

FULL BENCH.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Mya Bu.

1933
Jan. 3.

IN RE BABOO JIVAN HANSRAJ

v.

IRRAWADDY FLOTILLA COMPANY.*

Attachment—Benefit Fund for employees—Sum payable by employee at his uncontrolled discretion—Civil Procedure Code (Act V of 1908), s. 60—“Debts.”

A company created a Benefit Fund Scheme for its employees under which a certain proportion of the salary of the employees was compulsorily deducted as a subscription to the fund and when in the opinion of the directors the net profits justified them the company contributed a sum equal to the aggregate amount of the subscriptions of the members for the year. The whole fund was vested in trustees, and the directors in their absolute discretion were entitled to pay or not to pay the sum standing to the credit of a member in the fund on his death or retirement. A creditor of a deceased member attached the sum standing to the credit of such member in the fund in execution of his decree against his legal representatives.

Held that the sum was not a “debt” within s. 60 of the Civil Procedure Code, and was not liable to attachment. A debt for the purpose of attachment must be a debt payable to the judgment-debtor, but a sum which a person may or may not pay in his uncontrolled discretion is not a debt within s. 60 of the Code.

Eunoose for the appellant. The prohibition as to attachment contained in s. 60 (*k*) of the Civil Procedure Code does not apply to money in a private provident fund, not recognised by the Provident Funds Act of 1925. S. 8 of the Act provides for the recognition of private provident funds, by means of a notification in the official *Gazette*, but the Irrawaddy Flotilla Company’s provident fund has not been so recognised.

Again, the amount that stood to the credit of the subscriber has become payable to his legal representative by reason of his death, and as such the amount is a “debt” within the meaning of s. 60 (*l*), Civil Procedure Code.

The provident fund rules, in so far that they state that the directors have an absolute discretion to pay or withhold the money lying to the credit of a subscriber to him or to his heirs are *ultra vires*, as their purport is to defeat the just rights of creditors. A trust can only be created for a "lawful purpose" (s. 4 of the Trusts Act), and these rules, if allowed to operate, would defeat the provisions of law relating to the realisation of debts.

It may be that so far as the company's contributions are concerned, they are not attachable ; but the employee's subscriptions are.

McDonnell for the respondent. The deductions to the fund are made compulsorily and consequently this compulsory deduction ought not to be regarded as the subscriber's property till actually paid to him. The money is vested in trustees, and cannot be touched.

Clause 14 of the rules gives an absolute discretion to the trustees to pay or not to pay the amount, and the money cannot therefore be regarded as a "debt."

PAGE, C.J.—This reference may be disposed of quite shortly. The question propounded is :

"Can the attachment in suit be given effect with reference to the fund to which the deceased Maung San U was entitled under the Benefit Scheme of the Irrawaddy Flotilla Company to which he was a contributor" ?

No. one can read the scheme without being conscious of its imperfections. I have no doubt that the Irrawaddy Flotilla Company intended by the scheme to benefit their employees during their lifetime after they had ceased to be in the employment of the company through retirement, accident or ill-health or if they died while in the employment of the company that their dependants should be

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provided for. The scheme, however, is defective in many respects, and as it stands at present some of the clauses would not be able to bear close analysis. I cannot help thinking that as the scheme might work in a way that is not equitable in certain events the company would be well advised if they took steps to have their scheme put into such a form that it would give effect to what I have stated to be their obvious intention.

This reference arises in the following way. An employee of the company who was a member of the Benefit Fund of the company died, and after his death the applicant filed a suit in the Small Cause Court of Moulmein against his legal representatives claiming that he was entitled to a decree against them as representing the estate of the deceased in respect of a debt due from the deceased under a promissory note. He obtained a decree, and in execution of the decree the present proceedings were initiated with a view to obtaining a prohibitory order against those persons in whose possession the Benefit Fund was to prevent them from paying out the funds otherwise than in accordance with the attachment. In the Small Cause Court the application for a prohibitory order was rejected upon the ground that the money deposited with the Benefit Fund of the Irrawaddy Flotilla Company was not attachable by reason of s. 60 (1) (k) of the Civil Procedure Code.

It is common ground between the applicant and the respondent company that s. 60 (1) (k) has no bearing upon the matter now in issue.

Under the Benefit Fund scheme a certain proportion of the salary or wages of the members is compulsorily deducted as a subscription to the fund, and when in the opinion of the Directors the net profits of the company justified them in so doing the

company contributed a sum equal to the aggregate amount of the subscriptions of the members for the year. The whole fund was vested in trustees.

Now, Rule 14 runs as follows :

“On death or retirement owing to illness or accident.”

“On the death of any member of the Fund whilst in the service of the company, or on his retirement owing to illness, old age, or accident caused in the service of the company, in such cases as the Directors shall in their uncontrolled discretion think fit, the Directors shall (subject to the provisions in these rules hereinafter contained) pay to the executors or administrators of such member if dead, or to such retiring member, as the case may be, the total amount standing to his credit in the books of the Fund.”

The sole question that falls for determination is whether the sum standing to the credit of the deceased member in the Benefit Fund is a debt within s. 60 of the Code of Civil Procedure. A debt for the purpose of attachment must be a debt that is payable to the judgment-debtor or his estate. But a sum is not a debt which a person may or may not pay in his uncontrolled discretion ; and in my opinion it is clear, having regard to the terms of Rule 14, that the sum standing to the credit of the deceased employee in the Benefit Fund was not a “debt” within s. 60 of the Code of Civil Procedure.

We do not propose on this reference to consider or comment upon all or any other of the rules under which this scheme is constituted. It is enough to dispose of this reference to say that, in our opinion, the sum standing to the credit of the deceased in the Benefit Fund was not a debt liable to attachment within s. 60 of the Code of Civil Procedure. It follows, therefore, that the answer to the question propounded is in the negative.

The learned Judge who heard the application in revision is absent from the Court, and by consent

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of the applicant and the respondent we propose finally to dispose of this case. In our opinion the application in revision fails and is dismissed. We make no order as to costs.

DAS, J.—I agree.

MYA BU, J.—I agree.

COURT FEES ACT REFERENCE.

Before Mr. Justice Sen.

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 Jan. 10.

IN RE A.A.R. CHETTYAR FIRM

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DAW HTOO AND OTHERS.*

Court-fees—Review of judgment—Review limited to costs awarded—Court-fees Act (VII of 1870), Schedule I, Article 5.

On an application for review of judgment the proper court-fee to be charged is to be calculated on the basis of the relief which the applicant seeks in review.

Where the applicant asks for a review of the judgment only so far as it affects the question of the costs awarded against him, the application must be stamped *ad valorem* on the amount of costs so awarded and not on the whole amount claimed in the plaint.

Ma Shin v. Maung Shwe Hnit, I.L.R. 2 Ran. 637 ; *In re Puyao Nahako*, I.L.R. 50 Mad. 488—*referred to*.

Basu for the applicant. A mortgage suit by the 1st mortgagee in respect of property which had already been sold for arrears of revenue was dismissed by the trial Court and the first appellate Court, but on second appeal a money decree was passed with costs against the applicant, who was the second mortgagee, and who was made a party to these proceedings by the 1st mortgagee. The applicant is now seeking to have the order as to costs set aside ;

* Civil Reference No. 15 of 1932.