SUPREME COURT OF INDIA

Plerce Leslie and Co. Ltd.

Vs.

Violet Ouchterlong Wapshare

C.A.Nos.1174 of 1965

(S. M. Sikri, R. S. Bachawat and K. S. Hegde, JJ.)

20.12.1968

JUDGEMENT

BACHAWAT, J.:-

1. One James Henry Wapshare owned several estates incluing Naduvattam in the Nilgiris known as the Ouchterlony Valley Estates, having tea, coffee, cardamom and cinchona plantations. He lived in Naduvattam and Ootacamund with his wife Nellie, daughters Violet and Dorothy and sons James and Edward. In 1927 he formed a limited company known as the Ouchterlony Valley Estates Limited, having a share capital of Rs. 15 Lakhs and conveyed the estates to the company. All the shares of this company, sometimes referred to as the "old company" were held by him and the members of his family. The company borrowed Rs. 10 1/2 lakhs from the Imperial Bank of India against the issue of debentures. The loan was secured by a mortgage of the estates under a debenture trust deed dated May 13, 1927 and was repayable on May, 15, 1937. In default of payment within November 15, 1937 the trustee under the debenture trust deed was authorised to enter into possession of the estates and sell them. By an agreement dated August 16, 1936 Pierce Leslie and Co. Ltd., referred to as the appellant company, was appointed as the secretary of the old company. On April 15, 1937 the old company was served with a notice that in default of payment of the loan within November 15, 1937 the trustee for the debenture holders would take possession of the estates

and sell them. On May 18, 1937 James Henry Wapshare died leaving behind him his widow and his sons and daughters. In November 1937 after prolonged negotiations between the Wapshares and the appellant company it was settled that the company would purchase all the estates except Naduvattam for Rs. 10 lakhs. On December 29,1937 formal agreements were executed providing that the old company would convey to the appellant company all the estates except Naduvattam for Rs. 10 1/2 lakhs and the appellant company would convey Naduvattam to Mrs. Nellie Wapshare for Rs. 50,000 and would at the same time advance Rs. 50,000 on the hypothecation of Naduvattam crops. By January 10, 1938 the appellant company paid the entire purchase price and took possession of the estates and the entire dues of the Imperial Bank of India were liquidated. On March 30, 1938 the old company passed a special resolution for its voluntary winding of and appointed Capt. F. Murcutt as its liquidator. The appellant company promoted a new company known as Ouchterlony Valley Estates Ltd., for the purpose of acquiring the estates. The new company was incorporated on September 5, 1938. Fifty percent of its shares were held by the appellant company. Formal conveyances of the Naduvattam estate in favour of Mrs. Nellie Wapshare and of the other estates in favour of the new company were executed by the old company between January and May 1939. On the the execution of the conveyances the new company entered into possession of the estates conveyed to them. As soon as the affairs of the old company were wound up the liquidator made up the final accounts of the winding up and called the final meetings of the company and its creditors. On or about November 29, 1939 a copy of the final accounts and the return of the holding of the meetings were filed with the registrar of joint stock companies and were registered under S. 209 H of the Indian Companies Act, 1913. In view of S. 209 H (4) the old company stood dissolved with effect from March 1, 1940. On December 21, 1950 Mrs. Nellie, Violet, Dorothy James and Edward Wapshares instituted the present suit against the appellant company, impleading the appellant company as defendant No. 1, 12 persons said to be its directors and officials as defendants 2 to 13, Capt. F. A. Murcutt as defendant No. 14, the new company as defendant No. 15 and the old company as defendant No. 16. The plaintiffs prayed for a decree dealing that the old company had not been wound up in accordance with law and was still in existence as a corporate personality, a declaration that the old company was the real owner of the aforesaid properties and the new company held them in trust for the old company, a decree vesting or re-transferring the properties to the old company and alternatively to the plaintiffs an accounts. The plaintiffs alleged that the appellant company as the secretary and manager of the old company was bound in a fiduciary character to protect its interest and by availing itself of this character gained pecuniary advantage by purchase of the properties from the old company in 1939, that the agreement for sale and conveyances in respect thereof were induced by fraud, fraudulent concealment, misrepresentation, undue influence and improper means, that the new company was controlled by the appellants, that all the defendants were privy to the fraud, that the winding up of the old company was procured by the defendants fraudulently, that the plaintiffs discovered the fraud in September 1949, and the plaintiffs were the only shareholders of the old company and as such were entitled to maintain the suit. Defendants 4, 11 and 14 died during the pendency of the suit. The defunct old company impleaded as defendant No. 16 did not appear but the other defendants contested the suit. The Subordinate Judge, the Nilgiris, Ootacamund, dismissed the suit. He held that (1) there was no fiduciary relationship between the appellant and the old company; (2) the impugned agreements and conveyances were not induced by fraud, fraudulent concealment, undue influence or improper means and were valid and binding on the old company and the plaintiffs;

(3) the suit was barred by limitation; (4) the old company was dissolved in accordance with law and

was not in existence, and (5) the plaintiffs had no locus standi to maintain the suit. The plaintiffs field an appeal from the decree. The Madras High Court allowed the appeal in part and passed a decree asking the appellant to pay to the plaintiff's Rs. 1,50,000. The High Court held that (1) there was a fiduciary relationship between the appellant and the old company; (2) the appellant by availing itself of its fiduciary character gained a pecuniary advantage of Rs. 1,50,000 and to the extent of this unjust enrichment was bound to reimburse the plaintiffs; (3) the suit was not barred by limitation and (4) in spite of the dissolution of the old company the plaintiffs were entitled to maintain the suit. Aggrieved by this decree the appellant company filed C. A. No. 1174 of 1965 and the Wapshares have filed the cross-appeal C.A. No. 1935 of 1966 on the strength of certificates granted by the High Court under Article 133 (1) (d) of the Constitution.

2. The following 3 questions arise in these appeals:-

(1) was there a fiduciary relationship between the appellant and the old company, and if so, did the appellant company by availing themselves of this fiduciary character gain a pecuniary advantage of Rs. 1,50,000;

(2) is the suit barred by limitation: and

(3) are the plaintiffs as shareholders of the old company entitled to maintain the suit.

3. It is a settled rule of equity that any person bound in a fiduciary character to protect the interests of another person should not put himself in a position where his interest and duty conflict. If by availing himself of his fiduciary character or by entering into any dealings under circumstances in which his interests are or may be adverse to those of such other person he gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained, see Trusts Act, Section 88. But there is no rule which incapacitates a trustee from dealing with a cestui que trust. In Coles v. Trecothick, (1804) 9 Ves 234 (247) = 32 ER 592 (597) Lord Eldon said : "a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving, that the cestui que trust intended, the trustee should buy; and there is no fraud, no concealment, no advantage taken, by the trustee of information acquired by him in the character of trustee. I admit, it is a difficult case to make out, whenever it is contended that the exception prevails." As stated in Kerr on Fraud and Mistake, 6th Ed. page 192 :-

"Thus a trustee for sale may purchase the trust estate, if the cestui que trust fully and clearly understands with whom he is dealing and makes no objection to the transaction, and the trustee fairly and honestly discloses all that he knows respecting the property and gives a just and fair

price, and does not seek to secure surreptitiously any advantage for himself. The onus however, rests upon the trustee, and he is bound to produce clear affirmative proof that the parties were at arms length, that the cestui que trust had the fullest information upon all material facts, and that having this information he agreed to and adopted what was done."

4. The appellant company was the secretary of the old company, was in charge of its correspondence and accounts and was actively engaged in assisting it and its shareholders in selling the estates. In course of its employment the appellant acquired intimate knowledge of the income prospects and the market value of the properties. We agree with the High Court that the appellant stood in a fiduciary relationship towards the old company and was bound to protect its interests. The appellant entered into an agreement with the old company for the purchase of the properties. It promoted the new company to which the properties were subsequently conveyed. Fifty per cent of the shares of the new company were held by the appellant company and the new company was managed and controlled by it. The onus is upon the appellant company to establish affirmatively that the transaction was righteous and that it did not gain any pecuniary advantage by availing itself of it s fiduciary character. We are inclined to think that the appellant company has discharged this difficult burden of proof.

5. Since 1931 the Wapshares were keen on selling the estates. From time to time there were offers from intending buyers but none of them materialised. In 1936 there was a slump in tea and coffee prices. There was a possibility that the tea restriction scheme would be abolished and there would be a further slump in tea prices. The old company was indebted to the Imperial Bank of India for Rs. 10 1/2 lakhs against the issue of debentures secured by an English mortgage over all the estates. The Bank was pressing for the payment of its dues. There was every likelihood that in default of payment by November 15, 1937 the trustee for the debenture holders would enter into possession of the estates and sell them without intervention of court. The old company was not in a position to liquidate the debt without selling the estates, in April 1937 M/s. Kuruvilla Bros. agreed to purchase the properties, on May 18, 1937 James Henry Wapshare died. In July 1937 the deal with Kuravilla Bros. fell through The Wapshares and the old company tried their best to raise loans and for that purpose issued advertisements and contacted several bank and insurance companies but they were unable to raise any loan. In the begining of November 1937, the Wapshares had before them a firm offer from Arbuthnot Lathem and Co. for purchase of the estates for Rs. 14 lakhs. But the Wapshares were not willing to sell Naduvattam. The bungalow at Naduvattam was the home of the Wapshare family. Naduvattam was the highest altitudinal estates, grew the best tea in the area and had a very good name in the London tea market. The appellant had previously offered to buy all the estates for Rs. 111/2 lakhs only. The Wapshares wanted the appellant to make an offer which would enable them to retain Naduvattam and at the same time to liquidate the Bank's dues. At the insistence of the Wapshares interviews were arranged at Calicut on Novermber 4, and November 6, 1937 between Dorothy and Robert representing the Wapshars and Mr. Thorne representing the appellant. Mr. Thorne could not offer more than Rs. 10 lakhs for all the estates excluding Naduvattam. He told the Wapshares that they should accept the offer of Arbuthnot Lathem and Co. as they would get Rs. 14 lakhs by selling all the estates. The Wapshares were anxious to retain Naduvattam and were inclined to accept the appellant's offer. They took some for consideration and at the same time asked the Arbuthnots for time till November 10, for consideration of their offer. On November 10, Dorothy sent a telegram to the appellant company informing them that the family

was agreeable to their new proposal. The draft agreement was sent by the appellant an November 11. In the begining of November Mrs. Wapshare was ill and was in a hospital in Bangalore. But on November 10, she was well enough to discuss the appellant's proposal. On November l2, she came to Ootacamund and on November 13 she went to her lawyer Consalves, discussed the matter with him and gave her consent. Consalves was approached to put the bargain in legal form. He took exception to the draft agreement, but found the formal agreements to be free from blemish. At a meeting held on November 18, 1937 the shareholders of the company unaninously accepted the proposal. Mrs. Wapshare, Dorothy, Robert and Edward were present at the meeting. The meeting was also attended by E. W. Simcock, chairman of the company, H. M. Small, the director, nominated by the Imperial Bank of India and C. K. Pittock. All the Wapshares were sui juris. Dorothy was a shrewd young lady and the best business brain in the family. All the Wapshares knew the value of the properties intimately. They knew that Naduvattam if sold separately would not fetch more than Rs. 2 lakhs. Yet they chose to retain Naduvattam and set their estates for Rs. 10 lakhs instead of selling all the estates for Rs. 14 lakhs. The reason was that there was no other buyer willing to pay more than Rs. 10 lakhs for the other estates. They had decided not to sell Naduvattam and they were satisfied that Rs. 10 lakhs was a just and fair price for the other estates sold separately from Naduvattam. The appellant's offer enabled them to keep Naduvattam and at the same time to liquidate the Bank's dues. The deal was satisfactory to them in every way. They obtained all necessary legal advice. The documents were in proper legal form. There was no fraud, no concealment and no undue influence. No advantage was taken by the appellant of any information acquired by them in their character as secretary. The Wapshares clearly understood that they were dealing with the appellant company, had the fullest information about all material facts and that having this information they agreed to sell. They made no complaint abourt it for 12 years. Their long acquiescence in the sale is evidence the the transaction was in all respects see Parkes v. White, (1805) 11 Ves 209 (226) = 32 ER 1068 (1074).

6. On the whole and especially having regard to the long acquiescence we hold that the transaction was just and fair and that the appellant did not gain any pecuniary advantage by availing themselves of their fiduciary character or under circumstances in which their interests were in conflict with lose of the old company. In saying so we must not be understood to say that we encourage transactions of this type. Having regard to their fiduciary character the appellant company might well have avoided entering into the transaction.

7. The next question is with regard to limitation. The conveyances in favour of the new company were executed on January 14, 1939 and May 15, 1939. Simultaneously with the execution of the conveyances the new company entered into possession of the properties. Even before that date by January 10, 1938 the appellant company had taken possession of the properties. The suit was filed on December 21,1950 when the Indian Limitation Act, 1908 was in force. The plaintiffs cannot claim relief on the ground of fraud and consequently Article 95 has no application. Section 10 does not apply as the properties are not vested in the new company for the specific purpose of making them over to the old company or to the plaintiffs. Article 144 does not apply for several reasons. In the plaint there is no prayer for recovery of possession. The plaintiffs claim declaratory reliefs, a decree vesting or retransferring the properties to the old company or to the plaintiffs and accounts. Such a suit is governed by Article 120. The High Court passed a decree for money and not for recovery of immovable properties. A suit for such a relief would be governed by Article 120. Even

if the suit is treated as one for recovery of possession of the properties it would be governed by Art. 120 and not by Article 144. The old company could not ask for recovery of the properties until they obtained a reconveyance from the new company. The cause of action for this relief arose in 1939 when the properties were conveyed to the new company. A suit for this relief was barred under Article 120 on the expiry of six years. After the expiry of this period the old company could not file a suit for recovery of possession. In Rani Chhatra Kumari Devi v. Prince Mohan Vikram Shah, 58 Ind App 279 = (AIR 1931 PC 196) the Privy Council held that in a case where the property was not held by the trustee for the specific purpose of making it over to the beneficiary and the trust did not fall within Section 10, a suit by the beneficiary claiming recovery of possession from the trustee was governed by Article 120. Sir George Lowndes said :-

"The trustee is, in their Lordships' opinion, the "owner" of the trust property, the right of the beneficiary being in a proper case to call upon the trustee to convey to him. The enforcement of this right would, their Lordships think, be barred after six years under Article 120 of the Limitation Act, and if the beneficiary has allowed this period to expire without suing, he cannot afterwards file a possessory suit, as until conveyance he is not the owner."

It follows that the suit is barred by limitation.

8. The third question relates to the maintainability of the suit. The plaintiffs sued to recover properties belonging to the old company. The company went into voluntary liquidation and was wound up. As already stated the company stood dissolved on March 1, 1940 under Section 209 H of the Indian Companies Act, 1913. No application was made within 2 years to declare the dissolution to be void under Section 243. Apart from Section 243 the dissolution might possibly be set aside in a suit on the ground of fraud but the plaintiffs failed to establish any fraud affecting the dissolution. The dissolution has put an end to the existence of the company. In these circumstances, the appellant contends that all the properties and the rights of the old company, if any, have vested in the government by escheat or as bona vacantia and the plaintiffs cannot sue for the recovery of its properties. The plaintiffs dispute the right of the government to take the properties by escheat or as bona vacantia, and they contend that on the dissolution of the old company, its assets have now vested in its shareholders.

9. The common law of England recognises the right of the Crown to take property by escheat or as bona vacantia.

Escheat proper was the lord's right of re-entry on real property held by a tenant dying intestate without lawful heirs. It was an incident of feudal tenure and was based on the want of a tenant to perform the feudal. vices, see Halsbury's Laws of England, Vol. 16, Art. 830. On the tenant dying intestate without leaving any lawful heirs his estate came to an end and the Lord was in by his own right and not by way of succession or inheritance from the tenant, see Attorney-General of Ontario v. Andrew F. Mercer, (1883) 8 AC 767 (772). In most cases the land escheated to the Crown as the lord paramount, in view of the gradual elimination of intermediate or mesne lords since 1290. The

Crown takes as bona vacantia goods in which no one else can claim a property. In Dyke v. Walford, (1848) 5 Moo PC 434 (496) = 13 ER 557 (580) it was said that "it is the right of the Crown to bona vacantia to property which has no other owner." The right of the Crown to take as bona vacantia extends to personal property of every kind, see In re, Wells; Swinburne-Hanham v. Howard, 1933-1 Ch 29 (49). Escheat of real property of an intestate dying without heirs was abolished in 1925 and the Crown now takes all his properties as bona vacantia. On the dissolution of a company the Crown took its real property by escheat and its personal property as bona vacantia. Technical escheat of the property of a dissolved company was abolished in 1929 and now under Sec 354 of the English Companies Act, 1948 all the property and rights of a dissolved company is deemed to be bona vacantia and accordingly belongs to the Crown.

10. The right of the government to take by escheat for want of an heir or successor or as bona vacantia for want of a rightful owner has been recognised in our country for a long time. Statutes 16 and 17 Victoriae, C. 95, S. 27, an Act to provide the government of India asserted that "all real and personal estate within the said territories escheating or lapsing for want of an heir or successor, and all property within the said territories devolving, as bona vacantia for want of a rightful owner, shall (as part of the revenues of India) belong to the East India Company in trust for Her Majesty for the service of the government of India." By Section 54 of the Government of India Act, 1958 the existing provision was continued in force and was construed as referring to the secretary to state in council in place of the company. Section 20 (3) (iii) of the Government of India Act, 1915 provided that the revenues of India received for His Majesty would include "all movable or immovable property in British India eschewing or lapsing for want of an heir or successor, and all property in British India devolving as bona vacantia for want of a rightful owner." Section 174 of the Government of India Act, 1935 provided :

"Subject as hereinafter provided any property in India accruing to His Majesty by escheat or lapse or as bona vacantia for want of a rightful owner shall if it is property situate in a Province, vest in His Majesty for the purposes of the Government of that Province, and shall in any other case vest in His Majesty for the purpose of the government of the Federation." Article 296 of the Constitution now provides:-

"Subject as hereinafter provided, any property in the territory of India which if this Constitution had not come into Operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union."

11. These enactments show that in this country the government takes by escheat immovable as well as movable property for want of an heir or successor. In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure. It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction. "Private ownership not existing, the State must be owner as ultimate lord", see Collector of

Masulipatam v. C. Venkata Narainapah, (1859-61) 8 MIA 500 (525) (PC). The rules of English feudal law relating to mesne lords are not applicable, and consequently the zamindar could not take by escheat the land of a tenant dying without heirs. The right of escheat belongs to the government only, see Ranee Sonet Kooer v. Mirza Himut Bahadoor, (1875-76) 3 Ind App 92 (at p. 101). The government has the right to take all property within its jurisdiction by escheat for want of an heir or successor and as bona vacantia for want of a rightful owner, see Bombay Dyeing and Manufacturing Co. v. State of Bombay, 1958 SCR 1122 (1146) = (AIR 1958 SC 328 (339)). Supdt. and Remembrancer of Legal Affairs, West Bengal v. Corporation of Calcutta, 1967-2 SCR 170 (204) = (AIR 1967 SC 997 (1016)). Consequently the property of an intestate dying without leaving lawful heirs, and the property of a dissolved corporation passes to the government by escheat or as bona vacantia. The property taken by escheat or as bona vacantia belongs to the government, subject to trusts and charges, if any, previously affecting it.

12. As already stated, technical escheat of the real property of a dissolved company was abolished in England in 1929 and Section 354 of the Companies Act 1948 now provides that all property and rights of a dissolved company shall be deemed to be bona vacantia and shall accordingly belong to the Crown. There was no statutory provision like Section 354 before 1929. In the absence of such a provision, the Crown took the real property of a company dissolved before 1929 by escheat and its personal property as bona vacantia, except in so far as its right was cut down by statute, see 1933-1 Ch 29 (supra). Likewise in this country, the government took by escheat or as bona vacantia all the properties of a company dissolved under the Indian Companies Act, 1913 except in so far as its right was cut down by that Act. P. B. Mukherjee, J., expressed a similar opinion In re, U. N. Mandal's Estate Private Ltd., AIR 1959 Cal 493 at p. 498.

13. Accordingly the shareholders or creditors of the dissolved company cannot maintain any action for recovery of its assets. No effective relief can be given in such action, as the company is not a party and the assets cannot be restored to its coffers. On this ground in Coxon v. Gorst, 1891-2 Ch 73 an action by creditors for recovery of moneys due to the dissolved company was dismissed, and in re, Lewis and Smart Ltd., 1954-1 WLR 755 it was held that a pending misfeasance summons abated on the dissolution of the company.

14. The plaintiffs' contention that the properties of a dissolved company passed to its shareholders is based upon American law, which is stated in American Jurisprudence, 2d, Corporations, Art. 1659 thus :-

"Apart from statutory provisions which frequently embody the following rule also, the general equitable rule now followed in this country is that upon the dissolution of a corporation, the property and assets of the corporation constitute a trust fund for the benefit of its creditors and stockholders. This rule necessarily displaces and makes obsolete the early common law rule as to the reverted of real estate and the escheat of the personal estate of corporations in such a case, and practically makes obsolete the doctrine as to the extinguishment of the debts owing by and to the

corporation in such cases. Stated in another way, the rule is that after the dissolution of a corporation, its property passes to its stockholders subject to the payment of the corporate debts. The inherent jurisdiction of equity over trusts embraces the power to administer the assets of a dissolved corporation." The subject of dissolution of corporations is discussed in Articles 1628 to 1996 of the book. The corporation is dissolved by a judgment of Court (Art. 1645). For the purpose of complete winding up of its a affairs, statutes provide that even after dissolution the corporation shall continue to exist and may sue or be sued for a limited period, see Articles 1662, 1668, 1669, 1671, 1673. Statutes also provide for appointment of a trustee for the dissolved corporation and their effect is to convert its properties into a trust fund and to abrogate the common law rule of escheat, Articles 1676, 1677. The stockholders of the dissolved corporation can accordingly maintain an action against the trustee for distribution of the surplus assets after payment of the debts of the corporation, see Bacon V. Robertson, (1854-57) 15 L Ed 499.

15. The law in our country is very different. Here the winding up precedes the dissolution. There is no statutory provision vesting the properties of a dissolved company in a trustee or having the effect of abrogating the law of escheat. The shareholders or creditors of a dissolved company cannot be regarded as its heirs and successors. On dissolution of a company, its properties, if any, vest in the government. In 1891-2 Ch 73 (supra) page 78 Chitty, J., summarily rejected the contention that a chose in action vested in a company passed on the dissolution to its creditors. He said : "This supposed vesting in the creditors of the company's chose in action is a mere fiction with nothing in the statute to support it, and is in the teeth of the provisions of the statute." It follows that the plaintiffs are not entitled to maintain this suit.

16. A question may arise whether the government takes the property of a dissolved insolvent company subject to a trust for payment of its debts, see in this connection, In the matter of, Chandbali Steamer Service Co., (1956) 60 Cal WN 278 (284-296) and 1933-1 Ch 29 (supra) at pages 38 and 50. But that question does not arise in the present case and we express no opinion on it.

17. In the result, C. A. No. 1174 of 1965 is allowed, the decree passed by the High Court is set aside and the decree passed by the Trial Court is restored. C. A. No. 1935 of 1966 is dismissed. There will be no order as to costs in this Court and in the High Court.

Appeal allowed.