Sheth Dahyabhai Chimanlal (dead) by Lrs.

Vs

Sheth Ambalal Himatlal

Civil Appeal No. 1927 of 1969

(D.A. Desai, A.D. Koshal, R.B. Misra JJ)

06.05.1981

JUDGMENT

DESAI, J. –

1. Sir Rustom Vakil of Ahmedabad died on November 1, 1933, leaving behind him his widow Lady Tehmina, three sons Jehangir, Percy and Toos and his daughters. He had made his last Will and testament on November 18, 1924. By this Will he appointed five persons as executors and gave a specific direction in Clause 8 of the Will that certain properties therein specified be settled on trust by executing a trust deed and the executors were to be trustees for the purpose of the trust. A further direction was given that his son Jehangir be appointed as an additional trustee and executor when he attained the age of 21 years. By Clause 8-F of the Will he directed that during the life time of his sons Jehangir, Percy and Toos the entire income of the trust properties shall be enjoyed by them in equal shares but that after the life time of each son, trust property falling to his 1/3 share, interest as well as principal shall go to his children (sons and daughters) in the proportion therein mentioned. After his death there was some litigation between Percy on the one hand and Jehangir, Toos and Lady Tehmina on the other for administration of the estate of the deceased. The litigation ended in a consent decree and pursuant to the terms of the consent decree a trust deed was executed on April 14, 1941. Some of the trustees named by the testator had died in the meantime with the result that the trust deed named Jehangir, Percy, Lady Tehmina and three other persons as trustees. A schedule was annexed to the trust deed specifying the properties which were settled on trust in fulfilment of the direction given in the Will of the testator. A reference to the Tenth Schedule is necessary for the purposes of this appeal in which shares of a number of companies and the right to specific share in the income of certain managing agency companies was enumerated. By 1948, of the three trustees other than the descendants of the testator only one Sarosh Kothawala was surviving and he desired to retire as a trustee. Accordingly, by the indenture dated August 3, 1948 Sarosh Kothawala retired as a trustee and Toos, one of the sons of the testator was appointed as a trustee. Consequently, Jehangir, Percy, Toos and Lady Tehmina were the trustees and from amongst them Jehangir, Percy, Toos were also the beneficiaries of the trust.

2. On October 12, 1949, Jehangir took a loan of Rs. 1,00,000 from first respondent Sheth Ambalal Himatlal and assigned to him by way of charge to secure repayment of the amount advanced, all rights, claims and interest over the income payable to him under Clause 8-F of the Will of Sir Rustom Vakil. On January 7, 1950, Toos borrowed a loan of Rs. 1,00,000 from the first respondent and made an identical assignment of his share of the income in favour of the creditor. On May 28, 1950, Percy borrowed a loan of Rs. 1,00,000 from the first respondent and made a similar assignment of his share of the income in favour of the first respondent. Notice of assignment was given to the trustees in each case on the very day on which the advance was made. Jehangir, Percy

and Toos obtained from first respondent creditor extension of time for the repayment of the advance of Rs. 3,00,000 on the pretext that the income of the year 1949-50 was yet to be recovered by them and by pledging a part of the shares comprised in the trust. Respondent 1 asserts that in consideration of the extension of time granted by him, the debtors Jehangir, Percy and Toos agreed to be jointly and severally liable for repayment of the whole of the amount of Rs. 3,00,000 to him. Subsequently, on June 14, 1951, Jehangir, Percy and Toos borrowed a loan of Rs. 3,00,000 from the appellant Sheth Dahyabhai and assigned in his favour the right to receive certain dividend and the right to receive the income of the three commission agencies till the debt was fully repaid. A further loan of Rs. 3,00,000 was borrowed by Jehangir, Percy and Toos from Sheth Dahyabhai and executed an assignment of an identical nature in his favour. The second deed of assignment was impounded by the Collector for adjudging the adequacy of the stamp duty but that is not relevant for the present purpose. The dispute in this appeal is with regard to the priority to claim payment under the assignment in favour of the first respondent and the appellant. Respondent 1 claims priority in payment over appellant under assignment in his favour. He also made a further claim that he was entitled to priority in payment pursuant to agreement undertaking joint and several liability for the whole of the amount of Rs. 3,00,000 to him. Appellant Dahyabhai disputed the double priority claimed by the first respondent which led to a suit being Civil Suit No. 179/52 filed by the first respondent in the Court of Civil Judge (Senior Division), Ahmedabad. To this suit respondent impleaded the present appellant Sheth Dahyabhai, the heirs of Jehangir who had died in the meantime, the heirs of Percy who also had died in the meantime, Toos and Lady Tehmina and the various companies whose shares were pledged either with the first respondent or the appellant as also the official assignee representing the estate of Jehangir and Toos who had been adjudged insolvent in their life time and the trustees of the properties at the relevant time. It is not necessary to refer to the various averments in the plaint save and except saying that first respondent prayed for a declaration that the transfers made by way of assignment or mortgage in favour of the appellant were not binding upon the first respondent and for an injunction restraining the appellant from recovering the income which was payable to him. A further declaration was sought that the first respondent had a prior and preferential right to the income of the assigned choses-in-action and sought an injunction against some of the other defendants restraining them from acting contrary to his rights under the assignment. A prayer was also made that it be declared that Jehangir, Percy and Toos were jointly and severally liable to the plaintiff for his dues and he had a prior and preferential right even in respect of the joint and several liability of his debtors.

3. At some stage of the litigation Union of India had to be joined as a defendant as defendants 4-10 in the suit, some of the companies shares of which were the trust property, notified that they have been served with notice by the Commissioner of Income Tax to pay the dividends and share of income due and payable to the trustees of the trust to the Income Tax Department. After impleading the Union of India as defendant, the first respondent amended his plaint adding a further prayer that it be declared that the first respondent had prior and preferential right as against the Union of India to receive income of the trust properties and for an injunction restraining the Union of India from obstructing or interfering with the right of the plaintiff.

4. The appellant contested the suit, inter alia, contending that he was not aware of the loans advanced by the plaintiff and that he was also not aware of the assignments in his favour and that the first respondent-plaintiff was negligent in not intimating to the companies whose shares were the trust property about the assignment in his favour and that this inaction or omission amounted to negligence on the part of the first respondent-plaintiff and he was not entitled to claim any priority over the appellant defendant and that the appellant was a bona fide transferee for value without notice of the assignment in favour of the plaintiff.

5. It is unnecessary to refer to the priority claimed by Union of India in view of the fact that the trial court negatived this priority and the First Appeal No. 612/56 filed by the Union of India in the High Court of Bombay was dismissed and no further proceeding appears to have been taken.

6. The suit filed by the first respondent was decreed in his favour save and except holding that the question of joint and several liability of the three debtors could not be decided in the suit filed by the first respondent. Aggrieved by the decision of the trial court the appellant-first defendant in the suit preferred First Appeal No. 1/57 in the High Court of Bombay. A Division Bench of the High Court heard the appeal of the present appellant, First Appeal No. 612/56 filed by the Union of India, and four other appeals with which we are not concerned in the present appeal. The High Court by a common judgment confirmed the decree of the trial court according priority to the claim of the first respondent over the present appellant. On the question of joint and several liability of the three debtors claimed by the first respondent, the High Court reversed the finding of the trial court and declared that three brothers, the three debtors accepted joint and several liability for repayment of the three loans of Rs. 1,00,000 each advanced by the first respondent. However, the High Court posed to itself another question whether the assignment made in favour of the first respondent covers the joint and several liability of each of the three brothers to pay the outstanding loan and whether this joint and several liability can be accorded priority over the appellant and directed that the issue be remitted to the trial court for certifying its finding to the High Court. After the trial court certified the finding to the High Court, the appeal was set down for hearing and finally the High Court declared that priority of the plaintiff does not extend to the additional claim of the plaintiff first respondent herein arising from the acceptance by Jehangir R. Vakil, Percy R. Vakil and defendant 4 of the joint and several liability to pay the balance of loans taken in respect of each of them by the other two.

7. Aggrieved by the decree of the High Court according priority to the debt of the three debtors Jehangir, Percy and Toos in repayment of the debt over the first defendant, the letter has preferred this appeal by certificate. It may be made clear that the first respondent has neither filed cross-objections nor any separate appeal questioning the decree of the High Court not according priority to the joint and several liability undertaken by the three debtors.

8. The only question that survives for consideration in this appeal is whether any case is made out for interfering with the concurrent finding of the trial court and the High Court about the prior and preferential right of the first respondent to recover his debt from the income of the trust property payable to the three beneficiaries over the appellant who is another creditor of the same debtors.

9. Assignments in favour of the first respondent were prior in point of time to the loans advanced by the appellant. The claim of priority of the first respondent is questioned by the appellant contending that on account of the omission, inaction or negligence on the part of the first respondent the appellant being a bona fide transferee for value without notice, the first respondent is estopped from claiming priority over the appellant.

10 Mr. S.K. Dholakia, learned Advocate who appeared for the appellant urged three specific instances of inaction, omission or negligence on the part of the first respondent, the cumulative effect of which would result in an estoppel against the first respondent claiming priority over the appellant. Says Mr. Dholakia that the first respondent : (i) failed to notify the companies whose shares were the trust property, the income from which was to be received by him about the assignment of the right to recover the income thereof; and this omission having regard to the fact that the trustees and beneficiaries were the same, would constitute negligence and thereby he was

estopped from claiming priority over appellant who though a subsequent assignee was bona fide transferee for value without notice; (ii) omission or failure of the first respondent to take a Power of Attorney or some such authority by which he could recover the dividends directly from the companies thereby enabling the appellant to collect the income in respect of which now priority is claimed by the first respondent; (iii) negligence of the first respondent in not enquiring whether the income for the year 1949-50 available to the debtors was recovered or not and yet granting extension of time in repayment of debt on a mere representation of the debtors that the income was not received.

11. Jehangir, Percy and Toos the three debtors each borrowed a loan of Rs. 1,00,000 from the first respondent. All the three of them were trustees under the trust settled pursuant to the direction in the Will of late Sir Rustom Vakil. Simultaneously they were also the beneficiaries of the trust. Each one of them was entitled to a certain income, namely, dividends distributed by the companies whose shares were held in trust as also a share in the managing agency commission of certain companies. What emerges from this recital is that the trustees were also the beneficiaries and debts were incurred by the beneficiaries in their capacity as beneficiaries. While borrowing loan the beneficiary debtors assigned their right to receive income from the trust property which as trustees they were bound to distribute, and as beneficiaries they were entitled to receive, to the first respondent creditor in repayment of the loan advanced by him to each of the beneficiary. The assignment is thus of an actionable claim because there was no controversy that the dividends of a share in company can be assigned as a chose-in-action (see Re Severn and Wye and Severn Bridge Rly. Co ((1896) 1CH 559)). The assignors were the debtors who as beneficiaries were entitled to receive the dividend income. The assignee is the first respondent. Notice of assignment was given to the trustees who were liable to distribute the dividend income. Beneficiaries could have claimed the income from the trustees and beneficiaries who assigned the right to recover the income to their creditor also being trustees, had the notice of their own action. Even then there was formal notice to the trustees of the assignment.

12. Now the grievance is that though the notice of assignment may have been given to the trustees, yet obviously the real notice intended by the section ought to have been given to the companies who were to distribute the dividend income and omission to give notice to the companies was evidence of the negligence of the first respondent creditor and thereby he would be estopped from claiming priority over a subsequent creditor who advanced loan after making an enquiry with the companies about the assignment and who would thus be a bona fide transferee for valuable consideration without notice of assignment. This approach overlooks the substantive provision in Section 153 of the Companies Act, 1956 which provides that no notice of any trust, express, implied or constructive, shall be entered on the register of members or of debenture holders. The shares in the name of the trustees but the fact that they were trustees would not be recognised by the companies. The obligation is of the trustees to distribute the dividend income. The trustees had the notice of the assignment. Even if the creditor first respondent had given notice of assignment to the companies, they would have taken no note of it because the companies were bound to distribute dividends to the members whose names appeared on the register of members as maintained under Section 150 of the Companies Act. In this view of the matter we fail to see how the decision in Brahmayya & Co. v. K.P. Thangavelu Nadar (AIR 1956 Mad 570), would help the appellant in which it was held that to the general rule that a person cannot give a better title than he himself has, there is the qualification in favour of a bona fide purchaser for value without notice. Applying this general principle, the assignee of a debt may be estopped from questioning the act of the original debtor in paying up the debt to the original creditor if he failed to give the notice of assignment but it would be a question of fact in each case whether the assignee had given requisite notice sufficient to inform the original

debtor about the fact of assignment. And in this case it is the concurrent finding of fact that the firsts respondent had given notice of assignment to the trustees who in the facts of the case also happened to be the assignees. And notice of assignment is to be given to the person under an obligation to pay debt or money to the assignor and they would be in the facts of this case the trustees who admittedly had received notice. To claim benefit as a bona fide transferee the appellant ought to have made enquiry from the trustees and not from companies who would have neither recognised trust nor assignment. Therefore, there is no substance in the contention that the omission on the part of the first respondent to give notice of assignment to the companies would estop him from claiming priority over the subsequent creditor.

13. The second limb of the submission was that the first respondent by not taking a power of attorney or some such authority from the assignors to collect the dividends directly from the companies as was done by the appellant, was grossly negligent and this omission on the part of the assignee, would estop him from claiming priority over the appellant. This approach betrays lack of knowledge of the legal position about payment of dividends on shares of companies. The company incorporated under the Companies Act, 1956 or an existing company must maintain as enjoined by Section 150, a register of its members. Section 154 permits a company to close the register of members and this is resorted to when the dividend is to be declared so that the dividend may be paid to the person whose name as member is entered in the register of members. Now, the trustees in the instant case had got their names entered as members of the company and obviously the dividend would be payable to them. Once the trustees recovered the dividend they were under an obligation to distribute the income to the beneficiaries. And the recipient of the income with a liability to distribute the same had received notice of assignment. There was no further obligation on the part of the first respondent to obtain a power of attorney so as to make arrangements for directly receiving the dividend from the companies. The companies may or may not recognise such authority. If the appellant did obtain such a power of attorney that by itself is not indicative of a legal liability for every assignee to make such an arrangement for safeguarding his interest. Therefore, not taking a Power of Attorney or some such authority by which the first respondent could have managed to collect the dividend income directly from the companies would not be indicative of any negligence, inaction or omission on the part of the first respondent, as as to confer same right on the appellant.

14. The last limb of the submission was that the first respondent was negligent in granting an extension of time of repay the loan under the pretext that the income for the year 1949-50 was not available to the debtors even though the same was already recovered. The High Court rejected this contention by observing that the mere failure of the plaintiff to give any intimation of assignment to the companies was not indicative of a negligence on the part of the first respondent. That is a different aspect altogether. If, however, the debtors obtained an extension of time for repayment of the debt on a representation made to the first respondent and the first respondent granted extension it could be of no assistance to the present appellant. The question is whether the present appellant made sufficient enquiry before advancing the loan from his debtors or the trustees about any assignment made by the beneficiary debtors ? In the absence of any specific enquiry in this behalf, not from the companies nor from the trustees, but from the debtors or trustees, the submission that the first respondent was negligent sounds hollow. In our opinion, even if the first respondent granted extension of time for repayment of debt that would not give any right to the appellant to contend that thereby his debt is jeopardised and that such action of the first respondent amounted to a representation to the present appellant acting on which he advanced loans which would stop the first respondent from claiming priority over the appellant which, on obvious facts, the first respondent was entitled to enjoy. Therefore, the submission is without merits and must be rejected.

15. These were all the contentions in this appeal and as we find no merit in any of them, the appeal fails and is dismissed but in the circumstances of the case with no order to costs.

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