

## **BOMBAY HIGH COURT**

R.D. Sethna

Vs

Grace Edith Hemmingway

(B Scott, Kt., C.J. Batchelor, J.)

31.03.1914

### **JUDGMENT**

#### **B Scott, Kt., C.J.**

1. Charles Andrew Wakeford, an European inhabitant of Bombay, died there on the 18th October 1912 at the age of 82 or 84, unmarried He left him surviving as his next-of-kin ten grand-nephews and nieces : four-the children of his predeceased niece Jane Elizabeth Williams: and six-the children of his predeceased nephew Edmund Charles Harrison. The plaintiff, one of the daughters of the above-mentioned Jane Elizabeth Williams, applied to this Court for letters of administration; but before they were granted she filed this suit against the defendant Wilmot Harrison, the son of the abovementioned Edmund Charles Harrison, for a declaration that a sum of Rs. 10,000 deposited at the Hongkong and Shanghai Bank formed part of the estate of the deceased, and for such other reliefs as might enable her to get in the said amount.

2. The deceased was a Government pensioner and in addition to his pension was the owner of the deposit of Rs. 10,500 at the Hongkong Bank which fell due on the 7th of August 1912. previous to that date he mislaid the receipt and on the 24th of July he went to the Bank with the defendant to inquire what formalities should be followed in order to enable him to recover the money deposited. He was given a form of indemnity to sign, which he took away with him; but on the 4th of August the missing receipt was found. He had been taken ill about the 2nd of August and there can be no doubt from the medical evidence that on the 3rd and 4th of August his state of health was very poor. On the 7th of August he signed his name on the back of the receipt and gave it to the defendant with a letter addressed to the bank directing them to transfer the amount to the defendant. The defendant took these two documents to the Bank but he was informed that as he had not been identified by the deceased the amount could not be dealt with. The defendant returned to the Esoof Building where the deceased was living and wrote out at the dictation of the deceased Ex. 3, which was signed by the deceased, and after the signature deceased identified the signature of the defendant. The letter runs as follows:-Sir, I hereby state that I have found my

Bank receipt, Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew. I also wish you to hand over the amount of Its. 10,500 which is in fixed deposit to my nephew Wilmot Charles Harrison to his account.

3. The defendant obtained from the Bank Rs. 420, the interest due on the deposit and also Rs. 500 out of the principal and obtained a deposit receipt of Rs. 10,000 in his own name for the balance. The deceased died on the 18th of October and after the funeral the plaintiff was told for the first time by the defendant what the deceased had done. The plaintiff wrote through her solicitors on the 21st of November 1912, claiming that the deceased had left a will and Rs. 10,000 deposited in the Hongkong Bank, and calling upon the defendant to prove the will. The defendant's solicitors replied on the 27th of November 1912, and wrote again on the 28th of December (sic) defendant was continuously visiting the deceased, and from the 3rd of August, when the deceased was very ill, the defendant took privilege leave and stopped with the deceased. His wife also was visiting the deceased daily from that time.

4. I am satisfied on the evidence that the deceased was anxious that the defendant should have the benefit of this money deposited with the Hongkong Bank. There is no doubt that there was in existence at that time a will, which is referred to by the deceased in his letter of the 19th of December 1910. That will has not been forthcoming. It cannot be suggested now that that will has been suppressed by the defendant, and therefore, I must take it for granted that it was destroyed by the deceased. If I believe the evidence of the defendant and his witness Mr. Barwick, it was destroyed on the 24th of July. According to the defendant's evidence after he had been with the deceased to the Bank and to the Secretariat, they went to the Crawford Market, where they met with Mr. Barwick and had some conversation with him. From the Market the defendant and the deceased went to the deceased's rooms in Essoof's Buildings and Mr. Barwick came shortly afterwards. Mr. Barwick has deposed that in his presence the deceased asked the defendant to take the will out of a box, that the defendant read the will and handed it to the deceased, and that the deceased tore it up saying that he wanted to give the money in the Bank to the defendant as the defendant was going to look after him to the end. This evidence is supported by the terms of the letter, Ex. 3. Even if I believed the whole of that evidence, it does not follow that the deceased intended to give the immediate interest of this money to the defendant. What I think the evidence points to is this, that the deceased did not want to have the bother of having to sign documents and having to go to the Bank to recover interest, and he also did not want there to be any trouble after his death with regard to a will, but he wished that after his death the defendant should have the benefit of this money and that the defendant might be able to draw it without any further trouble. This could be effected by having the deposit receipt in the name of the defendant. I do not think that he intended that the defendant should be able to make away with the money during his lifetime or that the defendant should be able to draw the interest

without making due provision for his maintenance. All the evidence and all the surrounding circumstances of the case are perfectly in consonance with this finding.

5. Therefore, Section 80 of the Trusts Act will apply. The defendant must be considered as holding the deposit receipt for the benefit of the legal representatives of the deceased. It has been argued further for the plaintiff that even if there was the intention to transfer the beneficial interest in this debt due by the Bank to the defendant, yet a Court of Equity would set it aside if it was satisfied that the donor was not fully aware of what he was doing. The case of *Anderson v. Elsworth* (1861) 3 Giff, 154 has been cited in support of that proposition. However, I hardly think that the facts in that case are similar to the facts in this case. There is a considerable difference between a long legal document, which a layman would find it difficult to understand without its effect being explained to him by a lawyer, and the gift of a sum of money. If the deceased had in his mind the giving away of these Rs. 10,500, and acted in such a manner as to make a gift-an immediate gift of that sum-it would be difficult to say that he did not know what he was doing or to imagine circumstances from which the Court could hold he did not know what he was doing.

6. As regards the Rs. 500 paid by the Bank to the defendant out of the deposit of Rs. 10,500 on the 8th of August, the defendant's story is that the deceased gave him leave to draw this money from the Bank for his own use, while re-depositing Rs. 10,000 only, but this evidence is in conflict with the direct instructions given to the Bank by the deceased in his own letter; and I am not satisfied by any means that the defendant was right in getting that Rs. 500 from the Bank. It is certainly very doubtful whether under any circumstances the Bank was right in paying him. However, that matter is not before me now.

7. I find on the first issue that the Rs. 10,500 mentioned in the plaint was not given to the plaintiff by the deceased.

8. A point was raised that the plaintiff is not entitled to a decree, because at the time the suit was filed she had not obtained letters of administration to the estate of the deceased. Section 190 of the Succession Act says: "No right to any of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction." Decisions under Section 187 to the effect that the Court can give relief so long as probate has been granted before the decree apply also to Section 190. Therefore, the plaintiff having obtained letters of administration is entitled to a decree. There will be a declaration that the sum of Rs. 10,000 deposited at the Hongkong and Shanghai Bank forms part of the estate of the late Charles Andrew Wakeford and that the plaintiff is entitled to the same. I order the defendant to execute all such documents as may be necessary to enable the plaintiff to recover the said sum and interest.

9. The defendant appealed. After the filing of the appeal, his estate and effects having passed to the Official Assignee, Mr. R.D. Sethna was added as a party to the appeal.

10. Binning, with Shirt, for the appellant.

Inverarity, with Strangman (Advocate General) and Rallies, for the respondent.

**Basil Scott, Kt., C.J.**

11. The undisputed facts are that one Mr. Wakeford, who was in receipt of a Government pension of Rs. 54 per mensem, had a deposit of Rs. 10,500 with the Hongkong and Shanghai Bank under a deposit receipt of the 7th of August 1911 which fell due on the 7th August 1912. On the 26th June 1912 he wrote to the Bank saying the receipt had been stolen and asking for a duplicate receipt. He visited the Bank soon after and was given a form for an Indemnity to the Bank on the issue of a fresh receipt. He then told the Bank clerk Sunderrao that he wanted a duplicate and wanted to give the money to his nephew the defendant Harrison who had accompanied him to the Bank. The defendant came to the Bank again on the 7th August with the deposit receipt, which had been found duly endorsed and a letter from Wakeford but upon being told he would have to be identified by Wakeford took away the deposit receipt and the letter. He returned the following day with the deposit receipt bearing Wakeford's endorsement dated the 7th August and also with a letter in the following terms:-

Bombay, 8th August 1912. The Agent, Hongkong and Shanghai Banking Corporation. Sir, I hereby state that I have found my Bank Receipt. Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew.

I also wish you to hand over the amount of Rs. 10,500 which is in fixed deposit to my nephew Wilmot Charles Harrison to his account.

Yours truly, Sd. C.A. Wakeford, This is my nephew's signature.

(Sd.) W. C Harrison.

(Sd.) C.A. Wakeford.

12. The defendant asked for a new deposit receipt for Rs. 10,000 and the Bank issued a receipt for that sum in the defendant's name and paid him the interest due on the former receipt and Rs. 500 as the balance of the principal.

13. Wakeford died on the 18th of October 1912 at the age of 84 unmarried and leaving him surviving as his next of kin ten grand nephews and nieces, viz. two sons and two daughters of his predeceased niece Jane Williams and three sons and three daughters of his predeceased nephew

Edmund Harrison. Two days before the due date for payment by the Bank of the sum of Rs. 10,000 secured by the deposit receipt in favour of the defendant one of the daughters of Jane Williams filed this suit claiming a declaration that she as administratrix of Wakeford was entitled to the said sum of Rs. 10,000 as part of his estate.

14. The plaint was defective in that it did not show that the plaintiff had obtained Letters of Administration and it should on that account have been rejected on presentation. The plaintiff, however, obtained Letters of Administration on the 31st October 1913 a fortnight before the hearing and the hearing was allowed to proceed. A decree was passed for the plaintiff declaring that the Rs. 10,000 in question formed part of the estate of the deceased and that the plaintiff was entitled to same. This was not contrary to Section 190 of the Succession Act as remarked by the learned Judge. The only tenable technical objection was to the institution of the suit before the plaintiff had an existing interest in the subject-matter. That point, however, if it had been taken and had resulted in the rejection of the suit at the hearing, would have only led to a waste of time and costs without benefitting the defendant, for a fresh suit would immediately have been brought by the administratrix. The course which the trial eventually took was determined by a ruling of the learned Judge that the endorsement of the receipt by the deceased was not evidence of a gift and that the onus was on the defendant to show how what was the only property of the deceased in August came to be given to him and that if he proved facts from which the Court could deduce that there was a good gift the plaintiff would then have to prove circumstances showing the gift was invalid. On the evidence the learned Judge was satisfied that the deceased was anxious that the defendant should have the benefit of the money deposited with the Bank but did not think that he intended that the defendant should be able to make away with the money in the donor's lifetime or draw the interest without making due provision for the donor's maintenance but he held that there was no effective transfer, having regard to Section 130 of the Transfer of Property Act, of the debt due by the Bank to the deceased and that, if there was, there would be a resulting trust for the legal representative of the deceased under Section 81 of the Indian Trusts Act.

15. We are unable to concur in the learned Judge's conclusion as to the effect of the transaction of the 8th of August. It is established by a preponderance of English authorities that a deposit receipt is not a negotiable instrument which passes either by delivery or by endorsement, but where the money mentioned in the receipt is immediately payable and the receipt is presented duly indorsed together with an order to pay a given individual that individual becomes the owner of the money upon payment by the banker or his promise to hold it at the disposal of the payee. The question is discussed by Buckley J. in *In re Beaumont* [1902] 1 CH. 889,894, where he says :-In all the cases, in order that the gift may be valid, it must I think shewn that the donor handed over either property, or the indicia of title to property, which belonged to him. His own cheque is

not property; it is only a revocable order such that if the banker acts on it the donee will have the money to which it relates. Even without actual payment of the cheque there may be a good gift-for instance, if there is an undertaking by the banker to the donee to hold the amount of the cheque for the latter, that may be enough. Unless there is that, or something equivalent to it, there is no delivery of property, but only a delivery of that which if acted on will procure the delivery of property.

16. An order on a banker to pay money which he holds to credit of the customer is not an assignment of a debt but an authority to deliver property which if acted on is equivalent to delivery by the customer. Here the letter of the 8th of August is such an order and it has been acted on. It may be that if objection had been taken at the hearing it would have been rejected for want of a stamp. That, however, is not an objection which can be effective in appeal now that the letter is on the record (see Section 36 of the Stamp Act.)

17. The defendant is therefore the owner of the money secured by the existing receipt and the plaintiff cannot succeed unless she shows that he holds it in trust for the donor or his representatives. In our opinion the finding of the learned Judge as to the intention of the donor which is as favourable to the plaintiff as the evidence permits negatives the idea of any resulting trust. Upon that finding this is a much stronger case in favour of the donee than *Standing v. Bowring*. (1885) 31 CH.D. 282. The plaintiff in that case being 86 years of age and being possessed of Consols to the amount of 6000 transferred them into the names of herself and her godson. It was proved that she was aware when she did this that she would be able during her lifetime to receive the dividends and that if her godson survived her he would become entitled as survivor. Lindley L.J. remarked at p. 289 :-The plaintiff in her statement of claim and in the Court below rested her case on equitable grounds, and sought to establish a trust in her favour. But the only trust which was consistent with the evidence was a trust to pay her the income of the Consols for the joint lives of herself and the defendant. This trust was not in controversy, but is not sufficient for the plaintiff's purpose. No trust will suffice short of an absolute trust for herself. But it is impossible to impose such a trust on the defendant, when the evidence conclusively shews that she never intended to create any trust of the kind. Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied.

18. The gift in this case was an absolute gift to the donee with the expectation that he would look after the donor till the latter's death. In our opinion the evidence shows, though this is not essential to the defendant's success, that the defendant acted up to the donor's expectations. According to Ex. 10 (a letter of the deceased to the plaintiff in June 1911) the donor paid his rent

out of the interest he then received from the Bank and presumably paid his other expenses from his monthly pension of Rs. 54. In the month following the gift the defendant took the donor to live with him and thus became responsible for his lodging.

19. The learned Judge at one period of the case thought that the fact that an old man of debilitated health gave all his savings to the one among his nephews and nieces who had taken charge of him raised a presumption of undue influence. We are not prepared to assent to this, and the evidence shows that a coolness had arisen between the old man and the plaintiff whom along with her sister he had at one time intended to benefit by will. In our opinion the evidence establishes that the donor was perfectly sensible and competent at the time of the gift and the charge that the defendant exercised undue influence fails. We reverse the decree of the lower Court and dismiss the suit with costs throughout.