

(1933) 08 CAL CK 0041
In the Calcutta High Court

Bibhu Bhusan Dutta and Others

APPELLANT

Vs

Anadi Nath Dutt and Others

RESPONDENT

Date of Decision : 23-08-1933

Acts Referred:

Limitation Act, 1963 — Article 145

Citation : AIR 1934 Cal 87 : 150 Ind. Cas. 398

Judgement

1. The facts of the case may be stated quite shortly. Three brothers, Rajendra, Debendra and Gobendra, lived in commensality as members of a joint family. They had G P. notes of the face value of Rs. 33,000 as part of their joint family properties. Gobendra held the post of Dewan under the Burdwan Raj. In 1305 (1898) he put in as securities with the Raj for his service G. P. notes of the face value of Rs. 20,000 out of the aforesaid securities. In 1309 (1902) the brothers separated in mess. In 1311 (1905) they had a partition of their properties and as a result thereof, so far as the G.P. notes are concerned, they were divided into three shares. G.P. notes of the face value of Rupees 11,000 going to each of the two brothers, Debendra and Gobendra, and to the sons of Rajendra who had by that time died. Rajendra's sons got the notes that were with the family, but Debendra could not do so as the notes of his share formed a part of the security which Gobendra had lodged with the Burdwan Raj as already stated. In 1319 (1912) Gobendra retired from service, but the notes remained with the Raj. In October 1914 Gobendra died. Defendants 1 and 2 are his sons and defendants 3 and 4 his grandsons. The plaintiffs are the heirs of Debendra No. 1 being one of his two sons and No. 2 being the widow of the other. They instituted this suit to recover the said G.P. Notes of Rs. 11,000 or, in default, the equivalent money-value thereof together with interest. The Subordinate Judge, made a decree in favour of the plaintiffs ordering the defendants to return the securities within a week, failing which the plaintiffs were to recover Rs. 14 thousand odd representing the value of the securities and the interest thereon, together with interest pendente lite. Defendants 1 to 3 have then appealed, and defendant 4, as respondent, has supported them.

2. Apart from one other point that was sought to be raised on behalf of the appellants, but which we have not allowed as it was not raised in the Court below and involves investigation of facts, the only ground on which the decree of the Court below has been assailed is the ground of limitation. This contention was overruled by the Court below in the view that the case comes either u/s 10 or under Article 145, Limitation Act. The appellants' contention is that neither Section 10 nor Article 145 applies, and that the case is governed by Article 49.

3. To deal with the question, a few more facts have to be stated. After Gobendra's death, the defendants in 1915 applied for and obtained a succession certificate wherein the G.P. notes of the face value of Rs. 20,000 were shown as debts which they were entitled to collect, and thereafter within a short time, but the date does not appear, they withdrew the same from the Burdwan Raj. On 27th February 1922, plaintiff I wrote to defendant 1:

The Government papers of the value of Rs. 11,000 are with you; the interest thereon, and the principal amount which are due to me should be paid in full within this month if the principal and interest be not paid within, this month, I shall have to sue for it within the month of Chaitra.

4. On 1st March 1922, defendant 1 replied:

I have been surprised on receipt of your letter I do not admit that you will get from me Rs. 11,000 or any sum on account of Government paper or on any other account. I cannot understand why you have written to me in that way? You know very well you never made over to me any money or any Government paper, and that you have got nothing due from me

5. On 21st November 1927 the plaintiffs by a letter demanded from the defendants delivery of the promissory notes and interest asserting that their father Debendra had kept them with Gobendra and that the latter held them as Jimmadar and Trustee of Debendra. On 15th February 1928 they instituted this suit.

6. So far as Section 10, Lim. Act, is concerned the Subordinate Judge has observed thus:

Express trust or trust for a specific purpose within the meaning of Section 10 may be inferred from the circumstances or the conduct of the parties and it is not necessary that the trust should be proved by a written or oral declaration: vide Harihar Prasad Singh and Another Vs. Maharaja Kesho Prasad Singh, . Here the specific purpose was security in the Raj Estate. Gobendra was the trustee for the purpose.

7. Now, one of the most recognized definitions of trust is that given by Lindley, M.R. in *Williams v. Williams* (1897) 2 Ch 12. He defines trust as

an equitable obligation to deal with property in a particular way....A trust is really nothing except a confidence reposed by one person in another, and enforceable

in a Court of Equity.

Godfrey says:

A trustee then is he, who, while holding-legal ownership or possession of, or dominion-over, the subject of the trust, is bound to allow beneficial enjoyment or usufruct of the property to be reaped by another, who is called the cestui que trust or beneficiary. A trustee, properly so called, must have property vested in him or a right to call for a transfer of or to possess such property, and there must be a person or persons for whom he holds or ought to hold such property: *Re Barney* (1892) 2 Ch 265.

8. So far as Section 10 is concerned and upon the facts of the present case, the words, of that section that have to be specially regarded are

has become vested in trust, for any specific purpose," and "for the purpose of following in his or their hands such property or the proceeds thereof,

9. The expression "has become vested in trust" has received interpretations from the Courts which are not quite uniform. For our present purpose it is not necessary to discuss this conflict. The word "vesting" implies property in the subject matter, and that it is contrary to the ordinary accepted meaning of the term "vesting" to say that property is vested in persons by reason merely of their having control over it. Their Lordships of the Judicial Committee in the case of *Vidya Varuthi v. Balusami* AIR 1922 PC 123 at p. 315 of 48 IA observed:

The language of Section 10 gives the clue to the meaning and applicability of Article 134. It clearly shows that the article refers to cases of specific trust and relates to property conveyed in trust.

10. From this it would, seem to follow that the words "vested in trust" in Section 10 are equivalent to the words conveyed or bequest had in trust. The section and the article taken together mean that trust property shall not be subject to any law of limitation, that no length of time shall bar an action to recover such property, but that when trust property finds its way into the hands of an assignee for valuable consideration, the ordinary law of limitation will apply and that the assignee shall have the same benefit as an ordinary purchaser of property, not trust property, would have. While thus merely placing the property in the possession or control of a person does not amount to the vesting of the property in him, it cannot be that the word "vesting" is to imply ownership because a trustee cannot be the owner of the trust property. Markby, J. in the case of *Kheroda Money Dossee v. Doorgamoney Dossee* (1879) 4 Cal 455 at p. 468, speaking of a Hindu widow, who was executrix under the will, of her husband executed prior to the Hindu Wills Act, and dealing with Section 10, Lim Act of 1871, observed:

Possibly, as this is an Act which contains the law of limitation for all classes of persons, the word vest may be used when speaking of a person standing in a fiduciary relation, not in the sense of "owned," but in the sense of "held in

possession;" at any rate I am not prepared to say that had the gift to the sons of Woodoy been vested, the residue of the testator's property would not have been vested in the defendant Doorgamoney within the meaning of the word "vested" as used in Section 10 of the Act.

11. Pigot, J., in the Pull Bench case of the Secy. of State v. Guru Prasad Dhur (1893) 20 Cal 51 (FB), speaking of money held by the Collector as surplus proceeds of a revenue sale, said:

Possession with all the indicia of property in respect of them, so far as regards third parties, is had by the Government. I think this must be vesting of this moveable property within the meaning of the section The word "become" seems to convey every possible manner in which the vesting could take place.

12. In our opinion, while transfer of proprietary rights is not intended, mere transference of management or control is not enough to satisfy the requirements of "vesting" as contemplated by Section 10; a right to call for a transfer and to possess the property for the purposes of the trust and also a power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the "vesting."

13. The expression "for any specific purpose" need not detain us long after the pronouncement of the Judicial Committee in the case of Khaw Sin Tak v. Chuah Hooi AIR 1922 P C 212.

14. Their Lordships have said:

A specific purpose, within the meaning of Section 10 must, in their Lordships' opinion, be a purpose which is actually and specifically defined in the terms of the will or the settlement itself, or a purpose which from the specific terms can be certainly affirmed.

15. Also in the aforesaid case their Lordships have said:

The statement which was made in the authority of Balwant Rao v. Puran Mal (1884) 6 All 1, that the purpose of following the property in the hands of the trustees referred to at the end of Section 10 must be the purpose of restoring it to the trust which is specified in the earlier part of the section, is, in their Lordships' opinion, a sound and critical test by which they consider whether or not any particular trust is within the provisions of this section.

16. In applying Section 10 to the present case the following facts should be remembered. The G. P. notes stood in the name of Gobendra, and presumably he held them as the de facto head of the family and they were deposited with the Burdwan Raj to serve as security for Gobendra's service. The trust pleaded in the plaint was this:

The Government promissory notes of the value of Rs. 11,000 falling to the share of plaintiff 1 were earmarked and made over to and the same continued to remain as before in the custody of the father of defendants 1 and 2.

17. The Subordinate Judge has found that the trust consisted in leaving the G. P. notes with Gobendra for a certain purpose, namely that they were to serve as security deposit with Burdwan Raj for Gobendra's service there. Assuming that the G. P. notes were vested in Gobendra for that specific purpose, the present suit is not for restoring the G. P. notes to that trust, which had been completed and was no longer capable of administration. On that ground alone, if on no other, the suit would fall outside the scope of Section 10.

18. Mr. Basu was aware of this difficulty. He accordingly endeavoured to supplement the Judge's finding by asserting that there was a condition that on Gobendra's leaving the service the G. P. notes were to be returned to Devendra, or to Devendra's estate. Such an understanding may not have been unlikely, but can it be said that such was one of the specific purposes of the trust? We think we must answer the question in the negative. There is no deed nor any oral evidence as to what the conditions of the trust were, and it would be speculation, and not an inference from proved fact?, that the transaction evidenced by the Toka papers Exs. 7 and 7-a to assume that a return of the G. P. notes in specie was an object of the trust that was created. For aught one knows if the money had been set off or repaid in some other way the liability of Gobendra would have been equally extinguished. We are unable to hold that there are any materials which would justify us in affirming with certainty that a return of the G. P. notes in specie to Devendra's estate after Gobendra's service with the Burdwan Raj came to an end was a purpose of the trust. In our judgment therefore Section 10, Limitation Act, cannot be applied to the suit.

19. As regards the applicability of Article 145, which the Subordinate Judge]was of opinion, in the alternative, was the article applicable, Mr. Mitter has addressed to us a learned and weighty argument. He has argued that this article is not applicable, but Article 49 is the correct article to apply. His reasons, with authorities in support, may be summarised here:

Firstly. That Article 145 is applicable to the particular class of bailment known to Roman law under the name of depositum which is a bailment of a specific thing to be kept for the bailor and returned when wanted as opposed to commodatum where a specific thing is lent to the bailee to be used by him and then returned, and both of which again are contrasted with mutuum where money or things are given to be used and other things of the same nature and quality are to be returned instead. So in the case of deposit of money or other things which are not intended to be kept but used the article is not applicable: *Bala Krishnadu v. Narayana Swamy* AIR 1914 Mad 51, also *Gangineni v. Gothipati* (1910) 33 Mad 56. The contention is that Article 49 is applicable to the present case, where the G. P. notes were made over to be used as security.

Secondly. That even assuming that Article 145 is applicable, after demand and refusal, such as there was in the present case, no fiduciary relationship between the depositor and the deposittee could subsist, and that from that point of time at any rate, Article 49 would apply: *Kalyan Mal and Another Vs. Kishan Chand*, .

Thirdly. That the transaction was in the nature of a gratuitous bailment, which under the law is terminated by the death of the bailor or of the bailee (vide Section 162, Contract Act). For this reason, as also the reason that the wording of Article 145 contemplates a suit against the depositary himself and not against his heirs or assigns, that article cannot be applied in the present case, and failing that article the more general article, namely Article 49, should apply.

20. The true nature of the transaction in the present case, in our opinion, was that the G. P. notes were to remain intact with the Burdwan Raj, and remain there as property which Gobendra had put in as security for his service. As between Devendra and Gobendra and at the point of time when the partition took place, and which is the point of time with which we are concerned, the understanding was, not that Gobendra would be defalcating or incurring liabilities in other ways, a supposition which cannot be made in the absence of any evidence to that effect, but that on the termination of his service they or their substitute would come back intact to Debendra. The parties noted down in the Toke, papers Exs. 7 and 7-a, that the G. P. notes were in deposit in the Rajbati and at the same time Debendra gave a receipt acknowledging that he had received them. This fiction of taking and giving again was resorted to, to make the transaction complete as a deposit with Gobendra. To whatever form of bailment this transaction might correspond it was a transaction which, in the absence of a definition of deposit or depositary in the Limitation Act, must be judged by the ordinary dictionary meaning of these words. We entirely agree in the observations of Schwabe, C.J. in the case of *Kishtappa Chetty v. Lakshmi Ammal* AIR 1923 Mad 578 as to the meaning of this article. He said:

I cannot believe that it was the intention of the framers of that statute that the various District Munsifs throughout India or other Subordinate Judges who have to administer the law should have to study either *Coggs v. Bernard* 1 Sm LC 187 or the Roman law in order to ascertain what is the true meaning of Article 145. I think they meant to use simple and plain language, and they used the word depositary; and in using that word they meant simply to say that, where one man's property was handed by that man to another, he became a depositary of it, unless of course there was something in the terms of that handing over which would prevent his being treated as a person with whom it was deposited at all.

21. Taken in this broad sense a deposit would include a commodatum, or the lending gratis to be used by the bailee which is one of the kinds of bailment in Roman law and one of the six kinds of bailment in *Coggs v. Bernard* 1 Sm LC 187. In Story's classification of bailments into three heads it would come under the head of the second class, namely, transactions in the nature of trust for the benefit of the bailee, including gratuitous loans for use. Indeed Story in his bailments, Ch. 2, treats loans of moveables with permission to use under the head of deposits, the essence of a contract of deposit being the delivery of the thing. Maclean, C. J. in the case of *Administrator-General v. Kristokamini Dassee* (1904) 31 Cal 519 observed:

It is often not an easy matter to say whether any particular transaction constitutes a deposit or a loan for use.

22. The learned Chief Justice pointed out that where the thing lent is not cash such difficulty is not generally felt. In that case the suit was for recovery of Government securities or their equivalent in money deposited by the plaintiff's predecessors it being intended that the depositary should hold the securities on account of the plaintiff subject to the right of dealing with them by sale or pledge should necessity arise. Sale, J. had held that it was immaterial whether the transaction was regarded as one of deposit or of loan because in either case the article applicable would be Article 145: see *Kristo Kamini Dassi v. Administrator-General* 7 CWN 476. The decision was upheld on appeal by Maclean, C. J. and Stevens, J. it being held that the defendant might fairly be regarded as a depositary of the notes within the meaning of Article 145. Hill, J. dissented holding that

an essential characteristic of a deposit properly so called is that the thing deposited should not be used by the depositee and his liability is to return in specie the very thing deposited when his right to retain it has determined the general property in the subject matter of the deposit remaining meanwhile in the depositor.

23. In *Lala Gobinda Prosad v. Chairman of Patna Municipality* 6 CLJ 535 it was held by this Court that although the word deposit ordinarily implies the deposit of specific property returnable in specie it has a wider meaning. Even upon the definition given by Hill, J. the present case, in our opinion, would satisfy the requirements of a deposit, for it was not open to Gobendra to destroy the securities, but only, if need be, to be substituted by such fresh securities as the authorities might choose to issue. We are of opinion, therefore, that the first contention should fail. As regards the second contention we must dissent from the view propounded therein. We are supported in the view we take by a long series of decisions of all the Courts, e.g., *Shivlal v. Bhavani Shankar* (1902) 26 Bom 430, *Gangineni v. Gothipati* (1910) 33 Mad 56; *Gangahari v. Nabin Chandra* AIR 1916 Cal 869; *Promotho v. Pradyumno* AIR 1921 Cal 416 and *Ma Shew v. Ma Saw* AIR 1928 Rang 309. As regards the third contention, if the idea of a gratuitous bailment under the Contract Act is to be imported into the Limitation Act it cannot be gainsaid that by virtue of Section 162, Contract Act, the bailment must on the death of Gobendra have come to an end. But as we read the provisions contained in Article 145, Lim. Act, it takes no notice of the termination of the bailment; what it is concerned with is the time when the deposit was made.

24. But the question which presents to us greater difficulty is the question whether the suit, as against the defendants who were not themselves the actual depositaries but are only the heirs of the depositary, is a suit within the meaning of Article 145. The only authority of this Court directly bearing on this question is the case of *Promotho v. Pradyumno* AIR 1921 Cal 416 at p. 779 (of 26 C W N) in

which it was held that on the death of a depositary his heirs may be regarded as involuntary bailees. We find it very difficult to agree in this view. Involuntary bailment as we find in text books is a very different thing. Story in his book on Bailments, para. 44-a, says:

There is another class of deposits, which may properly be called involuntary, as contradistinguished from necessary and voluntary inasmuch as each of the latter presupposes some act of the depositor, whereas involuntary deposits may be without the assent, or even knowledge of the depositor. Thus, for example, where lumber, floating in a river is by a great flood or freshet thrown upon the land of another person and is there left by the subsidence of the stream, it may properly be called an involuntary deposit.

25. In para. 83-a, Story gives other such instances, e.g., goods coming upon one's land by the act or negligence of their owner, trees thrown by the wind on the land of a stranger, fruit falling upon another's land by force of wind or like causes. Rights and liabilities of parties in respect of involuntary deposits or finders of goods whom Story deals with under the head of quasi deposits stand in our judgment, upon a very different footing from those of the heirs of a bailee of depositary. In our judgment however the Limitation Act does not take any notice of the termination of the contract of bailment, and omitting all reference to bailment has used the word depositary with the object of relying upon the act of deposit as the starting point of limitation. Loan for use, no doubt, is a form of bailment without reward or gratuitous bailment. By the death of the bailee the bailment comes to an end. But the character of the transaction, in so far as it was a deposit, is not altered, and the person in whose hands the thing deposited comes, if it does by virtue of his succeeding to the estate of the original depositary becomes a depositary all the same.

26. Though we do not agree with all that has been said in the case of *S. Krishnaswami Aiyangar and Another Vs. V.S. Gopalachariar and Another*, , on this point, we agree with that decision, for the reasons we have just given in so far as it has held that a suit against the heirs of an original depositary does come within Article 145. The above being our view on the question of limitation we order that the appeal be dismissed with costs.