
(1951) 12 MAD CK 0007

In the Madras High Court

Case No : City Civil Court Appeal No. 104 of 1949

Devar and Co.

APPELLANT

Vs

C. Radhakrishna Naidu

RESPONDENT

Date of Decision : 11-12-1951

Acts Referred:

Trusts Act, 1882 — Section 5, 6, 7, 8, 88

Citation : AIR 1953 Mad 16 : (1952) 2 MLJ 308

Hon'ble Judges : Basheer Ahmed Sayeed, J

Bench : Single Bench

Advocate : A.K. Balakrishnan, for the Appellant; Subramaniam and Rajagopal, for the Respondent

Final Decision : Dismissed

Judgement

Basheer Ahmed Sayeed, J.—This appeal is against the judgment and decree of the learned Principal City Civil Judge, partially decreeing the

suit brought about by the plaintiff claiming arrears of salary, bonus and dearness allowance.

2. The plaintiff was employed as a driver under the defendants. The defendants are a firm of merchants carrying extensive business in timber in

several places in the State of Madras. The allegations of the plaintiff are that, while he was serving the defendants from February 1943 to June

1947 he was discharged from service without cause and without notice on the 10th June 1947. He, therefore, filed the suit claiming arrears of

salary from 1st June 1947 to 10th June 1947 and three months' salary for wrongful dismissal. He also claimed dearness allowance and bonus for

the period during which he served under the defendants. He alleged that in the accounts maintained by the defendants, the plaintiff was credited

with certain sums on account of dearness allowance, and bonus for the years 1943-44, 1944-45 and 1945-46, and though these sums were credited to the account of the plaintiff they were not paid, notwithstanding the fact that there were entries to the effect that those sums were paid to the plaintiffs.

3. The defendants filed an elaborate written statement. In that written statement they denied that there was any agreement between the defendants

and the plaintiff for payment of dearness allowance, but all the same, the defendants admitted that, as a matter of fact, ex gratia, they gave the staff,

including the plaintiff, dearness allowance calculated at the rate of one third of the month's salary from April 1943 onwards in addition to the

monthly salary to which alone they were entitled in law. They also denied that there was any agreement that the dearness allowance formed part of

the salary and was a term under the agreement of service, but they, nevertheless, averred that in fact dearness allowance was paid to the plaintiff,

though not month by month, but in lump sums as per particulars given in the statement of accounts appended to the written statement. With regard

to the claim for dearness allowance in respect of the year 1946-47 by the plaintiff, the statement of the defendants was that no dearness allowance

was allotted or intended to be paid to the plaintiff for the year 1946-47, and that consequently nothing had been paid to him in that respect, nor

was he entitled to the payment. The defendants did not admit the legal position that by reason of the credit entries in the account books of the

defendants in regard to the dearness allowance, the said entries had in law the effect of transferring to the plaintiff the right to such amounts, for the

reason that they did not form part of the contract of service and that, therefore, such payments were intended to be made only on gratuitous basis.

The defendants further denied the allegations of the plaintiff in regard to the payment of bonuses to the plaintiff or other employees. They

nevertheless admit that, as they thought it fit that some bonus should be given, they had voluntarily and gratuitously declared bonuses and paid the

same to the staff including the plaintiff, as per particulars mentioned in the statement of accounts appended to the written statement, and that no

bonus was allowed to the plaintiff for the year 1946-47 as claimed by him. They also make the further allegation that the plaintiff did not discharge

his duties to the satisfaction of the defendants, but nevertheless the payment of bonus was made in favour of the plaintiff also because it was not thought desirable to make any exception in the case of the plaintiff when other members of the staff were being paid, and so out of pity and consideration, to the plaintiff, he was also paid bonus, and that the dismissal was not wrongful and that the plaintiff was dismissed for the reason that he did not discharge his duties satisfactorily.

4. On these pleadings, the learned City Civil Judge framed about six issues. On the first issue as to the amount of salary payable to the plaintiff, it was agreed between the parties that the claim of the plaintiff might be confined to one month's salary alone, as he had secured an employment within a short period after his cessation of service from the defendants. The question of wrongful termination of service was not, therefore, considered. On the question as to whether there was any agreement for payment of dearness allowance for the years 1943 to 1946 the learned City Civil Judge held that there was no agreement between the parties, but on the question as to whether the dearness allowance and bonus had been actually paid to the plaintiff, the learned City Civil Judge held that neither dearness allowance nor bonus was paid actually to the plaintiff. On the claim for bonus and dearness allowance for the year 1946-47, the learned City Civil Judge held that, that claim could not be maintained. An issue was also framed as to whether the claim of the plaintiff was barred by limitation. On that issue, the learned City Civil Judge held that, in as much as there was a trust created in favour of the plaintiff in respect of the dearness allowance and bonuses claimed by the plaintiff, there was no bar of limitation and that the plaintiff was entitled to recover them from the defendants and he gave a decree in a sum of Rs. 1,333-5-4, being the amount that was credited to the account of the plaintiff in the accounts of the defendant's firm for the years 1943-44, 1944-45 and 1945-46. He did not award costs to the plaintiff and directed that each party should bear his or their own costs. Against this decree and Judgment, the defendants have now preferred this appeal.

5. Mr. O.T.G. Nambiar, appearing for the defendants-appellants, has contended that under the Trusts Act, Sections 5 to 8, on the facts of the present case, no trust created in respect of the movable property is valid, unless

declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. Section 6 of the Trusts Act provides that subject to the provisions of Section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee. Section 8 of the said Act provides that the subject matter of the trust must be property transferable to the beneficiary and it must not be merely beneficial interest under a subsisting trust. Construing these sections, the learned counsel for the appellants contends that if there was no separation of the trust property from the general property of the person who is supposed to be creating the trust, there cannot be a trust created. In this case, on the facts as have emerged from the plaint and written statement and the evidence that is on record, it is urged by the learned counsel for the appellants, that there has been no separation of the trust property from the general property of the defendants, and, therefore, there has been no setting apart or transfer of the property to the beneficiary that there has been no ownership created in the property that could be said to have been transferred in favour of the beneficiary and, therefore, the conclusions of the City Civil Judge are not warranted.

Learned counsel for the appellants has also invited my attention to a decision in -- "Chambers v. Chambers", 1944 2 Mad. L. J. 29. In that case, the Judicial Committee held that the subject matter was not clearly ascertained, that there was no setting aside the appropriation of the amounts as a fund transferable by the husband to the wife, that there was nothing in the case tantamount to a declaration of trust at all and that there was never any absolute parting by the husband with the alleged subject matter of the trust and it, therefore, finally held that there was no valid trust constituted.

Mr. O.T.G. Nambiar also referred to a decision in -- "Ramanathan Chettiar v. Palaniappa Chettiar", 1945 2 Mad. L. J. 164 which has followed the decision in -- "Chambers v. Chambers", 1944 2 Mad. L. J. 29 and has held

that an allocation of specific property or fund to charity is essential both for effecting an endowment under the Hindu law and for creating a valid trust. The mere credit entry in the donor's account books without setting aside and appropriating the sum credited is not sufficient to create a valid trust. The modes in which a voluntary transfer of property in favour of a temple can be validly and effectually made have also been discussed in the course of the judgment delivered by Patanjali Sastri J. in that case. The principles laid down in these decisions relied upon by the learned counsel for the appellants cannot be taken exception to. But the fact remains as to whether the facts disclosed in this case come within the purview of the rulings of these two decisions. Whether the subject matter was not clearly ascertained, whether there was any setting aside and apportionment of the amounts said to have been due to the plaintiff, whether there was an absolute parting with the alleged subject matter of the trust and whether the credit entries, without satisfying the conditions required for creating a valid trust in favour of the plaintiff, are the questions that arise for consideration in this appeal, on the facts as disclosed in the plaint, the written statement and the documentary and oral evidence that has been recorded.

6. The learned counsel for the respondents has taken me through the relevant paragraphs of the plaint as well as the written statement and he has read out the evidence on behalf of the defendants. The claim of the plaintiff has been, in the alternative, on the basis of a contract, a completed gift, relationship of depositor and deposit, creditor and debtor and beneficiary and trustee. The defendants no doubt deny all these relationships as between the plaintiff and themselves, but notwithstanding all these denials, the solid fact remains that the plaintiff served under the defendants as an employee on a particular salary, that his services were dispensed with and that before the services were dispensed with in June 1947, the defendants had credited to the account of the plaintiff several sums of money as and towards bonus and dearness allowance during the period of three years during which the plaintiff served under the defendants. The defendants admit that they not merely made these credit entries in favour of the plaintiff, but they go also to the extent of saying that all the amounts that have been shown as credit entries in favour of the plaintiff have actually

been paid and the dates for the payment are also given in the course of the evidence let in on behalf of the defendants. The first payment is said to

have been made on the 31st July 1944, the second payment on the 31st July 1945 and the third payment on the 18th February 1947, so that the

stand taken by the defendants is that bonus and dearness allowance were not merely declared to be paid in favour of the plaintiff, but that they

were also actually paid to the plaintiff on the respective dates mentioned above.

On the question as to whether actually payments had been or had not been made, of these various sums that were shown as due to the plaintiff, the

learned City Civil Judge has come to the conclusion that the payments of bonus and dearness allowance were never made by the defendants to the

plaintiff. There is also no cogent or convincing proof that the payments of dearness allowance and bonuses had actually been made to the plaintiff.

No receipts appear to have been taken from the plaintiff, for vouching the payments of these sums of dearness allowance and bonuses. The

defendants' witnesses would say that no muster roll was kept, that there was no salary acquittance register at all kept by the defendants and that

the signatures of the employees were not taken when salaries were disbursed. These things reveal a very strange state of business efficiency in the

defendants' firm, which is said to be transacting a very large business in timber throughout the state; so that, I do not think that there is any

justification for me to differ from the finding of the learned City Civil Judge that the amounts shown in the account books of the defendants firm

have not been paid to the plaintiff. That this was so is also corroborated by the fact that the second witness for the plaintiff, who was another

employee and whose services were dispensed with by the defendants and against whom also similar entries for payment of bonus and dearness

allowance were shown, was paid off a sum of Rs. 400 or thereabouts, in settlement of his claim of bonus and dearness allowance, when he filed a

suit against the defendants.

7. The question then is, what is the effect of the credit entries that have been found in the account books of the defendants in favour of the plaintiff.

The contention of the appellants is that those are mere credit entries and they cannot have the effect of creating a trust in favour of the plaintiff. One

has to consider whether these credit entries are merely as credit entries not

sufficient to create a valid trust or, taking the circumstances which obtain in relation to the fund, the credit entries have to be considered as being part and parcel of a trust created by the employer in favour of the employee. The important background that has been furnished in the evidence is that the defendants, who are Income Tax assesseees, when they filed their accounts in the course of the assessment to Income Tax have made statements to the effect that these amounts represented by the credit entries, have been amounts not merely set apart for the benefit of the employees, but also have been actually paid over to them, and on the basis of such setting apart and payment to the plaintiff and other employees, the defendants have claimed benefit, namely, reduction in the assessment of Income Tax & other taxes to that extent. In view of this fact, viz., that the Income Tax Department were made to believe & act upon the representation of the defendants that these amounts, standing to the credit of the plaintiff in the account books of the defendants have been set apart as funds belonging to the plaintiff and as funds paid over to the plaintiff and that thereby the defendants derived benefit in the matter of reduction of Income Tax, the question arises as to whether, in such circumstances, it will not be just and proper that the defendants should be fixed up to their representation to the Income Tax Department to the above effect and whether such a state of things could not be taken advantage of by the plaintiff. I should think that the defendants have not conducted themselves properly judging from the manner in which they have done in relation to the plaintiff and the Income Tax Department. They could not be allowed to blow hot and cold in the same breath. They cannot approbate and reprobate at the same time. But for the fact that they represented to the Income Tax department that these amounts standing to the credit of the plaintiff in their accounts had actually been paid and that they had become the property of the plaintiff, they would not have been entitled to the benefit and consideration in the matter of reduction of the Income Tax from the Income Tax Department. What is the effect of such a representation is the question. Undoubtedly, the effect of such a representation, in my opinion, would be that the amounts, which have been credited to the account of the plaintiff in the account books of the defendants have not only been separated from the general funds belonging to the

defendants, but have also been set apart for the benefit of the plaintiff, as an employee entitled to bonus and clearness allowance. I think, applying the principles laid down in the Privy Council decision in -- "Chambers v. Chambers", 1944 2 Mad.L.J. 29 and also the ruling in -- "Ramanathan Chettiar v. Palaniappa Chettiar", 1945 2 Mad. L. J. 164, I am inclined to hold that the action of the defendants in having made not merely the entries in the account books but also in having represented to the Income Tax Department that these amounts have been set apart for the plaintiff and other employees and that they have been paid over to the employees from year to year, would certainly constitute a trust in favour of the plaintiff.

8. Apart from this, there is the further fact which has to be taken into account, viz, the credit entries do not stand by themselves as mere credit entries in favour of the plaintiff. A reading of the exhibits containing the credit entries would show that this is something like a running account wherein there are also debit entries against the plaintiff. Loans that the plaintiff had borrowed on more than one occasion have been debited to this account of the plaintiff and the balance has been struck, after deducting these loans made to the plaintiff. The payments also made by the plaintiff on occasions have been credited towards this account. Not merely this. On occasions, even the salary has been credited towards this account of the plaintiff. This would mean that these amounts which have been found in the accounts to the credit of the plaintiff have been treated as amounts set apart for his benefit and as belonging to him and that they were separated from the general funds belonging to the defendants and that these amounts had been transferred for the benefit of the plaintiff having been separated from the general funds, as will be clear from the state of accounts and the way in which those accounts have been adjusted from time to time by the defendants themselves. Therefore, it cannot be denied, on one hand, that there is admission by the defendants that these amounts have been allocated and set apart, though they say that this was done ex gratia and not under any contract or agreement between the plaintiff and themselves; and, on the other hand, there is the conduct of the defendants which goes to show that they had treated these amounts as amounts belonging to the plaintiff and payable to him, so that if these amounts, which

belong to the plaintiff and which are payable to him have been retained by the defendants in their hands, the result would be nothing other than that

they were holding those amounts on behalf of the plaintiff as trustees, in order that they may be paid over to him whenever there was a demand by

the plaintiff for the same. Therefore, far from the provisions contained in Sections 5 to 8 of the Trusts Act not being applicable to the facts of the

present case, I think the principles embodied in those sections would certainly come into operation on the facts of the present case and they will

apply.

9. It is not necessary for me to characterise the evidence of the first witness of the defendants; Nevertheless, it furnishes a clear proof that the

defendants intended and agreed not merely to declare dearness allowance and bonuses to the plaintiff and other employees of theirs, but that they

also set apart deliberately those amounts calculated on the basis on which the defendants wanted to pay dearness allowance and bonuses to the

plaintiff and other employees. I do not think that the learned City Civil Judge has appreciated the evidence of D. W. 1 in the correct perspective.

Apart from what is to be gathered from the general tenor of the written statement, it must be considered that there has been an intention and

agreement to pay dearness allowance and bonus to the plaintiff, as revealed by the averments in the plaint, and also in the written statement, as also

the deposition of the first witness for the defence. The credit entries in favour of the plaintiff cannot but be treated as a declaration by the

defendants in favour of the plaintiff that the monies are held for and on behalf of the plaintiff by the defendants. The decision in --

"Kanakasabhpathi Mudaliar v. Hajee Oosman Sahib", 47 Mad L. J. 791 furnishes the nearest approach to the facts of the present case. That

decision is based on an earlier decision in -- "Bai Mahakore v. Bai Mangla", 35 Bom 403, where, one of the judges constituting the Bench held,

relying upon a declaration by the donor, that there was a trust created, whereas Heaton J. held that the relationship between the employer and the

employee was that of a depositor and depositee and that the relationship of depositor and depositee was established in the circumstances of the

case. I do not think that any violence will be done, if a similar inference is drawn from the facts of the present case. The plaintiff having been the

employee and who had been allocated and awarded dearness allowance and bonuses, can be treated as a depositor, as if he had received the money at the end of the year at the time when it was paid and that he redeposited the money with the defendants. Even from that view, the relationship of depositor and depositree will certainly entitle the plaintiff to claim the money that stand credited in the account books of the defendants. If it were certain Immovable properties which were actually not separated from the general properties belonging to the owner, as it was the case in -- "Chambers v. Chambers", 1944 2 M L. J. 29 certainly there would have been some difficulty in coming to the conclusion that there was no declaration of the trust in favour of the plaintiff by the defendants in having made the credit entries and having adjusted the accounts of the plaintiff from time to time in the manner in which they have done. But in this case the subject matter was involved in cash and that cash has been allocated and separated from the general funds and shown to have been so separated and allocated to the plaintiff when the defendants dealt with the Income Tax Department in connection with their assessment. Therefore, the difficulty that arose in -- "Chambers v. Chambers". 1944 2 Mad L. J. 29 is not to be seen in the present case. Similarly, the difficulties that have been pointed out in the credit entries that were the subject matter of discussion in -- "Ramanathan Chettiar v. Palaniappa Chettiar", 1945 2 Mad D. J. 164 do not obtain in this case, for in this case, the credit entries, far from remaining as mere credit entries, have the effect and character of having been amounts separately allotted and allocated for the benefit of the plaintiff and have been treated as such, as revealed from the course of conduct adopted by the defendants in relation to those credit entries in their books of accounts.

10. In these circumstances, I should think the decree of the learned City Civil Judge will have to be upheld and this appeal will have to be dismissed with costs.