

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

SHANKAR VISHVANATH VAGH AND OTHERS (ORIGINAL DEFENDANTS),
APPELLANTS, v. UMABAI BHERATAR SADASHIV NILKANTH WAGHLE
(ORIGINAL PLAINTIFF), RESPONDENT.*

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January 29.

Civil Procedure Code (Act V of 1908), section 60—Transfer of Property Act (IV of 1882), section 130—Trusts Act (II of 1882), section 5—Contract Act (IX of 1872), section 2 (i)—Married Women's Property Act (III of 1874)—Life policy expressed to be for the benefit of the wife of the assured—Attachment of the policy by the judgment-creditors of the deceased assured—Suit by the widow of the assured for a declaration that the policy was not liable to attachment—Dismissal of suit.

A policy of insurance effected by the assured upon his own life was expressed to be for the benefit of his wife. Subsequently upon the death of the assured his judgment-creditors having attached the policy, his widow applied to raise the attachment. Her application being rejected, she filed a suit for a declaration that the policy was not liable to attachment in execution of the defendants' decree.

Held, dismissing the suit, that under section 60 of the Civil Procedure Code (Act V of 1908) the policy was attachable as 'a security for money or saleable property belonging to the judgment-debtor over which he had a disposing power which he might exercise for his own benefit.' The policy was a contract between the deceased and the Insurance Company expressed to be for the benefit of the wife of the assured whereby the Company promised, on proof of the death of the assured, to pay the policy monies to the trustee or trustees who might be appointed by the assured by separate writing, and in default of trustees to the beneficiary (that is, the widow of the assured) and if the beneficiary be dead, to the assured's heirs, executors, administrators or assigns. Unless and until the appointment of trustees on behalf of the wife, it was in the power of the assured at any time to put an end to the contract by ceasing to pay the premia or otherwise to defeat the expectation of his wife by assigning the policy to a creditor. He could divest himself of his beneficial interest in the policy only by assignment in writing as provided by section 130 of the Transfer of Property Act (IV of 1882) or signed declaration of trust as provided by section 5 of the Trusts Act (II of 1882). He had adopted neither course. The policy on his death, therefore, formed part of his estate, the right of action against the Company being in his executors or other representatives untrammelled by any trust in favour of his wife.

* First Appeal No. 179 of 1911.

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Married Women's Property Act (III of 1874) is not applicable to Hindus.

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There is nothing in the Contract Act (IX of 1872) to show an intention that a person not a party to the contract can sue on it.

In re Flavell⁽¹⁾, *Bhikaji v. Dattatraya*⁽²⁾, *Samuel v. Ananthanatha*⁽³⁾, *Chinnaya Rau v. Ramaya*⁽⁴⁾, distinguished.

FIRST appeal against the decision of G. N. Kelkar, First Class Subordinate Judge of Belgaum, in original civil suit No. 584 of 1910.

Suit for a declaration.

One Sadashiv Nilkanth Waghle insured his life in the Oriental Government Security Life Assurance Company under Policy No. 48314, dated the 19th September 1901. The policy was expressed to be for the benefit of his wife Umabai. The material portions of the policy were as follows :—

Whereas Sadashiv Nilkanth Waghle, hereinafter called the Assured, has proposed to effect an Assurance with the Oriental Government Security Life Assurance Company, Limited, hereinafter called the Company, under the provisions of the Married Women's Property Act, 1874, for the benefit of his wife Umabai..... shall survive him hereinafter called the Beneficiary, and has delivered at the office of the said Company in Bombay a Proposal and Declaration in writing.....

Now these presents witness that provided the said Assured shall pay or cause to be paid at the office of the Company in Bombay the future premium of Rs.....on or before.....the Company shall pay at its office in Bombay to the Trustee or Trustees who may be appointed by the Assured by separate writing duly executed by him and of which the Company shall have due notice given to them, in trust for the Beneficiary as above mentioned, and in default of any such Trustee or Trustees to the Beneficiary or Beneficiaries, if she, he or they be of age, and otherwise capable of giving a discharge to the Company, and if any one or more of them be not of age, then jointly to those of the Beneficiaries who shall be of age and to the legal guardian of such of them as shall not be of age, and failing any of the Beneficiaries being alive when the sum assured by the policy becomes payable then to the Assured's Heirs, Executors, Administrators or Assigns the sum of Rs.....or such other sum as shall become due and payable by virtue of these presents, agreeably to the laws and regulations

(1) (1883) 25 Ch. D. 89.

(2) (1900) 2 Bom. L.R. 888.

(3) (1883) 6 Mad. 351.

(4) (1881) 4 Mad. 137.

of the said Company, on proof to the satisfaction of the Director of the death of the said Assured and of the title of the person or persons claiming payment.

And it is hereby declared that the receipt in writing of the Trustee or Trustees, or of the Beneficiary or Beneficiaries, or of the Beneficiary or Beneficiaries who shall be of age jointly with that of the legal guardian of such of them as shall not be of age or of the Assured, his Heirs, Executors, Administrators or Assigns as the case may be, shall fully discharge the Company from the sum assured by this policy. And further that the Company shall have no concern with or be responsible for the validity or proper execution of any trusts to which the said sum may be subject.

Subsequently the policy having been attached by the creditors of Sadashiv Nilkanth Waghle in execution of a decree obtained against him, Sadashiv's widow Umabai applied for the removal of the attachment and her application having been rejected on the 23rd March 1910, she filed the present suit on the 9th November 1910 for a declaration that the policy was not liable to attachment and sale in execution of the defendants' decree.

The defendants contended that the Married Women's Property Act (III of 1874) was not applicable to Hindus, that the policy in dispute was not trust property, that no legal trust could be made or created in respect of the policy, that assuming that such legal trust could be made or created, the deceased Sadashiv Nilkanth must have made the trust, or settlement, or arrangement with a view to ruin the defendants, that assuming that the plaintiff was entitled to the benefit of the policy, her right ought not to come in the way of the satisfaction of the defendants' decretal debt out of the money under the policy and that the defendants had a prior right to the money to that of the plaintiff.

The Subordinate Judge found that the principle of Married Women's Property Act applied to the policy, that the sum due under the policy was not liable to be attached in execution of defendants' decree against the deceased Sadashiv, that the policy in suit was not

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a fraud on the defendants and that the plaintiff was not a party to the alleged fraud. He, therefore, made the declaration as prayed for by the plaintiff.

The defendants appealed.

S. S. Patkar for the appellants (defendants):—The question is whether the policy is liable to be attached and sold in execution of our decree passed against the plaintiff's husband. We contend, firstly, that section 6 of the Married Women's Property Act is not applicable because that Act itself is not applicable to Hindus. Secondly, no trust was created independently of the Married Women's Property Act. Thirdly, the amount of the policy being not secured by hypothecation, it did not constitute a debt payable in *presenti*. It was a conditional and contingent debt: *Vishwanath P. Vaidya v. Mulraj Khatau*⁽¹⁾. Therefore, the policy monies remained the property of the deceased husband over which he had a disposing power unless there was an assignment under section 130 of the Transfer of Property Act, or there was a registered trust-deed under section 5 of the Trusts Act. It was held in *Oriental Government Security Life Assurance, Limited v. Vanteddu Ammiraju*⁽²⁾ that where the assured does not in his lifetime create a trust for the benefit of any person, such money, in cases where the provisions of the Married Women's Property Act do not apply, forms part of his estate and is recoverable by his legal representatives. The contract between the Company and the assured gives no right of action to the beneficiary named. When the Company refuses payment on the death of the assured, the legal representative and not the beneficiary will be entitled to enforce the contract. The policy in *Oriental Government Security Life Assurance, Limited v. Vanteddu Ammiraju*⁽²⁾ was similar to the one

⁽¹⁾ (1911) 13 Bom. L. R. 590.

⁽²⁾ (1911) 35 Mad. 162.

in question and was issued by the same Company. See also *Cleaver v. Mutual Reserve Fund Life Association*⁽¹⁾. The lower Court has relied on *Bhikaji v. Dattatraya*⁽²⁾. It was a case of a provident fund and there was no conflict between the creditors and representatives. The other two cases relied on by the lower court, namely, *Rajaram v. Ganesh*⁽³⁾ and *Ganga Baksh v. Jagat Bahadur Singh*⁽⁴⁾ were cases of gift and have no bearing. The policy money is, therefore, part of the estate of the deceased judgment-debtor and is liable to attachment and sale in execution of our decree.

N. A. Shiveshvarkar for the respondent (plaintiff) :— The Court should have regard to the nature of the policy. It creates a trust. The Company and the assured entered into an agreement which was clearly a trust in favour of the wife. The observations in *Oriental Government Security Life Assurance, Limited v. Vanteddu Ammiraju*⁽⁵⁾ are *obiter dicta* because the premia was held to come out of the joint family and, therefore, became joint property. The subsequent remarks are merely *obiter*. In the policy in suit there is a declaration of trust. The question is one of intention. The husband could not change the contract. No particular form is necessary to create a trust. The wife was not a stranger to the contract: see *Pollock and Mulla's Contract Act*, page 16 (2nd Edn.), *Dutton v. Poole*⁽⁶⁾, *Husaini Begam v. Khwaja Muhammad Khan*⁽⁷⁾. Under section 2, clause (d) of the Contract Act the consideration might be provided by some other person. Therefore the plaintiff could sue on the policy, the consideration for which was provided by her husband: *Samuel v. Ananthanatha*⁽⁸⁾, *Chinnaya Rau*

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(1) [1892] 1 Q. B. 147.

(2) (1900) 2 Bom. L. R. 888.

(3) (1898) 23 Bom. 131.

(4) (1895) 23 Cal. 15.

(5) (1911) 35 Mad. 162.

(6) (1666) 2 Lev. 210.

(7) (1906) 29 All. 151.

(8) (1883) 6 Mad. 351.

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Garu v. Ramaya⁽¹⁾. The Insurance Company became a trustee : Anson on Contract, page 234 (8th Edn.). If a person who is to take a benefit under a contract is closely related by blood to the promisee, a right of action would vest in him : *Touche v. Metropolitan Railway Warehousing Company*⁽²⁾, *In re Flavell*⁽³⁾, *Rakhmabai v. Govind Moreswar*⁽⁴⁾.

Secondly, the amount of the policy was a gift to the wife as held by the lower Court : *Bhikaji v. Dattatraya*⁽⁵⁾. The proposal to the Insurance Company may be considered as an oral will : *Jugmohandas Mangaldas v. Sir Mangaldas Nathabhoy*⁽⁶⁾.

Patkar, in reply :—The remarks in *Oriental Government Security Life Assurance, Limited v. Vanteddu Ammiraju*⁽⁷⁾ are not *obiter* because the point was decided on the contention that the Company was justified in withholding payment and was liable only to pay interest. As regards *Touche v. Metropolitan Railway Warehousing Company*⁽²⁾ and *In re Flavell*⁽³⁾, the agreements therein were unconditional and irrevocable, but the agreement in the present case was revocable and conditional. Under section 23, clause (c) of the Specific Relief Act, a person beneficially entitled can sue only in cases of marriage settlement and family arrangement. Here the husband could have changed the destination of the money at any time. Before the Married Women's Property Act such agreements did not create a trust. Therefore a statutory trust was created by the Act. There could be no gift because there was no delivery of possession and there was no registered document under section 123 of the Transfer

(1) (1881) 4 Mad. 137.

(4) (1904) 6 Bom. L. R. 421.

(2) (1871) L. R. 6 Ch. 671.

(5) (1900) 2 Bom. L. R. 888.

(3) (1883) 25 Ch. D. 89 at p. 92.

(6) (1886) 10 Bom. 528.

(7) (1911) 635 Mad. 162.

of Property Act. There was no trust by a registered document under section 5 of the Trusts Act. In the case of a will debts would take precedence over bequests. The husband had, therefore, a disposing interest in the policy under section 60 of the Civil Procedure Code and in the absence of assignment the policy monies are liable to attachment and sale.

SCOTT, C. J. :—The defendants are judgment-creditors of Sadashiv Nilkanth, the deceased husband of the plaintiff. In execution of their decree they attached a policy of insurance effected by the deceased upon his own life. The policy was expressed to be for the benefit of his wife, and the plaintiff therefore applied to raise the attachment. Her application being rejected she filed this suit for a declaration that the policy is not liable to attachment in execution of the defendants' decree.

The policy is attachable if it falls within the description contained in section 60 of the Civil Procedure Code as 'a security for money or other saleable property belonging to the judgment-debtor over which he had a disposing power which he might exercise for his own benefit'. The policy is a contract between the deceased and the Insurance Company expressed to be for the benefit of the wife of the assured whereby the Company promise on proof of the death of the assured to pay the policy monies to the trustee or trustees who may be appointed by the assured by separate writing and in default of trustees to the beneficiary (*i.e.*, the widow of the assured) and if the beneficiary be dead to the assured's heirs, executors, administrators or assigns. Unless and until trustees should be appointed on behalf of the wife it was in the power of the assured at any time to put an end to the contract by ceasing to pay the premia or otherwise to defeat the expectation of his wife by assigning the policy to a creditor. He could divest himself of his beneficial interest under the policy

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only by assignment in writing as provided by section 130 of the Transfer of Property Act or by signed declaration of trust as provided by section 5 of the Trusts Act. He adopted neither course. The policy on his death therefore formed part of his estate, the right of action against the Company being in his executors or other representatives untrammelled by any trust in favour of his wife. See *Cleaver v. Mutual Reserve Fund Life Association*⁽¹⁾. This distinguishes the case from *In re Flavell*⁽²⁾. We were asked to adopt the view taken by a Bench of this Court in *Bhikaji v. Dattatraya*⁽³⁾ that the policy was given in effect to the wife subject to the condition that she should survive the donor. In that case the rights of creditors of the assured did not come under consideration nor do the provisions of Chapters VII and VIII of the Transfer of Property Act appear to have been brought to the notice of the Court. We cannot therefore regard it as any authority upon the point which we have to decide.

It was in order to confer upon wives claiming under such policies the position of *cestuis que trustent* that the Married Women's Property Act, 1870, section 10 was enacted which in India is reproduced in section 6 of Act III of 1874. In *Holt v. Everall*⁽⁴⁾ Lord Justice Mellish said "Supposing that before the Act a married man had effected a policy on his own life, it might be doubtful whether, before the Act, a simple declaration on the face of the policy that it was for the benefit of his wife and for his children, would have been sufficient to make a trust for the wife and children". It appears from Bunyan on Insurance (p. 463) that before 1870 the difficulty was sometimes overcome by getting the Insurance Company to declare themselves trustees for the wife. This however has not been done in the

(1) [1892] 1 Q. B. 147.

(2) (1883) 25 Ch. D. 89.

(3) (1900) 2 Bom. L. R. 888.

(4) (1876) 2 Ch. D. 266 at p. 275

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present case, indeed the Company stipulate by the policy that it shall have no concern with or be responsible for the validity or proper execution of any trusts to which the sum payable may be subject ; and as the Act of 1874 does not apply to Hindus the plaintiff cannot claim the benefit of its provisions.

It was however argued that as under section 2 clause (d) of the Contract Act the consideration might be provided by some other person, the plaintiff could sue on a policy the consideration for which was provided by her husband. There is however nothing in the present case to show that the plaintiff was either the promisor or the promisee and therefore a party to the agreement. There is nothing in the Act to show an intention that a person not a party to the contract can sue on it. So far as it goes section 2 (i) is an indication to the contrary. In *Samuel v. Ananthanatha*⁽¹⁾, relied for the plaintiff, the contract was between the plaintiff and the defendant though a third party supplied the consideration. In *Chimmaya Rau v. Ramaya*⁽²⁾ there was also a direct agreement between the plaintiff and the defendants.

For the above reasons we reverse the decree of the lower Court and dismiss the suit with costs throughout on the plaintiff.

Decree reversed, and suit dismissed.

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(1) (1883) 6 Mad 351.

(2) (1881) 4 Mad. 137.