*, and recognised as an estate grantable by deed. It would be an estate in possession, were it not that other estates have a prior claim ; and their priority alone postpones or may entirely prevent possession being taken by the remainder man. The gift is immediate ; but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession." So far as Maung Chit Maung's right to share in the corpus of the estate is concerned in the present case, it must depend on the rights otherwise created by the deed of settlement which terminate on the death of Ma Yait and the attainment of the age of twenty by the youngest child, and the priority of those rights may entirely prevent Maung Chit Maung from

1927

MA YAIT AND THREE v. MAHOMED EBRAHIM MOOLLA

RUTLEDGE, C.J., AND BROWN, J.

enjoying possession of his rights to the corpus. But his estate in that corpus is always ready to come into possession the moment the prior estates determine and his interest in the corpus is of the nature of a vested remainder, and not a mere contingency or possibility. So far as his enjoyment of the income is concerned it is clear that that is not only a vested right but a present right to an estate of which he was enjoying the possession at the time of his transfer to the respondent. We are therefore of opinion that the property transferred by Maung Chit Maung in the deed of transfer is not "a chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy, or any other mere possibility of a like nature" within the meaning of section 6 (*a*) of the Transfer of Property Act, and that the transfer is not therefore barred by the provisions of that clause of the section.

It has further been contended on behalf of the appellants that so far as the claim to income is concerned Maung Chit Maung's right is a mere right to sue, and cannot therefore be transferred under the provision of section 6 (*c*) of the Transfer of Property Act, and we have been referred in this connection to the case of *Jai Narayan Pande* v. *Kishun Dutta Misra* (5). In that case a transfer had been made of certain property and mesne profits which had accrued due before the date of the transfer. It was held that mesne profits were unliquidated damages and that the transfer of these mesne profits was the transfer of a mere right to sue, and was therefore invalid. The right to income which had accrued due in the present case prior to the date of transfer may be a right to a sum of money which has not yet been definitely ascertained. But it cannot be said that it is merely

(5) (1924) 3 Patna 575.

a right to mesne profits. There is no suggestion here that the trustees are in any sense trespassers. The right to income from the property was a right which was vested in Chit Maung long before the date of the transfer, and we do not think that the mere fact that the actual amount due could not be determined without further enquiry is fatal to Maung Chit Maung's power of transfer. The liability of the trustees to pay the income is admitted, and the right of the beneficiary to claim his share of the income is in our opinion more than a mere right to sue.

We are therefore of opinion that the learned trial Judge has correctly found that the transfer by Maung Chit Maung was a valid transfer. Though the point was not raised in the memorandum of appeal it was suggested before us that the parties interested in the subject-matter of the dispute were not sufficiently represented. We don ot think however that there is any ground for our interference on this score. The trustees under the settlement are all joined as parties, and that is all that is imperatively required by the provisions of Rule 1 of Order XXXI of the Code of Civil Procedure. Whether the failure to join other beneficiaries will have any effect on the rights obtained in this litigation by the respondent as against minors and others it is not necessary for us to decide.

The question of limitation which is raised in the memorandum of appeal has not been argued before us, and would appear to be answered by the provisions of section 10 of the Limitation Act.

We are of opinion that the case has been rightly decided by the Court below and we dismiss this appeal with costs.