PRIVY COUNCIL.*

P. C.*
1923.
June 28.

PHIROZSHAW BOMANJEE PETIT (DEFENDANT) *v.* BAI GOOLBAI AND OTHERS (PLAINTIFFS AND DEFENDANTS)

[On Appeal from the High Court of Judicature at Bombay.]

Apportionment—Deed of settlement—Rents and dividends—Apportionment between settlor's executors and successive beneficiaries—Intention—Construction of deed—"Arising or accruing".

Under a deed of settlement executed in 1913 the questions arose whether income derived from rents and shares was apportionable *de die in diem*, (1) between the estate of the deceased settlor (who had retained a life interest) and persons beneficially entitled for a period of 13 months after his death, and (2) between those persons and persons beneficially entitled after that period:

Held, that the income was not so apportionable since an intention to that effect was not expressed clearly and unambiguously in the deed; that the words "arising or accruing" in the deed in reference to the income did not sufficiently show that intention.

Judgment of the High Court affirmed.

APPEAL (No. 32 of 1922) from a judgment and decree of the High Court (March 31, 1919) affirming, subject to modifications not material to the appeal, a decree of that Court in its original civil jurisdiction.

The decrees were made on an originating summons taken out by the respondents Nos. 1 to 4, the trustees of a deed of settlement, dated August 1, 1913, made by Bomanji Dinshaw Petit, who died on December 17, 1915.

The questions upon the appeal were: (1) As between the settlor's executors and the beneficiaries of the income for 13 months after his death, whether an apportionment of the income of the settled properties should be made as on December 17, 1915, the date of the settlor's death. (2) As between the beneficiaries of the income for 13 months after the settlor's death and the beneficiaries of the subsequent income, whether an apportionment of the income of the settled properties should be made as on January 17, 1917, being the termination of the 13 months' period.

* *Present*:—Viscount Haldane, Lord Buckmaster and Lord Parmoor.

These questions involve the construction of parts of Clauses 1 and 4B of the settlement.

Clause 1 of the settlement provided that the trustees should get in the rents, dividends, interest and other income of the settled properties, thereinafter called "the said income," and should after making certain payments thereout, "pay the balance of the said income to the settlor for and during the remainder of his life and down to his death".

Clause 4B provided that within 13 months after the settlor's death the trustees should from and out of the balance of the said income accruing within the first 13 months after the settlor's death (which would have been paid to the settlor, if alive) pay to his widow the 9th respondent Rs. 80,000 in such sums as she might reasonably require for certain purposes and proceeded as follows "Provided also that the said trustees shall divide the remainder of the said balance of the said income arising or accruing during the first 13 months after the settlor's death which should be left after payment thereout of the said sum of Rs. 80,000 among the said Bai Goolbai (the 9th respondent), Jehanghir Bomanji Petit (the 10th respondent), Dhunjibhoy Bomanji Petit (the 11th respondent) and Phirozshaw Bomanji Petit (the appellant) in equal shares.

The originating summons came on for hearing before Kajiji J. who decreed (amongst other things) that the rents and dividends were not apportionable between the estate of the settlor and the trust estate under the deed of settlement or between the fund comprised of the income for the 13 months after the settlor's death and the general estate but that the interest on the debts due to the settlor and settled by him was apportionable.

On appeal that decree was affirmed by Sir Basil Scott, C. J., and Hayward, J.—The appellate Court was of opinion that neither the cessation of the settlor's interest on his death, nor the expiration of the

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13 months period after his death, could be treated as effecting transfers within the meaning of section 36 of the Transfer of Property Act; and that, if they could be so treated, the provisions of the deed excluded the operation of that section.

1923, June 8. *Upjohn*, K. C., *Tomlin*, K. C. and *E. B. Raikes*, for the appellant.

Clauson, K. C. and *R. J. T. Gibson*, for the respondents Nos. 10 and 11.

[The arguments were as to the construction of the settlement; reference being made to *Ex parte Smyth*[1] and the notes thereto and to *Slack* v. *Sharpe*[2].]

June 28.—The judgment of their Lordships was delivered by

VISCOUNT HALDANE:—This is an appeal from the High Court at Bombay, which had affirmed a decree of the same Court in its original jurisdiction. The questions decided had been raised by originating summons, taken out by certain of the present respondents, who were trustees of an *inter vivos* settlement, dated 1st August 1913, and made by a wealthy Parsee inhabitant of Bombay, one Bomanjee Dinshaw Petit, who died on 17th December 1915.

By this settlement the settlor had conveyed a large amount of property to the trustees on trust, *inter alia*, and so far as is material for the purposes of the questions in this appeal, to receive the rents and profits and, after making certain other payments, to make over the balance of income to the settlor himself during his life. After his death the trustees were to realise, by sale, conversion or otherwise, of the trust premises, certain sums, and, within 13 months after the settlor's death, out of the balance of income from what remained, accruing within the first 13 months, to pay to his widow, the first respondent, from time to time and in

(1) (1818) 1 Swans. 337. (2) (1838) 8 A. & E. 366.

such sums as she should reasonably require and the state of the income should permit, the total sum of Rs. 80,000 for purposes mentioned. The trustees were then to divide the remainder of the balance of such income arising or accruing during the first 13 months after the settlor's death among the respondent, Bai Goolbai, the widow, the respondents, Jehangir and Dhunjibhoy, and the appellant, Phirozshaw, the settlor's son, in equal shares; the capital and income, after the 13 months, were, subject to the trusts stated, to go to other beneficiaries under the trust deed as therein provided.

The settled property consisted of land and immoveables specified in the first schedule to the trust deed; shares, bonds and securities specified in the second schedule; and outstanding debts due to the settlor specified in the third schedule.

Questions arose as to the interpretation of the deed, and an originating summons was taken out by the trustees to which the beneficiaries under the trust deed and the executors of a subsequent will made by the settlor were defendants. This summons raised a number of questions, of which two only are now raised on the appeal to His Majesty in Council. The first of these two questions arose between the settlor's executors and beneficiaries under the trust deed. It was whether an apportionment of the income of the settled properties, or any of them, should be made, as if the title to such income had accrued continuously, up to the 17th December 1915, the date of the testator's death. It was contended for the executors that the whole income should be treated as accruing *de die in diem*, continuously, so that although instalments, such as rents or interest, were not actually payable until after that date, the executors of the settlor who was to take during his lifetime should be held entitled to so

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much of what was not actually payable until after his death as was to be attributed on this footing to his title down to the date of his death.

The second question was an analogous one. It was whether, as between those who took beneficially the income for 13 months after the settlor's death, and those beneficially entitled to the income subsequently, a similar apportionment should be made as on the 17th January 1917, being the date of termination of the 13 months' period.

The summons was heard by Kajiji J., who decided against the application of any principle of apportionment, excepting as to interest on the debts due to the settlor specified in the third schedule and such of the securities specified in the second schedule as bore interest. As to these, it was not disputed by the respondents that his view was right. He gave no reasons for his judgment.

The case was heard on appeal by Scott, C. J., and Hayward, J., and these learned Judges affirmed the decision of Kajiji J. The only question which now arises is whether there is applicable, under Indian law, any principle of apportionment which applies to rents and periodical payments, such as rents and profits from land, and the dividends and income arising from shares carrying income periodically payable, such as are specified in the second schedule.

The point is raised on this appeal by one of the beneficiaries whose interest it might have been to contend that the principle of apportionment did not apply to the property in the first two schedules. He has, however, severed from his co-beneficiaries, and contends that the principle does apply, having regard to the terms in which the settlement is expressed, and this is the question which their Lordships have to decide.

The English Apportionment Act of 1870 provides that after its passing, all rents, annuities, and other periodical payments in the nature of income are, unless it is expressly stipulated that no apportionment is to take place, to be considered as, like interest on money lent, accruing from day to day, and shall be apportionable in respect of time accordingly. But this Act does not apply in India, nor do any of the earlier English Apportionment Acts. It is common ground that the principle which applies in the present case is that of the original English law as it stood apart from statute. The older English law on the subject was stated by Lord Eldon in *Ex parte Smyth*[1] and is amplified in the learned note appended to the report of that case by Mr. Swanston. The latter traces it to the two propositions, that an entire contract cannot be apportioned, and that under such an instrument as, for instance, a lease with a reservation of periodically payable rent, the contract for each portion is distinct and entire. The rule, however, while applicable to periodical payments becoming due at fixed intervals, did not apply to sums accruing *de die in diem*. It did not, for example, apply to annuities or to debts. The distinctions drawn were often fine. But it is not necessary for their Lordships to discuss them, because it is plain that, however clear the principle which governed the character of proprietary and contractual rights, it was always open to a testator or settlor, with full power of disposition, to exclude its practical consequences. He had only to say that it was his intention that the person entitled to the fixed sum, payable only after the determination of the intermediate title, should account to those in whom that intermediate title was vested or their representatives. Such an expression of intention had, at least, the effect of creating a trust in equity,

[1] (1818) 1 Swans. 337.

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and might, in certain cases, be operative at law by giving a special character to the title to the periodical payments. It had the effect of making the question, in most instances, one merely of construction of the instrument.

It is common ground that the old law in England, as referred to in 1818 by Lord Eldon in *Ex parte Smyth*[a] was the law applicable in India to the present case, and that under it the income from the property specified in the first two schedules was *prima facie* only apportionable if an intention to make it so was clearly discoverable in the trust deed, while the income arising from the debts specified in the third schedule was apportionable. The only question which now arises is as to the former, and as to this there is no question of difficulty as to the general principle of law. The real controversy is as to whether there is not in the trust deed language which, by implication, imports that apportionment was directed by the settlor to take place.

In order to answer this question their Lordships, therefore, turn to the provisions of the instrument.

Under the first trust in the settlement the trustees are to get in the income of the whole of the property settled, from whatever the sources specified in the schedules "arising," and to pay the balance to the settlor for and during the remainder of his life, "and down to his death". The subsequent direction is contained in the trust in the deed numbered 4 (*b*). This is to pay to the widow within 13 months of the settlor's death out of the balance of the "income accruing within the first 13 months" the Rs. 80,000 already referred to. The trustees are further directed to divide the remaining balance of the income "arising or

[a] (1818) 1 Swans. 337.

accruing" during the first 13 months after the settlor's death among four beneficiaries named in equal shares. The direction in the deed operates under the form of a trust for sale. The balance of the proceeds of sale and the income to be derived from it, are to be held as subsequently directed, "except the income arising or accruing due for and within the first 13 months after the settlor's death," as to which there is reference back to the direction already quoted.

It was argued for the appellant that the juxtaposition of the expressions "arising" and "accruing", and the employment of them in the language of the deed as if interchangeable, indicated that the income was intended to be treated as one the title to which was contemplated as accruing continuously. Moreover, it was said, if the trustees were to alter the character of the investments, they might from time to time, vary the rights of those beneficially entitled at their pleasure, and that this the settlor could not have contemplated. But their Lordships do not think that reliance can properly be placed on these arguments. The character of payments such as those directed is *prima facie* discontinuous at common law. No doubt, the settlor could have given directions which would have modified this character, or at least, have deprived it of the consequences arising from its discontinuity. But such directions would have had to be clear and unambiguous in order to have had the result of varying the rights defined by the general law. Their Lordships can find no such distinctness in direction in the deed before them as would have been required to have this effect.

They will accordingly humbly advise His Majesty that the appeal should be dismissed. The trust estate is very large and the trustees found it necessary to have

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the questions which have arisen decided by the Courts below. There the costs were allowed out of the estate. As regards the present appeal, their Lordships think that justice will be done if the appellant has no costs and the 10th and 11th respondents who contested the appeal have their costs, as between party and party, out of the estate. The trustees do not appear separately on the appeal. They will be entitled to have reimbursed to them any expenses to which they have been put by it.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondents Nos. 10 and 11: Messrs. *Latley & Hart.*

Solicitors for respondents Nos. 5 to 9: Messrs. *Sandersons & Orr Diquams.*

A. M. T.

PRIVY COUNCIL.*

P. C.* 1923. *July* 10.

MADHAVRAO WAMAN SAUNDALGEKAR AND OTHERS, DEFENDANTS *v.* RAGHUNATH VENKATESH DESHPANDE AND OTHERS, PLAINTIFFS.

[On Appeal from the High Court at Bombay.]

Watan lands—Claim to permanent tenancy—Limitation—Adverse possession—Statutory restriction on alienation—Bom. Act III of 1874, sec. 5.

Persons who and whose predecessors in title have claimed to be, and were, tenants of service watan lands cannot acquire title to a permanent tenancy of the lands by adverse possession as against the watandars from whom they hold.

Radhabai v. *Anantrav Bhagvant Deshpande* (1885) 9 Bom. 198, distinguished and commented upon.

Having regard to the prohibition, imposed in the interest of the State by Bom. Act III of 1874, section 5, against alienation by a watandar,

* *Present*:—Lord Sumner, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.