Privy Council Appeal No. 76 of 1935

M. E. Moolla Sons, Limited (in liquidation) - - - - *Appellants*

v.

The Official Assignee of the High Court of Judicature at Rangoon and Others - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH MAY, 1936.

Present at the hearing:

LORD ROCHE.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

The controversy in this case is between the plaintiff company M. E. Moolla Sons, Limited, which was registered under the Indian Companies Act in 1921 and which was ordered to be wound up compulsorily on 21st June, 1927, on the one side, and the Official Assignee at Rangoon on the other side as assignee of the estate of one M. E. Moolla who was adjudicated insolvent on the 7th May, 1927. The subject matter of the dispute is the right or interest which under a deed of settlement dated 5th May, 1908, made by his father, was taken by one Maung Chit Maung and conveyed by him to Moolla by registered deed dated 17th December, 1919. The controversy arises out of the fact that on the 22nd December, 1920, by an unregistered instrument purporting to be articles of agreement made between Moolla, his mother Mariam Bee Bee, and Mahomed Ali Modan as trustee for the plaintiff company (not yet registered) Moolla agreed to sell to the company his business, the goodwill thereof, and the several properties or assets specified in the first schedule thereto. Item No. 88 in the first schedule was: " Purchase of the right of Maung Chit Maung in the estate of his deceased father U Ohn Ghine . . . Rs.2,50,000."

The plaintiff company, having been incorporated on the 21st January, 1921, the board of directors at a meeting held on the following day 22nd January, 1921, resolved that the company do:—

"ratify, confirm and adopt the Agreement dated 22nd day of December, 1920, and made between Mohammed Ebrahim Moolla of the first part, Mariam Bee Bee of the second part and Mohammed Ally Modan as Trustee of the Company of the third part as provided under Article 4 of the Articles of Association, and that this agreement be prepared and executed without delay and that Mr. Hashim Esooff Moolla do place the Seal of the Company to the said agreement.

"Resolved further that on the execution of the above agreement Mr. Hashim Esooff Moolla on behalf of the Company do accept and carry out, all Conveyances, transfers or Assurances of the various properties mentioned in the aforesaid agreement from Mr. Mohamed Ebrahim Moolla, and Mariam Bee Bee respectively to the Company and do register such documents respectively.

"Resolved further that on the execution of the aforedescribed transfers the said Hashim Esooff Moolla on behalf of the Company do issue scrips to Mr. Mohamed Ebrahim Moolla and Mariam Bee Bee of the Company for the value of the properties respectively transferred by them."

So far as regards the right of Maung Chit Maung under his father's deed of settlement of 5th May, 1908, no further transfer was at any time executed by Moolla to the company, and no registered instrument at any time came into existence to carry out the contract of sale contained in the agreement of 22nd December, 1920.

The first question which arises upon the present appeal is whether or not for the purposes of transfer in 1920 the interest of Maung Chit Maung under his father's settlement was immoveable property so as to be governed by the provisions of section 54 of the Transfer of Property Act (IV of 1882) and section 17 of the Indian Registration Act (XVI of 1908). Maung Chit Maung's father, who executed the registered deed of settlement of 5th May, 1908, was by name Maung Ohn Ghine and his right to make such a settlement depended, inter alia, upon whether he was a Hindu or a Bhuddist. After litigation between his son Maung Chit Maung and his trustees, it was finally held by this Board in *Ma Yait* v. *Maung Chit Maung*, (1921), 48 *I.A.* 553 that he was neither, being a Kalai, that is a member of a community composed of descendants of Hindus intermarried with Burmese women. On this footing he was governed by the Indian Succession Act and the deed of settlement was not prima facie bad as inconsistent with any personal law applicable to him. The provisions of the settlement which are of cardinal importance for the determination of the exact character of the right given thereby to his son Maung Chit Maung are as follows:—

"7. After the death of the Settler and during the lifetime of Mah Yait and until the youngest child attains the age of 20 the Trustees shall pay and divide the income and interest of the estate at intervals not exceeding six months to and between Mah Yait, Mah Mya, Mah Noo and the other children, Rupees One thousand (Rs.1,000) per month being paid to Mah Yait and the remainder being divided equally between the children. If any child shall die before the youngest child attains the age of 20 leaving a child

or children such child or children shall take and if more than one equally between them the share which his her or their parent would have taken. After the youngest child shall have attained the age of 20 the nett proceeds of sale of the properties described in the first, second and third schedules and of any other properties or investments representing the properties in the first schedule shall be divided in equal shares between the children then surviving and the issue of any child or children who may then be dead such issue taking and if more than one equally between them the share which his her or their parent would have taken if he or she had survived until the youngest attained the age of 20.

"8. The proceeds of sale of the property in the fourth schedule shall be divided in equal shares among all the issues in whatever degree living at the death of the youngest child. Until the youngest child attains the age of 20 years the income shall be paid and divided in the same manner as the income of the other properties according to clause 7 hereof. After such event and until the sale take place the income shall be divided between the surviving children or child and the issue of deceased children in equal shares."

The effect of these provisions has already been canvassed by the Board in *Ma Yait* v. *The Official Assignee*, (1929), 57 *I.A.* 10 an appeal rising out of a suit brought by Moolla in 1925. The trustees of the settlement had, it would appear, taken up the attitude that the interest of Maung Chit Maung was a mere *spes* of such character that it could not be transferred having regard to the provisions of section 6 of the Transfer of Property Act. In that case the settlement of 5th May, 1908, was described by Lord Atkin delivering the judgment of the Board as follows:—

"The question at issue was whether the rights that were given, if any, to the assignor of the plaintiff, the eldest son, were a possibility of a like nature of an heir-apparent succeeding to an estate, and so forth, or were a right to sue. That turns upon the construction of the settlement. Without going into it in detail, it may be described as an ordinary settlement made in the settlor's lifetime, by which the settlor transferred to the trustees a large amount of property, in substance, probably, the whole of his property, in trust to allow the settlor during his lifetime to manage the property, and to have the sole benefit of the income both from the immovable and movable property. The settlement then proceeded to declare certain trusts that should come into operation after his death. The trusts to come into operation after his death were that, as to the property comprised in three schedules, the trustees, during the life of the widow and until the youngest child attained the age of 20, were to distribute the income in the manner provided—namely, that they were to pay Rs.1,000 a month to the widow, and to divide the remainder amongst the children, including the eldest son, Maung Chit Maung, the assignor of the plaintiff. After the youngest child attained the age of 20, the property was to be sold, and the proceeds were to be divided in equal shares between the children then surviving, the issue of any child who was dead to represent his father's share. There was a slight alteration in the trusts in relation to the property comprised in the fourth schedule, because in that case the property was not to be distributed until the death of the youngest child, and it was to be divided then amongst the children living at that date."

Lord Atkin went on to say :—

> " That is a very plain and ordinary settlement and it gives very plain and well understood rights to all the parties who benefit under the settlement : a vested right in the income, contingent rights in the corpus."

The question now is whether the interest of Maung Chit Maung was an interest in immoveable property. The Division Bench of the Rangoon High Court, Page C.J. and Mya Bu J., have answered this question in the affirmative, and acting on the law laid down by the Board in *Ariff* v. *Jadunath Majumdar* (1930) 58 I.A. 91 have dismissed the suit.

The subject matter of chapter 3 of the Transfer of Property Act is given by the heading to that chapter as " Sale of immoveable property." The phrase " immoveable property " is not defined in the Act itself though there is in section 3 a provision to the effect that immoveable property does not include standing timber, growing crops or grass. The phrase, however, is defined in the General Clauses Act, 1897 (X of 1897) section 3 (25) as follows : " Immoveable property shall include land, benefits to arise out of land, and things attached to the earth." The words used being " shall include " the provision is not in the strictest sense a definition as the description given does not purport to be exhaustive. By section 4 of the Transfer of Property Act it is provided that section 54, paragraphs 2 and 3, and certain other sections, shall be read as supplemental to the Indian Registration Act, 1908. The Registration Act in section 2 (6) contains a fuller description of what is meant by immoveable property though here again the word used by the legislature is " includes " and the description is not intended to have the exhaustiveness of an exact definition. Clause (6) is as follows :—

> " (6) ' Immoveable property ' includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass."

Section 17 (1) of the Registration Act provides that the following documents shall be registered :—

> " (*a*) instruments of gift of immoveable property ;
>
> " (*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property ; "

By section 49 of the Registration Act—

> " No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall :—
>
> " (*a*) affect any immoveable property comprised therein, or
>
> . . . . . .
>
> " (*c*) be received as evidence of any transaction affecting such property,
>
> unless it has been registered."

It is to be observed upon a comparison of these different sections that while the Registration Act only requires certain

documents to be registered on pain of the consequences entailed by section 49, the Transfer of Property Act by section 54 enacts that (with a limited exception) the sale of immoveable property can be made only by registered instrument. The provisions of the Registration Act by themselves would not operate to render invalid a mere oral sale. On the other hand the somewhat wide phrase " any interest . . . to or in immoveable property " which occurs in clause (*b*) of section 17 (1) of the Registration Act does not occur in section 54 of the other statute.

A consideration of section 54 of the Transfer of Property Act shows that the section in its structure is much influenced by the decision of the legislature to exempt transactions of sale of land of small value from the requirement of registration. It would be obviously undesirable that transactions in contingent or remote interests should be exempted from registration merely on the ground that at the time of the transaction the value was small. For this reason and also for the reason that, in the absence of a registered instrument, delivery is to be required as a formality necessary to the completion of the transaction, section 54 divides its provisions as to immoveable property according as the immoveable property is tangible or intangible. In one respect its language is unhappy, namely, in its employment of the words " in the case of a reversion or other intangible thing." " Thing " is an unfortunate word to apply for more reasons than one, because the reference can only be to an interest of some sort in immoveable property, and it is difficult to see how the phrase " in the case of a reversion or other intangible thing " can be intended to fall short of covering every interest in immoveable property which is not regarded (as e.g., an undivided share in land is regarded) as being tangible immoveable property itself.

For the present purpose it is important to bear in mind that the distinction between moveable and immoveable property is being considered from the standpoint of an Act which deals with the formalities of transfer in connection with a system which is intended to secure registration of transfers as distinct from titles on the one hand and contracts on the other. It is no part of the purpose of the provisions of section 54 that they should have any effect upon the devolution of property; and immoveable and moveable property for the present purpose do not necessarily correspond to real and personal estate in English law, whether or not these notions be specially considered in the light of equitable doctrines concerning trusts for conversion of real estate. Whether the distinction drawn between moveable and immoveable property by the Indian enactments involves a very different test from that applicable in England to determine what is an interest in land under the Mortmain Act or the Fines and Recoveries Act or the Dower Act or under any other English Act is a separate problem in each

case. The Indian distinction may be thought to present some analogy to the distinction between moveable and immoveable property as understood in international law for the purpose of the doctrine *mobilia sequuntur personam*. [Cf. *Murray* v. *Champernowne* (1901) 2 I.R. 232.] The learned Chief Justice in the present case relied upon two English cases decided under the English Dower Act, namely, *Lacey* v. *Hill* (1875) L.R. 19 Eq. 346 at 348 per Jessel M.R. and *In re Thomas* (1886) L.R. 34, Ch.D. 166. In these cases gifts to a widow of a share of income to be derived from land and of a share in the proceeds of sale of land were held to be interests in land within the meaning of section 9 of the Dower Act of 1833.

These cases do not stand alone. Thus *In re Watts* (1885) L.R. 29, Ch.D. 947, a testator was entitled to £800 secured by mortgage upon the life interest of a lady and the reversionary interest of one of her children in the trust funds of her marriage settlement. Part of these funds was invested in mortgage of real estate. It was held that the £800 was an interest in land within the Mortmain Act 9 Geo. 2, c. 36, s. 3. In *Miller* v. *Collins* [1896] 1 Ch. 573 it was held that a married woman's equitable reversionary life interest in a sum of money properly invested by her trustees upon a mortgage of land was an interest in land within the 77th section of the Fines and Recoveries Act, 1833. On the other hand it was held in *In re Lynes Settlement Trusts* [1919] 1 Ch. 80, that the reversionary interest of a daughter in the trust funds of her father's marriage settlement part of which was properly invested in realty and held by the trustees upon trust for sale was her personal estate within Lord Kingsdown's Act (1861) and the Wills Act (1837). While each of these cases may be regarded as a decision upon the question what is an interest in land, and though it may be difficult to suppose that the decision turned upon any special colouring which those words can be supposed to take from their context, or from the purpose of the particular Act in question, nevertheless it cannot be too strongly emphasised that the question in India is entirely a question of construction of the Indian statutes. Elaborate precaution has been taken by those statutes to give such help as an express description can give and in so far as a completely exact definition is not provided the purpose of the Indian statutes and the context of the phrase to be construed must furnish the guide.

A number of Indian decisions have been brought to the notice of the Board. In *Mangalaswami* v. *Subbia Pillai and others* (1910) I.L.R. 34, Madras 64, at 66, an assignment, which was in effect a mortgage of future rents due in respect of the plaintiff's share in certain land, was held to be inadmissible in evidence for want of registration. In the course of a careful and accurate discussion of the question it was said :—

> "The question is whether future rents payable in respect of land are benefits to arise out of land It has never been doubted

> that a lease by a Zamindar or a transfer by him of the zamindari interest, which is generally the right to the melvaram, is a transfer of immoveable property. If the assignment is, however, of an arrear of rent, the benefit has already arisen out of the land and is therefore outside the definition of immoveable property. It has been held that a lease of a right to market dues upon a certain land requires registration as an instrument dealing with a benefit to arise out of land (see *Sikandar* v. *Bahadur* [1905] I.L.R. 27 All. 462), though the profits which have already accrued from a lambardar were held not to fall within the definition of immoveable property (see *Damodar Das* v. Girdhari Lal [1905] I.L.R. 27 All. 564). The decision in *Venkaje Babaji Naik* v. *Shidramapa Balapa Desai* [1895] I.L.R. 19 Bom. 663, seems, almost exactly, to cover the present case. There, a right to assessment due upon certain land was assigned by an unregistered instrument. It was held that the instrument required registration as the assessment had not accrued due at the date of the assignment, but was only to become due in the future."

It was contended for the present appellants that while a right in respect of future rents might be immoveable property where the owner of the right was himself entitled *vis-à-vis* the tenants to collect and enjoy the profits of the land, the same reasoning could not be applied to a case, such as the present, where the right granted was subject to the intervention of trustees, and was no more than a right to receive from the trustees a sum of money out of the income of the property. The case of *Natha Kerra* v. *Dhunbaiji and others* (1898) I.L.R. 23 Bom. 1, is, however, in conflict with any such contention. There the testator had directed his trustees to hold certain immoveable property

> " upon trust to pay the rents, profits, interest, dividend and produce of so much thereof as shall from time to time under the provisions of this my will shall remain or be in their hands, unto my wife during the term of her natural life, she thereout maintaining, educating and bringing up my children in a manner suitable to their degree in life."

The children had grown up and had finished their education so that the obligation imposed upon the wife in respect of them had been discharged. It was held that her life interest had been properly attached in execution of a decree against her as an interest in immoveable property. The circumstance that the lady was herself one of the trustees is entirely irrelevant and formed no part of the ground of the decision.

While their Lordships do not regard the English decisions as an authority upon the construction of the Transfer of Property Act, this question whether the intervention of trustees makes any difference to the application of the phrases " immoveable property " or " benefits to arise out of land " or " any right, title or interest to or in immoveable property " is a more abstract problem upon which English authority is not necessarily uninstructive. Their Lordships will quote the observations of Lindley L.J., concurred in by A. L. Smith L.J., in a case already cited (*Miller* v. *Collins* [1896] 1 Ch. 573, at 586) which was a case of a reversionary life interest in a sum of money invested by trustees upon a mortgage of land. The learned Lord Justice observed as follows :—

> "Now I confess I am quite unable to see the impropriety of describing the interest of a person beneficially entitled to money invested on mortgage held by his trustee as an interest in land. The interest of the cestui qui trust is not confined to the money, but extends to the security for it, i.e., to the land held by his trustee. Such land is vested in the trustee, but upon trust for whom? The only possible answer is, upon trust for those persons who are beneficially entitled to the money. If there is only one such person, and he is sui juris, the trustee can be required to transfer the security to him, i.e., to assign the debt and convey the land to him. If there are several such persons, and they are all sui juris and absolutely entitled to the money, and they agree, they can also require the mortgage debt to be assigned and the land to be conveyed to them. These are only illustrations which lead me to say that a cestui qui trust of a mortgage debt has an interest in the land. If the debt is so settled that the cestuis qui trust have not the right to call for an assignment of the debt to them, they are nevertheless as much cestuis qui trust of the whole security and debt and land, and each of them has an interest, though possibly a limited interest, in the one quite as much as the other. It is true they can only reach the mortgagor or the land through their trustee; but this does not show that they have no interest in the land, the legal estate of which is in their trustee."

These observations are at least sufficient answer to the view that the beneficiary has no interest in immoveable property because his right is only to call upon the trustees to carry out their trust or because the distinction between legal and equitable estates does not as such exist in the law of India.

Upon a full consideration of the nature of the interest in the income of his father's estate which was given to Maung Chit Maung by the deed of settlement of 5th May, 1908, and also of his interest in the ultimate proceeds of sale of the properties described in the schedules thereto, their Lordships are of opinion that the High Court of Rangoon rightly held in appeal that the interest of Maung Chit Maung was immoveable property within the meaning of the Transfer of Property Act and the Registration Act. In so saying their Lordships must be understood to refer so far as the interest in the income is concerned, to Maung Chit Maung's interest in future rents and profits. Rents and profits which at the time of assignment had been received by the trustees of the settlement had ceased to be immoveable property, as is sufficiently explained by the passage already cited from the judgment in *Mangalaswami* v. *Subbia Pillai* (*supra*). If the plaintiffs in the present suit had made any case to the effect that prior to December, 1920, the trustees had failed to pay Maung Chit Maung's share of the income to him or to his assignee, and that the arrears were intended to pass to Moolla and from him to the plaintiff company, this part of their case would have been free from embarrassment arising from section 54 of the Transfer of Property Act. No such case, however, would appear to have been made and no proof was given to that effect. In suit No. 271 of 1925 in the Rangoon High Court the trustees of the settlement have

paid over to the Official Assignee an admitted sum of Rs.41,000 representing rents and profits for a certain period. This fact their Lordships learn from the judgment of Shaw J. at first instance in the present case, and as from the appellants' case before their Lordships it would appear (paragraph 11), that the trustees brought this sum into Court as " the share of Maung Chit Maung in the income of the trust estate from the year 1920," there is no doubt good reason to explain the fact that no case has been made with special reference to the income of the estate prior to that year.

The remaining contentions of the appellants may be shortly considered. In view of the fact that by section 52 (1) (*a*) of the Presidency-towns Insolvency Act III of 1909, the property of an insolvent does not comprise property held by the insolvent on trust for any other person, the plaintiff company, while making no claim for specific performance of the contract of 22nd December, 1920, contended that the interest in Maung Chit Maung in his father's settlement never vested in the Official Assignee of Moolla by reason that Moolla was a trustee for the plaintiff company. Why Moolla, who had contracted to sell to the plaintiff company, should be supposed to have made himself trustee for the company by an express declaration of trust is a question not readily answered, and in their Lordships' opinion there is no reasonable evidence of any declaration whereby Moolla expressed an intention to assume any such character. As a means of overcoming the difficulties arising in the plaintiff company's path from section 54 of the Transfer of Property Act, the suggestion of a trust is misconceived. No doubt a contract may raise a trust. Indeed, as was recalled by Lord Macnaghten in *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523, at 546, Lord Thurlow in *Legard* v. *Hodges* (1792) 1 Ves. Junr. 477, referred to "this maxim which I take to be universal that whenever persons agree concerning any particular subject, that in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust." But in the present case part of the plaintiffs' difficulty is that by section 54 of the Transfer of Property Act a contract for the sale of immoveable property " does not of itself create any interest in or charge on such property " according to the law of India. It is further to be observed that by the Indian Trusts Act (II of 1882) section 5 conformably to the general scheme of the other statute :—

> " No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee. These rules do not apply where they would operate so as to effectuate a fraud."

The present case does not appear to be within the last clause of this section since to relegate the plaintiff company to their

remedy by specific performance or to refuse them remedy if they be not entitled to specific performance would not effectuate any fraud. In any view section 54 by itself is in the present case a sufficient answer on the facts and section 5 and section 8 of the Trusts Act are additional difficulties.

It was suggested before the Board that under sections 88, 91 or 92 of the Trusts Act which occur in chapter 9 and deal with "certain obligations in the nature of trusts," the plaintiff company could establish the right which they claim without having recourse to a suit for specific performance, but their Lordships consider that no case under these sections was pleaded and no case was proved.

Another contention of the plaintiffs was to the effect that the Official Assignee of Moolla's estate was estopped from denying that the interest of Maung Chit Maung in his father's settlement was now vested in the plaintiff company. This contention was rested upon the fact that in the previous suit 271 of 1925 an appeal of the trustees of the settlement to His Majesty in Council was resisted at the expense of the plaintiff company, though in the name of the Official Assignee. Their Lordships have some difficulty in seeing how the plaintiffs can make good their case by means of an estoppel, but on the facts it is reasonably plain that no estoppel is made out. By a letter dated 2nd June, 1927, the plaintiff company's legal adviser proposed to the Official Assignee that the company should pay the expenses of the appeal without prejudice to any claim which the Official Assignee might prefer at a later stage. It is true that the Official Assignee, who was also liquidator of the plaintiff company, came subsequently to the conclusion that the right in suit was vested in the company, and was willing that in place of the insolvent the name of the company should be substituted on the record for the purposes of the appeal to England; but on the 2nd April, 1928, the Court decided to make a different order, and the Official Assignee and not the company was brought on the record in the place of Moolla. That the company, in providing the funds for contesting the appeal thereafter were acting on the strength of the proposal that this should be without prejudice to the ultimate decision of the question as between the company and the Official Assignee, is their Lordships think, the only reasonable inference.

The plaintiff company, having omitted, doubtless for good reason, to make any claim against the Official Assignee of Moolla's estate for specific performance of the contract of 22nd December, 1920, their Lordships are of opinion that the Division Bench of the Rangoon High Court rightly dismissed the suit. They will humbly advise His Majesty that this appeal should be dismissed with costs.

(35959—3A) Wt. 8136—2 200 6/36 P. St. G. 338

In the Privy Council

M. E. MOOLLA SONS, LIMITED
(in liquidation).

v.

THE OFFICIAL ASSIGNEE OF THE HIGH COURT OF JUDICATURE AT RANGOON AND OTHERS.

DELIVERED BY SIR GEORGE RANKIN

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