Hukumchand Gulabchand Jain

Vs

Fulchand Lakhmichand Jain and Others

Civil Appeal No. 216 of 1962

(K. Subha Rao, Raghuvar Dayal, R. S. Bachawat JJ)

16.02.1965

JUDGMENT

RAGHUBAR DAYAL, J. -

There is a temple known as Shri Chandraprabhu Khandelwal Jain Temple at Dhulia. Gulabchand Hiralal, father of appellant Hukumchand Gulabchand Jain, a leading member of the Khandelwal Jain Community at Dhulia, looked after the temple for over 40 years till his death sometime in 1950. The appellant looked after it after his father's death. To members of the community interested in the temple, help to be a public temple, instituted the suit against the appellant and the Charity Commissioner, Bombay, praying for the removal of the appellant from possession of the trust properties, for the rendering of true and faithful accounts of all the assets and income of the trust property and for the framing of the scheme for the administration of the trust. It was alleged in the plaint that the appellant's father was maintaining all accounts of income and expenditure concerning the temple and that the funds of the temple were many times advanced at interest and that the temple had come to hold large properties, movable and immovable. It was further alleged that the temple had a large income from offerings, house-rent etc., but the appellant and his deceased father had not been maintaining the accounts properly and that the funds of the temple were being advanced at interest, though no such income was shown as received recently by the appellant.

The appellant, in his written statement, denied that the amount was so advanced at interest as alleged by the plaintiffs and stated that his father had been keeping a ledger in the name of the temple in the accounts in which its income and expenditure had been duly entered since over 40 years and that the appellant himself had kept separate account books for the temple since October 30, 1951. He denied that any income recently received had not been shown in the accounts.

The trial Court held that the appellant had committed minor irregularities in the maintenance of the accounts, that he was liable to render accounts and that the Commissioner was to ascertain the amount due from the appellant on taking the accounts. It definitely held it not established that income, if any, derived by way of interest on loans advanced out of the funds of the temple had not been credited to the account of the temple and that no instance of fraudulent or dishonest misappropriation of temple funds on the part of defendant No. 1 or his father had been established. It found that the meeting of the community had passed a resolution on August 22, 1958, by an overwhelming majority, sanctioning the accounts submitted by the appellant and that only two persons who opposed against the resolution were the two plaintiffs of the suit.

The Commissioner found that on the date of the institution of the suit, i.e. on February 17, 1954, Rs. 10,088-10-3 were due for principal and Rs. 16,853-6-0 were due for interest, from the appellant.

The plaintiffs admitted the report to be correct but the appellant contended that under the rule of damdupat interest exceeding the amount of principal could not be allowed. The appellants contention was accepted and the trial Court passed a decree on April 23, 1955, for Rs. 20,177-4-6 against the appellant, with future interest at 6 per cent per annum. We are not now concerned with the other items of the decree and therefore we make no reference to them.

The appellant deposited the amount due under the decree on July 18, 1955. The plaintiffs appealed and claimed a larger amount on various grounds, including the one that the principle of damdupat should not have been applied and that interest on the balance of the trust fund should have been calculated and compound interest allowed in place of simple interest on the amount of the trust fund in the hands of the defendant or his father.

The appellant filed a cross-objection against the allowing of interest on the balance of the trust funds with his father and himself.

The High Court agreed with the plaintiffs that the principle of damdupat could not be applied in the circumstances of the case and that compound interest should have been charged against the appellant. It therefore set aside the decree passed by the trial Court in so far as it determined the amount due to the temple and referred the case back to the trial Court for re-assessment of the amount due to the temple having due regard to the observations made in its judgment. On an application by the appellant, certificate under Art. 133(1) of the Constitution was granted.

The appellant has then filed this appeal and questioned the correctness of the order of the High Court holding him liable to pay compound interest and holding that the principle of damdupat was not applicable in this case.

The High Court said in its judgment that it was the contention of the plaintiffs that the appellant's father and the appellant used the funds of the temple in their business and that they were therefore liable to account on that footing. There was no such allegation in the plaint or in the memorandum of appeal to the High Court. The High Court referred to the khulasa submitted to the Commissioner by the plaintiffs and stated that it was specifically alleged therein that the amount was being used by the defendant and his father in business. Support for such an allegation was found in the statement Exhibit 24 of the appellant's father in 1931. Reference was also made to the fact that the appellant had nowhere denied the fact of the moneys of the temple being used for the purpose of the business and to the non-production of certain books of account by the appellant. His statement that they were not available was not accepted. The High Court recorded the finding in this form (at p. 43 of the appeal record) :

> "Under these circumstances it would not be an unreasonable inference to draw that the amounts belonging to the temple were being utilised by Defendant No. 1 (the appellant) and before him by his father in their business."

Having come to this conclusion and to the view that the position of the appellant's father and the appellant vis-a-vis the temple funds was that of a trustee, the High Court considered whether the plaintiffs could claim interest on equitable grounds and held that they could claim compound interest with yearly rests, as the money had been used in the business or had been so mixed up with their own funds that it was impossible to say that they had not so used it. The High Court did not apply the rule of damdupat as the liability of the appellant was not founded on loans or on any contract.

It is contended for the appellant that there was neither an allegation nor evidence to the effect that the trust funds had been used in his business by the appellant's father or the appellant and that therefore the appellant was not liable to pay compound interest on the trust funds in his hands or in the hands of his father. It was further urged that if interest was payable by the appellant's father or the appellant on the balance of trust funds, it should be simple interest and the amount of interest could not be more than the amount of principal due on the date of the institution of the suit on the principle of damdupat.

It has not been established in this case that the trust funds with the appellant or his father were used in their trade or business. We have already referred to the finding of the High Court in this respect. It is a very halting finding. The High Court has not definitely held it proved that the funds were used in the business. We say so, as the High Court has said (at p. 46 of the appeal record) :

> "Since we are of the view that the defendant No. 1 and his father have used the monies of the temple in their business or have so mixed it up with their own funds that it is impossible to say that they have not so used it ....."

This is not a clear-cut definite finding that the funds had been used in business or trade. The earlier finding noted at p. 43 of the appeal record and quoted by us earlier, loses its force in view of what has been said later. There is no evidence about such use of the money. There was no such allegation in the plaint.

It was said in the khulasa dated December 22, 1954 and included in the Additional Report of the Commissioner of even date :

> "Because the amount that was received by the defendant in respect of the temple could be utilised by the defendant in his business he used to pay interest thereon at the rate of annas 8."

This too, is not, as stated by the High Court, a specific allegation that the amount was being used in business.

The plaint did not even say that the amount had been always advanced on loan. What it said in para 1 is that the funds of the temple were many times advanced at interest and that no income from interest recently received had been shown in the accounts. No evidence has been led about the regular advance of the trust funds as loans. On the other hand, the accounts show only a few entries about the receipt of interest on the trust funds.

The statement, Exhibit 24, made by the appellant's father on October 26, 1931, in Regular Suit No. 377 of 1931, was in a suit instituted by the appellant's father for the recovery of money advanced on a mortgage at compound rate of interest. Gulabchand, father of the appellant, stated in examination-in-chief, that the funds lend were of the temple, the transactions of the temple were in his name and that interest at compound rate had been agreed upon. In cross-examination he stated that he had with him funds of the temple and that he paid for them compound interest at 8 annas. This statement does not necessarily mean that the appellant's father had been crediting the temple accounts with compound interest, at the rate of 8 annas, on the temple funds in his hands.

Gulabchand made another statement on January 12, 1950. It is exhibit 23. This statement was made in proceedings on Miscellaneous Application No. 110 of 1949. He stated :

> "Suit No. 377 of 1931 had been filed. In the same my deposition has been recorded. I have made a statement that the amount was of the temple. But I gave a statement to that effect as that amount has been set apart for the temple. I have given a statement that after the mortgage deed was executed and before the suit was filed, I set apart this amount for the temple and that the transaction of the temple was in my name. That statement is correct.
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> If it is the amount of the Mandir, I credit it to the Khata of the Mandir. I do not pay interest for the amount of the Mandir. As there was interest in the mortgage deed, I have taken interest at eight annas from Mangilal. I have made a statement that I have with me the amount of the temple and that I pay interest for it at eight annas."

These statements, taken together, lead to the inference that Gulabchand was not crediting interest on the temple funds in the accounts except when he received interest on the amounts lent and that this statement made in 1931 was in connection with the amount lent on a mortgage deed. He charged compound interest from the mortgagor and therefore credited that interest in the accounts. It is significant to note that the four entries about interest were for the years 1927 to 1931 when Suit No. 377 of 1931 was filed. The fact that no interest appears to have been credited after 1931 bears out the inference we derive from the statements of Gulabchand.

There is another matter which throws light on this question and tends to support our conclusion. The report submitted by the Commissioner on November 29, 1954 shows that the balance at the beginning of samvat year 1996, corresponding to 1939-40, was Rs. 7,649-14-3. The amount credited during the year was Rs. 573-12-0 and the amount debited was Rs. 769-3-6. If the opening balance be ignored, there would be a deficit of Rs. 195-7-0 and the accounts for the samvat year 1997 opened with a debit balance of Rs. 195-7-0. This shows that the opening balance of samvat year 1996, i.e. Rs. 7,649-14-3, had been taken out of the accounts. It appears that this amount was taken out of the accounts. It appears that this amount was taken over to some Bhandara account and was credited again in the temple accounts for samvat year 2009, i.e., 1952-53, after being brought out from Bhandara account. Such dealing with this amount does not appear to be consistent with its being used in business.

In view of the shaky finding of the High Court about the funds being used in business by the appellant's father or the appellant and in view of what we have said above, we hold that it has not been proved that these funds had been used in business and that therefore the appellant is not liable to pay compound interest on the balance of the trust funds with his father or himself.

We may now consider whether the appellant is liable to pay simple interest on the balance of trust money with his father or himself.

Two questions arise for consideration and they are whether the trustee is liable to pay simple interest on the trust capital in his hands and if he is so liable what rate of interest be charged from him in the present case. Interest can be allowed on equitable grounds only as no statues in force during the period in suit and dealing with public charitable trusts made the trustee liable to pay interest. The Indian Trusts Act does not apply to public or private religious or charitable endowments and therefore the provisions of s. 23 thereof cannot be used for charging interest from the appellant trustee. The Charitable and Religious Trusts Act has no provision which provides for charging the trustee with interest.

Reference may therefore be made in this connection to what is stated in para 1691 of Halsbury's Laws of England, III Edition. Vol. 38 :

> "Subject to this, or unless a trustee is expressly otherwise authorised or required under the terms of his trust, he must duly and promptly invest all capital trust money coming to his hands, and all income which cannot be immediately applied for the purposes of the trust; and he is liable for any loss which may result from its being improperly invested or being left uninvested for an unreasonable length of time, and for interest during the period of its being so left."

This is so because the trustee has to conduct the affairs of the trust in the same manner as an ordinary prudent man of business would conduct his own affairs. In para 1812 are set out the circumstances in which a trustee, besides being required to account for the principal trust money, can also be charged with interest on it and one of the circumstances is when the Court considers that the trustee ought to have received interest. Such could be the case when the trustee, in breach of his duty, retains the trust money in his own hands uninvested or mixes it with his own money or property.

It appears from the Commissioner's report that the trustee in this case had over Rs. 10,000 in his hands from samvat year 1988 commencing from November 10, 1931, upto February 17, 1954, when this suit was instituted. The trustee kept such a large sum uninvested for a long time extending over 22 years. The accounts show that reasonably he could not have expected to require this amount for any current purpose of the trust during these years. He should have invested the amount. His failure to do so makes him liable to pay interest.

It appears from what is said in para 1814 of Halsbury's Volume 38 that where a trustee simply fails to invest trust money which he ought to have invested or there are no other special circumstances in the case, he is in general charged simple interest at the rate of 4 per cent per annum. We consider it reasonable to charge interest at 4 per cent per annum in this case.

We have now therefore to decide what had been the amount of trust funds in the hands of the appellant's father at different times and what would be the amount due from the appellant on the date of the institution of the suit, both for principal amount of trust money and for accumulated interest with him. We do not consider it desirable that the case be sent back to the trial Court for these calculations, in the light of our finding, as this litigation has been pending for over 10 years and as the accounting is to be done for a period commencing from November 10, 1931, from which date the accounts are available to the Court.

The Additional Report of the Commissioner, dated December 22, 1954, shows that the amount of principal on February 17, 1954, the date on which the suit was filed, was Rs. 10,088-10-3 and that the accumulated amount of interest due on that date was Rs. 16,853-6-0 at the rate of 6 per cent per annum. The plaintiffs-respondents admitted this report to be correct. The defendant also admitted the correctness of the principal amount found due by the Commissioner. He, in fact, did not even dispute that the amount of interest at 6 per cent per annum would be what has been found by the Commissioner. What he contended was that he was not liable to pay interest in excess of the amount of principal found due, in view of the rule of damdupat. In these circumstances, these figures can be accepted as correct.

When the Commissioner had submitted his first report on November 29, 1954, both the parties

objected to the accounts prepared by him. The defendant had objected to the Commissioner's including a sum of Rs. 7,648-14-3 twice over in his accounts. This sum represents the balance at the close of samvat year 1995 corresponding to 1938-39. It was not taken over in the accounts for the samvat year 1996. The Commissioner, in preparing the account, took this amount into consideration without making up the accounts for the samvat year 1996. He found and noted in his accounts that the amount credited to the temple during the samvat year 2009 corresponding to 1952-53 was Rs. 9,978-5-3 and that this amount included a sum of Rs. 7,648-14-3 which had been brought from the Bhandara account. He however did not consider this sum to be the sum which had been not included in the accounts of the temple from the samvat year 1996.

The learned District Judge agreed with the objection of the defendant and held that this amount had been included twice in the Commissioner's accounts.

The respondents did not dispute the correctness of this finding in the High Court and therefore we do not consider it a sound contention that this sum of Rs. 7,648-14-3 be further added to the balance found due by the Commissioner.

The appellant stated that the statement of the balance in hand submitted by him to the meeting on August 22, 1953 was arrived at by adding an amount of Rs. 7,000 to the balance shown in the accounts as he had found a sum of Rs. 7,000 in a bag marked 'Dharmadya' inside a safe. The High Court has not considered the statement of the defendant about so finding a sum of Rs. 7,000 reliable. It was not urged before the High Court, as has been urged before us, that this sum of Rs. 7,000 be included in the amount of trust money in the hands of the appellant on the date of the institution of the suit. The High Court merely dealt with the complaint for the respondents that the Commissioner had not taken this sum into account for the purpose of computation of interest on funds in possession of the defendant. The High Court considered this complaint to be justified. We therefore do not accept the respondent's contention that Rs. 7,000 be added to the balance found due by the Commissioner and hold that the High Court was in error in ordering interest to be calculated on this amount as well.

According to the report of the Commissioner, the amount of interest on the principal amount of trust money in the hands of the trustee worked out to Rs. 16,853-6-0 up to February 17, 1954 at 6 per cent annum. We have held that the interest be calculated at 4 per cent per annum. If follows that at this rate the amount of interest found due by the Commissioner would be reduced to Rs. 11,235-9-4. The principal due on that date was Rs. 10,088-10-3. The question now arises whether the amount of interest be limited to the amount of principal, on the basis of the principle of Damdupat, or not. The High Court has held that the principle of Damdupat will not apply in this case. We agree with that opinion.

The rule of Damdupat applies to cases where a loan is advanced. This is clear from Colebrooke's Digest on Hindu Law.

Part I, Vol. I, of the Digest deals with Contracts. Book I of this Part deals with Loans and Payment. Section I of Chapter I of Book I deals with Loans in General and describes what may or may not be loaned by whom, to whom and in what form, with the rules for delivery and receipt. These matters are comprised under the title 'loans delivered (rinadana)', which means the complete delivery of a loan or debt, by whom, where and to whom made. Chapter II deals with Interest and states at the commencement of Section I :

> "Such interest, as may be taken without a breach of duty on the part of the creditor, is a rule (dherma) for delivery by the creditor. Or .... for it is the nature of a loan, that it should produce to the lender the principal sum advanced, and interest in addition thereto."

The various Articles in this Section use the expressions 'creditor', 'lender', 'loan', 'principal', 'lent', 'borrowers' and thus make it amply clear that it deals with interest on the amounts advanced by a creditor to a debtor. Section I deals with the rates of interest to be charged. Section II deals with Special Forms of Interest. Paragraph 53 thereof states :

> "Interest on money, received at once, not year by year, month by month, or day by day, as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time."

This is what is known by the rule of Damdupat and has been rightly construed, as long ago as 1863, by the Bombay High Court in Dhondu Jagannath v. Narayan Ramchandra [[1863] Bom. H.C. Rep. 47, 49]. Section III deals with Interest Specially Authorized and Specially Prohibited. Article II of this Section deals with Limits of Interest. Paragraph 59 thereof states :

> "The principal can only be doubled by length of time, after which interest ceases."

The limit of interest is different under other paragraphs for loans advanced in different circumstances. Paragraph 61 repeats what has been stated in paragraph 53 of Section II and adds a special rule to the effect :

> "On grain, on fruit, on wool or hair, on beasts of burden, lent to be paid in the same kind of equal value, it must not be more than enough to make the debt quintuple."

It is therefore clear, as stated earlier, that the rule of Damdupat applies in respect of interest due on amounts lent by a creditor to the borrower, the debtor. The question then is whether the funds in the hands of a trustee can be said to be such loans notionally advanced by the trustee to himself as an individual. If their character can be deemed to be such, there may be a case for applying the rule of Damdupat to the interest on such funds and that if it is not so, this rule of Damdupat will not apply to the interest ordered to be paid on such funds.

It has been urged for the appellant that the trustee is a debtor with respect to the trust money in his hands. Reference has been made to Halsbury's Laws of England. III Edition, Vol. 38, page 1044 where it is stated at para 1801 :

> "A breach of trust is, in equity, regarded as giving rise to a simple contract debt."

In the foot-note is stated :

> "Strictly speaking, the relation of debtor and creditor does not subsist between a trustee and his cestui que trust (per Lindley, L.J. in (1886) 18 Q.B.D. 295)."

Lewin on 'Trusts', 15th Edition, states at p. 745 :

> "The debt constituted by a breach of trust is, even after it has been established by a decree, an equitable debt only, and until the Bankruptcy Act, 1869, would not have

> supported a petition in bankruptcy."

It was said by the Earl of Halsbury, L.C., in Sharp v. Jackson [[1899] A.C. 419, 426] :

> "It has been suggested that there was a proposition which could be maintained, as to which I confess I entertain grave doubts whether any decision goes to that extent, namely, that the relation between a cestui que trust and a trustee who has misappropriated the trust fund is not that of debtor and creditor. That it may be something more than that is true, but that it is that of debtor and creditor. I can entertain no doubt. As that question has been mooted and brought before your Lordships' House as one question for decision here, I certainly have no hesitation in saying that in my opinion no such proposition can properly be maintained, and that although there are other and peculiar elements in the relation between a cestui que trust and a trustee, undoubtedly the relation of debtor and creditor can and does exist."

No other Lord expressed an opinion on this point.

The correctness of this expression of the Earl of Halsbury has been doubted in Lake, in re. Dyer, Ex Parte [[1901] 1 K.B. 710, 715] by Rigby L.J., who remarked at the hearing :

> "How is a trustee a debtor ? Can he be sued at common law ? I do not see how he can be a 'debtor', for the money he is fraudulently dealing with is, at law, his own money. No doubt he can be called upon to replace the money, but that must be by a suit in equity, not at law. Notwithstanding the high authority of the statement that has been referred to, I confess I do not understand it."

We are of opinion that though a trustee, who has custody of trust funds, has a pecuniary liability to make good those funds if he has used them and may, on the basis of such a liability, be said to be a debtor of the trust, yet he, as an individual, is not a borrower of the funds from the trust and cannot be said to have taken a loan from himself as a trustee in charge of the trust funds. His liability to pay interest, when ordered by the Court on equitable grounds, does not come within the provisions dealing with interest in Hindu Law, as mentioned in Colebrooke's Digest.

There is no fixed rate of interest which a trustee be liable to pay as there is no contract between him as a trustee and as an individual to pay interest. He simply uses the money in his custody. It is only when the Court determines his liability to pay interest that interest is to be calculated on the principal amount due from him. It is not the case of a creditor letting interest accumulate and thus make the debtor pay interest much more than what he had borrowed as principal.

The principle of Damdupat was evolved both as an inducement to the debtor to pay the entire principal and interest thereon at one and the same time in order to save interest in excess of the principal and as a warning to the creditor to take effective steps for realising the debt from the borrower within reasonable time so that there be not such accumulation of interest as would be in excess of the principal amount due, as in that case he would have to forego the excess amount. There may be justification for the principle of Damdupat applying in the case of an ordinary creditor and a debtor, but there seems no justification for extending that principle to the case of a trustee who has to pay interest on the funds in his hand with respect to which on certain grounds he is held liable to pay interest. We therefore hold that the rule of Damdupat will not apply with respect

to the interest adjudged payable by a trustee on his committing breach of trust with respect to the trust funds in his hands.

The result then is that the appellant is liable to pay Rs. 10,088-10-3 for principal and Rs. 11,235-9-4 as interest, upto the date of the institution of the suit, i.e. upto February 17, 1954.

We therefore allow the appeal, set aside the decree of the High Court and modify the decree of the trial Court accordingly. The result will be that the suit temple will be entitled to get from defendant No. 1 a sum of Rs. 21,324-3-7 upto the date of the suit, together with future interest at 4 per cent per annum on Rs. 10,088-10-3 from the date of the suit till the date of payment. The appellant will bear his costs throughout. The costs of the respondents will come out of the estate.

Appeal allowed.

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