

(1909) 04 MAD CK 0032
In the Madras High Court

M.R.M.A. Subramanian Chettyar

APPELLANT

Vs

Rajah Rajeswara Dorai, alias Muthuramalinga Dorai and
Another

RESPONDENT

Date of Decision : 21-04-1909

Acts Referred:

Civil Procedure Code, 1882 — Section 462

Citation : (1909) ILR (Mad) 490 : 2 Ind. Cas. 963

Hon'ble Judges : Arnold White, C.J; Miller, J

Bench : Division Bench

Judgement

1. This is an appeal from the decree of the Subordinate Judge of Madura (East). The plaintiff is the minor Rajah of Ramnad. The 1st defendant was a creditor of the late Rajah and is the party in whose favour the three instruments which the plaintiff seeks to have set aside were made. The 2nd defendant is the trustee appointed under a deed of settlement (Exhibit 1 page 398) executed by the late Rajah on the 12th July 1895. The suit is brought for a declaration that an agreement of the 16th January 1899 between the 1st and 2nd defendants (Exhibit XLIX pages 514) and two mortgages of the 6th and 13th July 1899 (Exhibits LXXXIII and LXXII pages 670 and 668) executed by the 2nd defendant in favour of the 1st defendant are invalid and for an order that a sum of Rs. 43,000 paid under these instruments should be paid by the 1st defendant to the credit of the trust estate.

2. The circumstances in which the suit is brought are as follows:

The late Rajah, who had contracted debts to the amount of some 20 lakhs, executed a deed of settlement on the 12th July 1895 (Exhibit I p. 398). By that deed he conveyed the Ramnad Zamindari to the 2nd defendant in trust for purposes mentioned in the deed. Stated quite generally, the object of the trust deed would seem to have been to save the estate in the interests of the Rajah's son, the present plaintiff. After the execution of this deed the Rajah continued to contract debts. His financial position, and his attitude towards the trustee are

shown by a letter (Exhibit II p. 415) which he wrote, some 16 months after the execution of the deed, to the trustee Mr. Chentsal Rao, who had been appointed under the deed of settlement as co-adjutor for the purpose of advising the trustee and to Sir Bashyam Ayingar, who was one of the three members of the Committee appointed by the deed.

3. In the meantime, negotiations had been entered into by the trustee with an English Firm, Messrs. Ogiby Gillanders and Co., with a view to the raising of a large sum of money on a mortgage of the estate, in order to clear off all the liabilities. On June 18th, 1897, a preliminary agreement was signed between the trustee and the representative of Messrs. Ogiby Gillanders & Co., (Exhibit W p. 227) and (Exhibit IV p. 425). These negotiations were conducted in England by Messrs. De Claremont and Donner and in India by the South Indian Export Cot, and by Messrs. Lovelock and Lewes on behalf of the proposed lenders, whom it will be convenient to refer to as the contractors" on the one hand, and the trustee and the coadjutor on the other hand.

4. Whilst these negotiations were going on, the first defendant on November 17th, 1897, commenced Original Suit No. 60 of 1897 in the Subordinate Judge's Court, Madura East, for the purposes of getting the settlement of July 12th, 1895 set aside as having been made in fraud of creditors. The negotiations with the English Firm turned mainly on the question of the postponement of the claims of the Rajah and of the members of his family, who were entitled to be paid certain allowances under the deed of July 1895 to the payment of interest on the contemplated loan from the English contractors.

5. On the 29th September 1897, the co-djutor wrote to Messrs. Lovelock and Lewes, (Exhibit D. D. p. 242) confirming a telegram that the Rajah was willing to give a charge on the Zamindari free of the payment of the allowances of 66 or 76 thousand rupees. On the 26th November 1897. De Claremont and Donner in London wrote to the South Indian Export Company, Madras. (Exhibit XI p. 437) enclosing a letter from the contractors stating that the latter insisted on the allowances to the Rajah and the members of his family being postponed in full. On the 24th December 1897, the trustee wrote to the South Indian Export Co., (Exhibit XII p. 439) to the effect that he was willing to try and agree to the conditions proposed. On the 19th February 1898, the trustee wrote to the coadjutor (Exhibit XVIII p. 447) saying that they should try and obtain the consent of the allowance-holders as soon as practicable. The trustee was only able to obtain the consent of the allowance-holders to the extent of 99 thousands out of 130 thousands. This is referred to in a letter from co-adjutor to the South Indian Export Co., dated 24th March 1898 (Exhibit XXXI p. 457) in which he states that as the amount of allowances, the postponement of which is not possible, is small, he hopes the contractors will see their way to issue the loan. On March 18th, 1893 he telegraphed to the co-adjutor (Exhibit E. E. p. 243) confirming a telegram of the Rajah and saying that they must let these two allowances alone together with two small attached ones "(referring to the

allowances with reference to which they were unable to obtain the consent for postponement) and point out to them that under trust deed we empowered to attend to service of interest prior to payment of allowances and, therefore, we can assure them without even consent of parties." On the 25th April 1898 the trustee wrote to the Rajah (Exhibit XXXV p. 461). This is a document of very great importance since, with reference to the question whether the subsequent transactions which the plaintiff seeks to impeach can be upheld, the first question for consideration is whether the proposals made by the trustee in this letter and accepted by the Rajah constituted a breach of trust. The agreement was sanctioned by the co-adjutor. This letter, according to the case of the 1st defendant, is the basis of the liability incurred by the trustee to the 1st defendant in the later instruments, which the plaintiff now asks to have set aside. The letter refers to the wish of the contractors that the allowances payable to the Raja and the other members of his family amounting to Rs. 1,30,000 a year, should be made a second charge on the estate. It refers to a statement by the Rajah that he would give his consent to this and also obtain the consent of the other members of the family if the trustee agreed to pay him a sum of 4 lakhs of rupees. The letter goes on to state that the trustee is prepared to give him a mortgage bond for 4 lakhs of rupees on the security of a suitable portion of the Ramnad Zamindari, such security to be subsequent to the mortgage to the contractors. The letter states that the trustee would pay to the Rajah every year up to 1908 a sum of Rs. 36,000 as interest on 4 lakhs from the surplus proceeds of the estate and thenceforward Rs. 61,000 a year from the same source towards the principal and interest till the whole of the amount is liquidated. The arrangement is to have effect only in the event of the Rajah and the other members of the family agreeing to the postponement of their respective allowances. On May 27th 1898, the Rajah wrote to the trustee (Exhibit XL p. 466) asking him to obtain from one Ponnuswamy Tever a loan of one lakh on behalf of the Rajah and to give him a mortgage on the estate for this amount out of the mortgage for 4 lakhs referred to in the letter of April 25th, 1898. The loan obtained from Ponnuswamy Tever was carried out in accordance with the request of the Rajah (see Exhibit LXII p. 561). The sanction of the co-adjutor was not obtained (see evidence of trustee page 807).

6. On the 30th June 1898, the late Sir V. Bashyam Iyengar gave a written opinion (Exhibit FF page 243) apparently advising on behalf of the trustee to the effect that the allowance payable to the Rajah's brother could not be enforced against a mortgagee unless it was shown that the mortgage was created with the intention of defeating the claim for maintenance and that it could not be contended that the intention of the trustee in creating the mortgage was to defeat the claim.

7. Sir Bashyam Iyengar also advised that the trustee might, if so required, undertake in the mortgage deed that the service of the mortgage loan should have priority over the maintenance allowance. On September 16th, 1898, Messrs. De Claremont and Donner wrote to the South Indian Export Co., (Exhibit

XLI page 467) saying that the question had arisen as to the legal effect of any agreement by the allowance-holders to postpone their allowances. In connection with this question the opinion of Mr. J. D. Mayne was taken. His opinion (Exhibit LIII(a) p. 520) is to the effect that it was not essential that the consent of the allowance-holders to the postponement of their allowances should be obtained but that it was desirable that the signatures of as many as possible should be secured in the mortgage to be given to contractors. This opinion, is referred to in a letter of September 23rd 1896 from the London Solicitors of the contractors to the Madras Solicitors in which it is stated that the contractors will not insist on the maintenance-holders executing the deed, provided they entered into an agreement with the trustees agreeing to postpone their claims (Exhibit XLIII page 468).

8. This being the state of negotiations with reference to the postponement of the allowances, the trustee on the 16th January 1899, entered into an agreement (Exhibit XLIX page 514) with the 1st defendant. This is one of the instruments which the plaintiff seeks to have set aside : and is also the instrument in pursuance of which the two mortgages, which are also asked to be set aside, were executed. On the 9th April 1899 the trustee entered into an agreement (Exhibit XLV page 474) with the allowance-holders who had agreed to postpone their allowances that he would pay their allowances out of the rents, incomes and profits of the Zamindari according to the terms of the settlement-deed of July 1895.

9. On the 13th June 1899 the deed between the contractors and the trustee was executed (Exhibit XLVIII page 478).

10. A letter written by the trustee on the 5th July 1899 to the co-adjutor (Exhibit XLVI page 476) shows how the trustee purported to deal with 4 lakhs of rupees referred to in (Exhibit XXXV). One lakh out of the sum, borrowed from, Ponnuswami Tever, had been paid to the Rajah. Rupees 16,000 had been paid to another creditor on account of the Rajah. Out of the sum which he had agreed to pay to the 1st defendant under (Exhibit XLIX), Rs. 2,91,416 were on account of the Rajah.

11. These sums exceeded Rs. 4 lakhs by a sum of Rs. 7,416 and this amount the trustee said he intended to treat as an advance on the Rajah's allowance and to adjust the same in due course.

12. On July 6th, 1899, the trustee executed a mortgage to the 1st defendant (Exhibit LXXXIII page 670) for Rs. 4,23,000 and odd. On July 13th, 1899, the trustee executed a hypothecation bond on paddy to the 1st defendant (Exhibit LXXXII p. 468) for the balance of Rs. 50,000 which the trustee had covenanted to pay on the 3rd July 1899 within a week from that date, but which he had been unable to pay. The contention, putting it broadly, on behalf of the 1st defendant was that in order that the loan from England might be obtained, it was necessary to secure the postponement of the allowances and that the agreement to give a

mortgage for 4 lakhs to obtain this end was within the powers of the trustee and was a reason-. able and proper exercise of his powers. It was argued that whether the claims of the allowance-holders would or would not in law be postponed to the mortgage to the contractors, the advisers of the English lenders desired that the consent of the allowance-holders should be obtained to the postponement of their claims.

13. We cannot help thinking that if the Rajah had not incurred further liabilities after the deed of settlement of July 1895 (Exhibit I page 398) and had not brought strong pressure to bear upon the trustee and those associated with him to relieve him from his financial embarrassments, we should have heard nothing of the transaction entered into by the trustee in Exhibit XXXV and it seems to us that the predominant motive of the trustee was to relieve the Rajah.

14. The transaction (Exhibit XXXV) is a curious one, since no money changed hands. What the trustee did was to undertake to charge the estate with 4 lakhs in favour of the Rajah and subsequently to utilize this undertaking for the purposes of Exhibit XLIX, by transferring the liability of the estate to the Rajah to the 1st defendant. Exhibit XXXV is in the form of a series of proposals which were initialled by the Rajah. Having regard to the fact that the consent of all the allowance-holders was never obtained, it was not contended that Exhibit XXXV constituted an agreement of which specific performance could be obtain- ed. The question was elaborately argued and many authorities were cited as to whether this transaction was within the powers conferred on the trustee expressly or by implication by the trust deed or under general law. Paragraph 12 of the trust deed empowers the trustee to mortgage the trust property for the purpose of raising loans for payment of the debts specified in the third schedule to the trust deed. Assuming that it was within the powers of" the trustee to create a charge on the estate in favour of A without receiving any advance from A but with a view to raising money from B for the purpose of paying off the scheduled creditors, the question is : was this power exercised properly and reasonably and in the interest of the estate?

15. The first point to be considered is : was the consent of the allowance-holders necessary in law? The contention on behalf of the plaintiff was that, under the provisions of the trust deed of July 1895, the trustee had power to postpone the allowances without obtaining the consent of the allowance-holders. Now the trust created was a trust subject to the payment of the debts of the creditors mentioned in the 3rd schedule. Mr. Sundarier on behalf of the 1st defendant relied strongly on the provisions of paragraph 23 of the trust deed. Paragraph 23 enumerates the purposes to which the trustee shall apply the rents, incomes, and profits of the trust premises.

16. In the fifth place he is to apply such part as may be required in payment of the debts of the scheduled creditors. In the sixth place he is to apply such part as may be required in payment to the allowance-holders mentioned in the second schedule, during, their lives, of the monthly sums set opposite to their

names. Paragraph 24 provides that the trustee shall not be bound to make payments mentioned in the order in which they are mentioned, but that he might make them as and when required. Numerous authorities were cited on behalf of the 1st defendant to show that the enumeration of the payments in paragraph 23 imposed no obligation on the trustee to make the payments in the order mentioned and Mr. Sundarier contended that paragraph 24 gave the trustee a discretion, that the payment to the allowance-holders must be as and when required, with reference to the provisions of the deed, and that the trustee could not carry out his discretion by exercising it once for all in favour of creditors, original or substituted.

17. On behalf of the plaintiff it was argued that " as and when required " meant according to the exigencies of circumstances " and that the trustee, if not under an obligation, had discretion to pay original debts or debts incurred for the purpose of discharging original debts, before the allowances.

18. We are of opinion that, on the construction of the deed of settlement, the trustee had power without the consent of the allowance-holders to postpone the allowances to the payment of interest under the English loan. This appears to have been the view taken by the trustee in the telegram (Exhibit EE page 243), to which reference has been made, sent shortly before making to the Rajah the proposals contained in Exhibit XXXV. In his evidence the trustee said that though he had the power of postponement he shrank from incurring the ill-will of the Rajah and the other allowance-holders by exercising his power without their consent, (See his evidence pp. 801,802). The Rajah also took the same view and before Exhibit XXXV was written, had himself agreed on his own behalf and on behalf of the allowance-holders to the postponement of the allowances. (See his telegram to the Indian Export Co., dated 20th April 1898, Exhibit Z page 239).

19. We think that there is no foundation for the contention that an undertaking by the trustee once for all to postpone the allowances to the service of the loan would be void as fettering the discretion given him by paragraph 24 of Exhibit I or as assuming a power of postponement not conferred by that paragraph. The payments provided in paragraph 23 are to be made as and when they shall be required (paragraph 24) and there is nothing inconsistent with this in an undertaking that the calls upon the income shall rank in. a particular order. The case is not analogous to those cited where a covenant is held to be void if it imports an undertaking to exercise in a particular way a power of appointment which the covenantor is to exercise by his will. Here there is nothing to require the trustee to keep the discretion open, or to prevent him, if the circumstances required him to do so, from fixing once for all the order of payment. Now in these circumstances, was the trustee entitled to secure to the Rajah the payment in instalments of a sum of 4 lakhs of rupees to enable him to pay off post settlement debts not binding on the trust estate, in consideration of his agreeing to postpone his own allowance and to obtain the consent of the other allowance-holders to like postponement?

20. The expenditure, by way of payment for assistance of this kind, of more than 14 per cent. on the loan under negotiation is prima facie an extravagance, and the trustee seeks to justify it by alleging that the Rajah would not without it have given his consent or obtained that of the other members of the family.

21. It may be taken that it was a matter of the highest importance to the trustee to obtain the loan of ₹1,75,000 for the purpose of paying off existing debts carrying high rates of interest. In these circumstances the obvious duty of the trustee was to take the best advice he could get and decide whether the postponement, if postponement was necessary, could not be effected without casting a burden of 4 lakhs on the estate. He does not seem to have done this until after his agreement with the Rajah was practically concluded and it was found that the Rajah was unable to obtain the consent of his brother the holder of the largest allowances. He does not appear to have attempted, in the interest of the estate, to make the best bargain he could with the Rajah in the 1st instance or to come to a fresh agreement with the Rajah when the Rajah failed to obtain the consent of all the allowance-holders to postponement.

22. He says that he had throughout the approval of the co-adjutor and the legal adviser Sir Bashyam Iyengar and indeed that the agreement to pay the Rajah's post-settlement % debts was suggested by the former; we do not know in what form the case was put before the latter, the only opinion of his that is on the record being Exhibit FF in which in June 1898 he gives reason for believing that the trustee himself has power without the consent of the allowance-holders to postpone their claims on the income of the estate to those of the contractors. It is in the face of this opinion somewhat difficult to believe that Sir Bashyam Iyengar approved of the expenditure of 4 lakhs of rupees in buying an unnecessary consent, but if he did, it must have been that he, like the trustee, was ever anxious to help the Rajah to pay off his subsequent debts and to save him from disgrace. Moreover, it is no answer to a charge of breach of trust that the trustee acted under competent legal advice. *National Trustees Company of Australasia v. General Finance Co. of Australasia* (1905) A.C. 373 :74 L.J.P.C. 73 : 92 L.T. 736 : 21 T.L.T. 522. After taking the opinion of Mr. Mayne the contractors agree to dispense with the consent of those of the allowance-holders who were obdurate, and they required the trustee to undertake to postpone all the allowances to the service of the loan, both before and after default (Exhibit XLVIII paragraphs 4,5 and 6 page 486) that is to say, while the trustee " should remain in possession, and in the event of a default after the trustees for the debenture holders should have assumed possession.

23. Now the Rajah and the trustee say that the former would not have given his consent for less than 4 lakhs, and the trustee opines that the English contractors would not have dispensed with the Rajah's consent; hence it is argued, necessity for the payment is made out and the agreement must be upheld. But it seems to us that if the trustee had taken the considered opinion of Sir Bashyam Iyengar before entering into any agreement with the Rajah and had laid the

master before the contractors, it is probable that no payment would have been made, or at any rate that the Rajah would have modified his demands.

24. There is really no evidence that the Rajah ever asserted a claim to rank before the service of the English loan or that the trustee made any attempt to obtain his assistance for any price less than the payment of all the "subsequent" debts. There is no doubt that the Rajah was anxious for the payment of his subsequent debts, and it is probable that had the trustee not fallen in with his views on that matter he would not so readily have lent his aid to the loan. On this point Mr. Sundarier tendered certain documents (the list is given in Civil Mis. Petition No. 795 of 1903 on the record) which the Subordinate Judge declined to admit in evidence. We have admitted them (Nos. 2 to 7 and A and B in the list) as showing that the Rajah was throughout this period scheming to procure the payment of his post-settlement debts out of the trust estate, but we do not think they make any difference, to the result. The trustee did not try to make any reasonable bargain. It can hardly be doubted that if he had approached the Rajah fortified with the opinion of Sir Bashyam Iyengar he could have saved the estate, if not the whole charge of 4 lakhs of rupees, at any rate a great deal of it. The bargain which he did make can be deemed reasonable, if at all only in the view that the Rajah would not in spite of legal opinion have yielded his consent on any other terms and that the English contractors would have thrown up the loan if his consent has not been obtainable. These things are not proved and were not tested by the trustee and the bargain cannot, therefore, be held to be a reasonable one or one which the Court can uphold.

25. We now proceed to deal with certain propositions advanced by Mr. Sundarier for the appellant which if they are sound would settle the appeal in his favour.

26. The first is that whether or not the agreement XLIX and the mortgages LXXXII and LXXXIII can be upheld as a provident and reasonable exercise of the powers of the trustee, the appellant, 1st defendant, is safe because he acted in good faith. The cases cited in support of this contention do not suffice to establish it. No doubt where a sale by a trustee to another person does not itself amount to a breach of trust by trustee and the breach of trust is committed in respect of the application of the purchase money, the transferee who pays his money bona fide without notice that a breach of trust is in contemplation is absolved from liability to lose the estate he had acquired. But no case to which we have been referred goes, we think so far as to decide that the transferee is to be absolved merely because in his opinion (he having full notice of the trust) the transaction is prudent and beneficial to the cestui que trust. The appellant had beyond any doubt full notice of the trust in this case, and it seems to us impossible to uphold a contention that because he honestly believed that he was giving good value for a mortgage which the trustee was empowered to effect, he is absolved, and entitled to retain his mortgage, however improvident the transaction may be found to be in reality. Having notice of the trust he has notice that the trustee must act reasonably and prudently. See *Keating v. Keating* 46

R.R. 178. Here, moreover, we have nothing to support the view that the appellant really believed that the bargain he was making was a satisfactory one from the point of view of the estate. He has not gone into the box to say that that was his view, and the extent of his bona fides is, as pointed out by the Subordinate Judge, comprised in this that he took the mortgages with a view of getting good security for his money and not with any desire to cheat any one else. That is we think not enough and *Corser v. Cartwright* L.R. 7 H.L. 731 the case on which Mr. Sundarier chiefly relied is not an authority against this view. The next proposition is this. Even if the provision to pay Rs. 4,00,000 cannot be supported still the mortgages LXXXII and LXXXIII and the agreement XLIX in pursuance of which the mortgages were executed are supported by sufficient consideration to warrant the trustee in effecting them. Practically we have been asked to decide O.S. No. 60 of 1897 and to hold that had that suit been tried out the settlement Exhibit I might have been set aside as intended to defeat or delay the unsecured creditors of the Rajah and Mr. Sundarier places his chief reliance on *Freeman v. Pope* 5 Ch. App. 538 and the cases which have followed it, which adopt the view that when the effect of a voluntary settlement is necessarily to delay a creditor the intention will be presumed.

27. We do not know whether if there had been no question of paying the Rajah's post-settlement debts to the amount of 4 lakhs, the trustee would have entered into the agreement XLIX nor do we know whether the co-adjutor Chentsal Rao or the legal adviser Sir Bashyam Iyengar would have approved a compromise on those terms. What was done and what was approved by them though apparently without any great enthusiasm (vide Exhibit WW and Devan's explanation thereof) was the making of an agreement to secure to the 1st defendant a debt which the estate was bound by the settlement to pay him, but which was then unsecured, and further to secure a post-settlement debt which the estate was not bound to pay, but which the trustee undertook to pay out of the sum of 4 lakhs owed to the Rajah by the estate. The evidence of the trustee (page 832) shows that the agreement Exhibit XXXV weighed very much with him in the matter. He thought, he says that the estate would be in no way prejudiced because the payment would come out of the 4 lakhs. We do not find in his deposition anything to suggest that he would have deemed himself justified in compromising the suit on the terms of Exhibit XLIX had there been no debt owed by the estate to the Rajah. And had we come to the conclusion that Exhibit XXXV was binding on the estate, we should have perhaps found more difficulty in refusing to accede to the argument that the compromise was affair and reasonable one.

28. We cannot go quite so far as Mr. Krishnasainier would have led us and hold that the suit (O.S. No. 60 of 1897) was certain to fail or certainly not bona fide. But in our view it was not very likely to succeed, and though it might have been right in the circumstances to buy the 1st defendant, it was certainly not right to do so at the price of Exhibit XLIX and the mortgages which followed on it.

29. The settlement Exhibit I provided for the payment of all debts due at its date (paragraphs 23-5), it was made subject to all debts then valid and binding (paragrah 6) and the Rajah retained for himself only a maintenance allowance. It was a transaction to which the assent of the creditors would probably have been easily obtained for it saved the estate from being further wasted by the Rajah whose evidence shows that he was dissipating his property with considerable rapidity.

30. But the deed was not expressed to create a trust for creditors, nor was the payment of creditors stated as the primary object of the settlement: on the contrary it was stated to be for the benefit of the Rajah's son and other members of the family, and creditors who were not secured by mortgages might have had to wait for payment longer than they would have had to do had they been at liberty at once to attach the Zamindari on a decree obtained in a suit against the Rajah.

31. At the same time it is very difficult to say that the settlement necessarily delayed the unsecured creditors, and even if *Freeman v. Pope* 5 Ch. App. 538 can be followed without reserve, [as to which vide *Ex parte Mercer*, *In Re: Wise* 17 Q.B.D. 290 it seems to us that the 1st defendant and his father had small chance of convincing the Court that the settlement was intended to delay them. There was, however, a chance of it and there were other matters to be considered. Mr. Krishnaswamier invited us in this connection to admit in evidence certain documents Exhibits L to U excluding Q which were refused admission by the Subordinate Judge. We have admitted them all, including Q at the instance of Mr. Sundarier, as throwing light on the circumstances surrounding the execution of the settlement deed and so on the settlor's intention, but they do not materially help the plaintiff.

32. On the contrary they show that the Rajah's primary object was to preserve the estate rather than to pay his debts but they do not disclose any intention to defeat his creditors. The first defendant's suit undoubtedly stood in the way of the loan which was under negotiation for the payment of the debts scheduled in the deed of settlement, and the Rajah was so anxious to save himself from the consequences of his post-settlement extravagance that it was somewhat doubtful what attitude he might assume. He had, however, given his evidence before the trustee was finally committed to a compromise see (Exhibit QQQ 4 to 7th November 1898 and Exhibit XLIX 16th January 1899) and he could do but little against the interests of the estate in that matter, and though it is easy to conjecture that the contractors in England would have hesitated to advance money to the trustee while his title was in litigation, the trustee clearly ought to have ascertained their view before compromising a suit in which his success was most probable when the compromise entailed so heavy a burden on the estate as the mortgage Exhibit LXXXIII and the other payments agreed to in Exhibit XLIX and there were other matters to be considered on the other side of the question. The first defendant's father and the 1st defendant had since the settlement

continued to lend money to the Rajah on such security as remained to him, and before their suit was launched in November 1897 negotiations were in progress for a loan which if obtained would enable the unsecured creditors to obtain payment of their pre-settlement debts earlier than they would have been able to obtain it in all probability had they been left to their remedies against the Rajah and the zamindari. These facts suggest that the suit was not a bona fide attempt to obtain a remedy for a grievance, but rather an attempt to force* a compromise and obtain concessions from the trustee. Further, although the 1st defendant was not a party to the deed of settlement of July 1895, there is a good deal of evidence to show that he acquiesced in, and took the benefit of, the deed and was, therefore, precluded from impeaching its validity. The evidence would seem to establish that the deed of 1895 came into existence with the consent of the 1st defendant's father (see the Rajah's evidence on page, 707 and his evidence in deposition Exhibit QQQ p. 330) that the first defendant received payment of interest on Rs. 1,300,000 (see Exhibit B) from the trustee out of the allowances which the trustee had to pay to the Rajah and that he took bonds from the Rajah on the footing of the trust, the Rajah promising to pay out of the allowances provided for in the trust deed, and that he paid rent to the trustee in respect of leases to him by the Rajah--see Exhibit B. E. F. Series G. H. J. LXVI, LXVII and LXVIII. The evidence also shows some grounds for the suggestion that with regard to O.S. No. 60 of 1897 the trustee was unwilling to go into the box (see Exhibits VV and WW and the evidence in connection with the application to examine the trustee on commission) and that he was unduly influenced by this consideration in compromising the suit. An elaborate argument took place upon the question whether the compromise was bad on the ground it had not been sanctioned by the Court, we do not propose to discuss this question as we are prepared to assume for the purposes of this case, that the sanction of the Court was not necessary.

33. The remaining facts put forward as proving consideration for the compromise are the release of the 1st defendant's lien on some furniture, which had been purchased from the Rajah by the trustee and the transfer to the trustee of a Fen held by the 1st defendant on some jewellery belonging to the Rajah and on the Rajah's allowances. Assuming that the trustee had any right to buy the furniture for the estate with the lien on it, the release of the lien would not go far as valuable consideration for the mortgage LXXXIII and, moreover, there-lease is really illusory for by LXXXIII the securities were not to be transferred until Rs. 1,25,000 were paid up. The first defendant thus obtained temporarily double security both in regard to the furniture and jewellery, the charge on the allowances alone was to be released on payment of Rs. 50,000, and the execution of the mortgage. The charge of the allowance which, of course, would be valueless after the Rajah's death, was not a security in which the trustee was entitled to invest the money of the estate and the jewellery was not in the possession of the trustee and, therefore, whatever its value, formed a risky security to exchange for a mortgage, even a third or fourth mortgage of the

whole of the Ramnad zamindari and the trustee does not seem to have done much to satisfy himself as to the value of this jewellery "the Rajah and some others" he says "were telling me that it was worth two lakhs" (p. 777) but he does not say that he even ascertained that the pledgee Annamalai Chetty who held the property for a debt of Rs. 65,000 was still in possession of the whole of it. These very risky securities are obviously not adequate consideration for the mortgage LXXXIII and even adding to them the withdrawal of the suit we cannot think that the Court would uphold a compromise shewing so great a risk and so small a benefit to the cestui que trust.

34. Also it seems to us that Exhibit XLIX could not operate as an assignment of the Rajah's rights (if any) under Exhibit XXXV. The Rajah's rights were correlative to the obligation undertaken by him to obtain the consent of the allowance-holders to the postponement of the allowances. The assignment will only be good if the correlative obligation had been discharged. This obligation was not discharged. Further the trustee, by transferring the liability of the estate to the Rajah to the 1st defendant gave up all rights of set-off which he had against the Rajah in respect of the* Rajah's liability to the estate.

35. Moreover, the benefits which it was suggested the estate derived under Ex. XLIX were, for reasons which have been stated, if not illusory, altogether disproportionate to the obligation incurred. The validity of Exhibit XLIX depends on the validity of Exhibit XXXV and we have no doubt that the agreement must be declared an improvident transaction not binding on the plaintiff. Mr. Sundarier asks us to throw on the plaintiff the burden of proving that this transaction is a breach of trust, and, in support of this contention, has relied on Hire Purchase Furnishing Co. v. Richens 20 Q.B.D. 387 and Re Hanson (1908) 2 Ch. 366. But neither of these cases is in point. In the former all that is laid down is that the law will not presume illegality when the facts connected with the transaction impugned are equally consistent with legality--and from the latter it may be gathered that it will be presumed that a devisee who is also an executor is acting in accordance with his duty when he sells to pay legacies, property charged by the will with the payment of debts and legacies.

36. It is clear to us that if a transaction of this kind is impugned, a transaction which prima facie throws a heavy burden on the estate for no apparently commensurate benefit it will lie on the trustee to show that there is a real benefit to the beneficiaries. Mr. Krishnaswamier has cited a string of cases in support of this view, but we think the matter is too plain to require the discussion of authorities and the 1st defendant having complete notice of the trust must show, as against the beneficiary, that the transaction is one which the Court can uphold.

37. The question is really perhaps of no great importance for the evidence, in our opinion, establishes affirmatively the fact that the agreement was improvident in the circumstances of the case.

38. The questions so far considered from the subject of issues 7 and 8 in the suit

and we shall now briefly deal with the remaining issues.

39. On the 1st issue no argument was addressed to us, and there is no apparent reason to differ from the view of the Subordinate Judge. On the 2nd issue the decision of the Subordinate Judge that the plaintiff can sue alone seems to us to be right. If the other allowance-holders are beneficiaries under the trust deed their interest in the Zemindari is at most that of charge-holders, and if, as Mr. Sundara Aiyar contends, they have a charge on the property it does not greatly matter to them whether a subsequent mortgage is or is not set aside. However that be, there seems to be no good reason why the plaintiff who is sole beneficial owner of the corpus of the trust property should not sue to protect it and Mr. Sundara Aiyar has cited no authority touching the question against those to which the Subordinate Judge refers in paragraph 15 of his judgment.

40. The 3rd issue was not pressed and on the 4th issue Mr. Sundara Aiyar did not make any attempt to show that the view of the Subordinate Judge is wrong.

41. As regards the 5th issue Mr. Sundara Aiyar's contention is that one defendant cannot be ordered to pay money to another. But unless it is established that the plaintiff can get no relief unless he seeks to remove the trustee and procure the appointment of another we can see no principle on which he ought to be held disentitled to a decree that the money due to the trust be paid over to the trustee. The authorities cited *Giyana Sambanda Pandara Sannadhi v. Kandasami Tambiran* 10 M. k375 *Strinivasa Ayyangar v. Strinivasa Swami* 16 M.k 31 differ from the present case in that the person to whom the property was by the decree directed to be delivered was not a defendant but some one substituted for the defendant. So in the case of *Booth v. A. Beckett* 15 E.R. 676 and *Rae v. Meck* 14 A.C. 558 there is the same difference. But there is no authority cited to us to support the view that the suit must be for the removal of the trustee. *Padmanabha Chettiar v. Williams* 3 M.k 239 was referred to but that does not decide that the discharge of the trustees is a necessary object in a suit instituted for the protection of the estate against a breach of trust. There may easily be cases where a trustee has made a mistake and yet it may be unnecessary to remove him from his office : a difficulty might no doubt arise if the trustee to whom payment is ordered declined to execute the decree; in that event it might be necessary to remove him but that event has not occurred in the present case. We are unable to hold that the decree of the Subordinate Judge is wrong in directing payment to the trustee. Here too we may remark that the present trustee to whom payment will now have to be made is not the man responsible for the breach of trust, but his successor, and there can be no objection to payment to him; but even as matters stood at the date of the Subordinate Judge's decree we do not think there was anything improper in the direction in question.

42. On the 6th issue we have heard a great deal of argument, but in view of our decision on the 7th issue it is really unnecessary to decide the questions raised; it seems to us at least doubtful whether the trustee had power to compromise at

the expense of the trust estate a suit in which his own position as trustee was attacked vide *Graham v. M'Cashin* (1901) 1 Ir. R. 404 and cases cited therein at page 412 of the report and if he had not, the mortgages will not bind the beneficiaries. It is not, however, necessary to decide this point.

43. For the reason we have stated it is not necessary to express an opinion on the 9th issue on which the Subordinate Judge has found that in the absence of a sanction of the Court u/s 462 of the CPC of 1882, the compromise of O.S. No. 60 of 1897 is voidable by the plaintiff.

44. The finding on the 10th issue is not contested by Mr. Sundarier but forms the object of attack in the plaintiff's memorandum of objections : according to the trustee's evidence (p. 835) his payments to the 1st defendant amounted to Rs. 41,092-11-7 and not to Rs. 39,087-8-4 as in the decree (p. 851). Exhibits LIX--LIX (m) (pp. 543 et seq) are vouchers for the payment alleged.

45. We must allow the memorandum of objections.

46. As to the 11th issue the Contention on behalf of the 1st defendant on this issue is to the effect that he is not bound to restore to the trust estate the sums paid to him by the trustee under the invalid contracts--payments under the covenant in XLIX--to pay Rs. 20,000 and payments under the mortgage LXXXII.

47. Mr. Sundarier relied on *In Re: Barney* (1892) 2 Ch. 265 and contended that the money was not part of the trust estate which the beneficiary can follow. But that was not a case in which the trustee paid out a debt which the estate was not bound to pay In that case Mrs. Barney carried on a trade which was not authorised by the will under which she was a trustee, and one Mitchell who assisted her in the business, with notice of the trust was held not to be a trustee for sums of money paid to him by her for goods supplied for the purposes of the trade at market rates.

48. Here we have found that the 1st defendant gave no adequate consideration for the encumbrance in pursuance of which the money was paid out to him, and on that ground alone the cases are distinguishable. Ours is a case in which trust money has by a breach of trust come into the hands of the 1st defendant, and the beneficiary can follow it if he desires so to do. *Smith v. Patrick* (1901) A.C. 282 : 84 L.T. 740 : 17 T.L.R. 477.

49. No argument was addressed to us on the 12th, 13th or 14th issues.

50. On the 15th and 16th issues it is not necessary* for us to pronounce an opinion (1) whether the deviation in respect of the payment of" 4 lakhs from the agreement Exhibit XXXV would invalidate the mortgages or (z) whether differences between the mortgages and the agreement XLIX would Have that effect.

51. These are all the issues framed in the case, and we do not find one on which to found the contention advanced on behalf of the 1st defendant that whatever

may be our views as to the compromise under which O.S. No. 60 of 1897 was withdrawn, we cannot now set aside the agreement because it is impossible to re-open the suit. This question has been discussed very briefly by the Subordinate Judge in his consideration of the 9th issue, but is not really covered by that issue.

52. Nor is it one of many grounds of appeal that the Subordinate Judge's decree ought, if it set aside the compromise, to have directed the restoration of the suit to the file. In the 46th ground the contention is only that the compromise ought not to have been set aside because the parties cannot be restored.

53. The Subordinate Judge's decree declares that the mortgages are not binding on the plaintiff, and that declaration we believe to be correct; it says nothing about O.S. No. 60 of 1897, and we are not asked in the memorandum of appeal to make any addition to it.

54. Our decree, therefore, should not contain any direction with reference to the suit. All that we need consider is whether in the events that have happened the agreement XLIX and the consequent mortgages can be declared invalid as against the plaintiff, seeing that part of the consideration for them was the withdrawal of the suit.

55. We see no good reason why we should be deterred from declaring the mortgages invalid merely because the 1st defendant since the withdrawal of the suit has received payment of his debt and because the trustee Venkata Rangier is dead.

56. We dismiss the appeal with costs and allow the memorandum of objections with costs.