

(1933) 02 CAL CK 0045
In the Calcutta High Court

In Re: Ernest Clarence O'Brien

Date of Decision : 22-02-1933

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 17, 52(2)
Transfer of Property Act, 1882 — Section 12

Citation : AIR 1933 Cal 701 : 147 Ind. Cas. 422

Hon'ble Judges : Lort-Williams, J

Bench : Single Bench

Judgement

Lort-Williams, J.—The "Provident Fund for the Permanent European Assistants of Grindlay & Co., Ltd., in India," which is governed by rules, was created on 1st February 1928, with the object of providing members with a pension or payment on the termination of their service with the company (Rule 3).

2. "Member" means every European assistant in the service of the company in India who is a subscriber to the fund (Rule 2).

3. Assistants engaged before 1st February 1923, had the option of joining it, if declared before 1st January 1930 (Rule 8).

4. The fund is administered by trustees appointed by the company (Rule 4.)

5. The fund is fed by payments made by the company and by compulsory deductions from the salaries of members (Rule 6, 8, 10, 11, 12, 15 and 25).

6. No member can make any claim upon the fund except as provided by the rules (Rule 18).

7. He cannot receive (except ex gratia) any benefit from that part of the fund derived from payments made by the company until he has served the company for 12 years and is not dismissed for negligence, dishonesty or misconduct. But on retirement or discharge or death, he or his legal representative is entitled to receive the amount of his own contribution with interest (Rule 19 and 20). Rule 29 and 30 provide as follows:

29. Subject to the provisions of Rule 23, no member shall be entitled to draw any

money from the fund in respect either of principal or interest or to transfer or assign, whether by way of security or otherwise, howsoever his share or interest therein or in any part thereof, and no such transfer or assignment shall be valid, and the trustees shall not recognize or be bound by notice to them of any such transfer or assignment, and all moneys contributed by the member standing in the subsidiary ledger to the credit of any member, who shall purport to transfer or assign his share or interest or any part thereof as aforesaid, shall forthwith be forfeited as from the date of such transfer or assignment to the use of the fund and be dealt with accordingly: if any prohibitory order or attachment or process of a civil or criminal Court be served upon the trustees or any person on behalf of them, by which any moneys standing to the credit of any member in the books of the fund shall be attached or ordered to be paid into Court or be ordered to be withheld from any member, such moneys as represent contributions by the member shall forthwith be forfeited to the use of the fund, provided that the trustees shall be at liberty, in their uncontrolled discretion, at any time thereafter, to give such moneys or any part thereof for the benefit of the wife, children or relations of such member.

30. If any member shall purport to transfer or assign or charge his interest in the fund as aforesaid, or if such interest shall be attached or otherwise dealt with or affected as indicated by Rule 29, the company may forthwith cease all contributions to the fund in respect of such member and all moneys standing to the credit of such member in the subsidiary ledger representing contributions by the company and all interest thereon shall forthwith be forfeited to the use of the fund.

8. The insolvent, E.C. O'Brien, was adjudicated an insolvent upon his own petition on 23rd May 1932. He entered the service of the company on 1st January 1924, and was discharged on 31st May 1932, on account of his insolvency. Prior to the filing of his petition, the following amounts stood credited to him in the books of the provident fund for principal and interest:

Rs. a. p. London's contribution	4,789	3	0	His contribution	3,143	4
3 Bank's contribution	3,771	14	9			

Total ... 11,704 6 0

9. Though it is not stated it must be presumed that he exercised the option given to him under Rule 8. The petitioner who is the Official Assignee, contends that this sum or part of it is the property of the insolvent and vested in the Official Assignee immediately on adjudication as assignee of the "insolvent's estate, and he asks for an order compelling the trustees to pay this sum to him forthwith. It is clear that no member has any property in the fund, nor can make any claim upon it, except as provided by the rules, so far as these are legally valid. The so-called contribution or subscription made by the member is derived from a compulsory deduction from or reduction of his salary. These moneys and others contributed by the company belong to the trustees. The member is entitled to

claim a payment from the fund, only in certain circumstances specified in the rules. Thus it is clear that O'Brien could not on discharge claim any payment in respect of that part of the fund, which was contributed by the company, because he had not served for 12 years (Rule 19 and 20). This disposes of the sums called "London's" and ""Bank's" contributions respectively. The question remains to be decided whether the sum of Rs. 3,143-4-3 is property of the insolvent which has vested in the Official Assignee. This depends upon the legal effect of Rule 29 and 30.

10. The company contends that, if and when, any order of the Court is served upon the trustees, by which any such sum standing to the credit of any member is ordered to be paid into Court or to be withheld from the member, such sum is forthwith forfeited to the use of the fund. This means really that, in such circumstances the member forthwith loses his right to make any claim on the fund, because no member has any property in the fund, which belongs to the trustees, and cannot therefore forfeit any part of it. His claims arise only when he ceases to be a member. For this reason the latter part of the rule, upon which the company's contention rests, is irrelevant, because the insolvent ceased to be a member when he was discharged at the end of May. Thereupon his claim upon the fund, whatever it might be, vested, and owing to his insolvency vested in the Official Assignee. The final question remains to be decided whether he had any claim subsisting at the time of his discharge. This depends upon the earlier part of Rule 29. On the date of his insolvency, the insolvent, for the reasons already stated, had no property in the fund, because he was still in the service of the company and any claim he might have could only arise upon his discharge when he would cease to be a member. Therefore if in those circumstances he had purported to transfer or assign his share or interest in the fund, such transfer, according to the rules, would have had no effect except that all contributions made by the member or by the company for him would be ipso facto forfeited forthwith to the fund. This again is badly expressed in the rule and means really if accurately stated, in accordance with the position in law, if the member purported to transfer whatever he might be entitled, under ordinary circumstances to claim when he ceased to be a member, that is to say his future right (if any) of a payment from the fund, then and thereby such right would be extinguished. In my opinion this according to the rules if valid, would be the effect of such an attempt to transfer or assign.

11. But the insolvent made no such transfer or assignment, and consequently suffered no such forfeiture, unless his petition to be declared insolvent amounts to or is equivalent in law to such a transfer. In my opinion it is. The meaning of Rule 29 is that any transfer or assignment howsoever made or caused by the member, shall involve forfeiture. Presentation of a debtor's petition is an act of insolvency [Presidency Towns Insolvency Act, 8. 9 (f)], upon which the Court may make an order adjudicating him insolvent (Section 10). Thereupon his property vests in the Official Assignee, as from the commencement of the insolvency, which relates back to the presentation of the petition [Sections 17

and 52 (2)(a)]. The-effect-therefore of the debtor's petition, if he is afterwards adjudged insolvent thereon, is to transfer or assign immediately his property to the Official Assignee. Doubtless such transfer is strictly speaking by operation of law. But in my opinion it is equivalent to a voluntary transfer by the debtor to the Official Assignee and is within the meaning of Rule 29. It would be otherwise, if the debtor were adjudicated otherwise than on his own petition, because transfer in such a case could hardly be deemed to be due to the voluntary act of the debtor. It would be otherwise also if it could be shown that there was collusion between the trustees and the debtor to defeat the claims of creditors. This is not suggested in the present case. But Section 12, T.P. Act, 1882, provides that:

Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

12. When the debtor exercised his option to become a member of the fund, this, in effect, amounted to an agreement to transfer from time to time part of his salary to the fund upon the terms provided in the rules. One of the terms is contained in Rule 29. That offend-against the provisions of Section 12 and is therefore void. On this point the law in India and England is the same, but differs apparently where the transfer has been made by one person for the benefit of another. In English law all such transfers are protected, whereas in Indian law they seem to be protected only if made by will (Succession Act, 1925, Section 120, Illus. 7).

13. The result is that the debtor's claim to this sum of Rs. 3,143-4-3 became vested when his service terminated and must be paid to the Official Assignee. The petition to this extent is allowed. There will be no order for costs.