
(1927) 09 BOM CK 0005
In the Bombay High Court
Case No : O.C.J. Suit No. 1617 of 1926

Omar Tyab Aba Shariff

APPELLANT

Vs

Ismail Tyab Aba Shariff

RESPONDENT

Date of Decision : 23-09-1927

Acts Referred:

Trusts Act, 1882 — Section 73

Citation : AIR 1928 Bom 69 : (1928) 30 BOMLR 177 : 108 Ind. Cas. 495

Hon'ble Judges : Rangnekar, J

Bench : Single Bench

Judgement

Rangnekar, J.—On February 17, 1927, Mr. Justice Kemp appointed Mr. Moos, receiver of the estate of the minor plaintiffs in this suit. As one of the prayers of the notice of motion was for interim maintenance of the minors the learned Judge appointed the Administrator General as guardian of the property of the minors and directed the receiver to pay to him a monthly sum of Rs. 600 for their maintenance. The order, however, contained no directions as to whom the maintenance allowance was to be paid. As Mr. Justice Kemp sat in the Sessions and thereafter went on leave, the matter could not be mentioned to him, and was ultimately brought before me. It was agreed between all the parties that the Administrator General should be directed to pay the maintenance allowance to defendant No. 2, and, as I was about to make the order, the Administrator General, who appeared in person, requested me to substitute the expression "Official Trustee" in place of the original expression "Administrator General." On my inquiring as to the reason for the change, he mentioned that as Official Trustee the fees chargeable would be less and besides that, there was the Government indemnity under the Official Trustees Act II of 1913. The other parties not objecting, and as it seemed to me that the substitution was beneficial to the estate, I made the order.

2. The solicitors for the plaintiffs thereafter ex majore cautela applied to the learned Chief Justice for his sanction to the appointment of the Official Trustee as

guardian of the property of the minors under Rule 13 of Part II of the Original Side Rules. On that some doubt was felt as to the correctness of the order by the learned Chief Justice and the Judges and it was settled that the matter should be argued and the question should be judicially determined with a view to settle the practice of this Court. The necessity for this arose as, undoubtedly, in the past such orders have been made, and about three or four orders have been produced before me by the Official Trustee. By two of these the Official Trustee was appointed guardian of the property of certain minors. One was made by Mr. Justice Mulla in 1922, and the other by Mr. Justice Mirza in 1925. Of the remaining two, one was made by Mr. Justice Davar in 1914, but that seems to me to be an order made u/s 12 of the Official Trustees Act. But in that proceeding the Official Trustee was not appointed guardian of the minors. Obviously to such an order there can be no objection. The remaining order was made by Mr. Justice Starling in 1899, but this also was u/s 32 of the Act of 1864 which corresponds to b. 12 of the present Act. By that order, however, the Official Trustee was directed to pay the income of the moneys handed over to him to the petitioner as guardian of the minors for their maintenance.

3. On September 2, the matter was placed before me for argument. All the parties appeared. The Advocate General appeared for the Official Trustee and Mr. M.S. Vakil was appointed by the Court to argue the case *amicus curiae*.

4. Two questions have arisen for decision: (1) whether the Official Trustee is an officer of the Court within the meaning of Rule 13 of Part II of the Bombay High Court Rules (Original Side) 1913; and (2) whether the Official Trustee can be appointed guardian of the property of a minor.

5. The first presents no difficulty. The office of Official Trustee was created in India by Act XVII of 1843. The preamble of the Act runs as follows :?

Whereas the property of infants, Feme-Coverts and others vested in trustees, is exposed to peculiar risks and burthens in the territories, subject to the Government of the East India Company, not only from the insolvency of trustees, but from the frequent difficulties occasioned by their death, or absence, or refusal, or incapacity to act.

6. Then followed Section 1. By that section it was enacted that:?

In all oases in which any property is subject to any trust, and there shall be no trustee willing to act, or capable of acting within the jurisdiction of her Majesty's Courts in the said territories, it shall be lawful for the Supreme Court of each of the Presidencies in the said territories, on petition to appoint the Registrar, or such other Officer of the Court, as the Court may from time to time select as the Official Trustee, under the provisions of this Act to be a trustee of such property, and that upon such appointment such property shall vest in such Officer and his successors in office, and shall be held by them upon the same trusts as the same was held previous to such appointment.

7. Act XVII of 1843 was repealed by Act XVII of 1864 which as amended from time to time was ultimately superseded by Act II of 1913, which is the present Act. By Section 4 of the present Act the Government has the power of appointing an Official Trustee. u/s 6 the Official Trustee is a corporation sole, has perpetual succession and an official seal, and may sue and be sued in his corporation name. u/s 15 the revenues of the Government are liable to make good all sums required to discharge any liability which the Official Trustee, if he were a private trustee, would be personally liable to discharge. Section 17 provides for certain fees to be charged in respect of the duties of the Official Trustee as the Government may prescribe. And u/s 18 all moneys and fees received in the hands of the Official Trustee are to be credited to Government.

8. A mere perusal of these provisions and a comparison of the present Act with the earlier Acts will show that under the present Act the Official Trustee is a Government officer appointed by Government and liable, under the provisions of Section 16 of the General Clauses Act, to be removed by Government.

9. My answer, therefore, to the first question is in the negative.

10. I now turn to the second question. This would depend upon the object with which this office was created and the nature of the powers and duties of the Official Trustee under the Act. The present Act was passed, as the preamble shows, to consolidate and amend the law constituting the office of Official Trustee. It is permissible, therefore, to consider the preamble of the earliest Act, which I have already set forth. The learned Advocate General also relies on the same. That preamble shows that the office was created as frequent difficulties occasioned by death or absence or refusal or incapacity to act, as also from insolvency of trustees in whom property was vested under a trust, and to protect such property from risks and burdens to which it may be liable. If any doubt is felt as to the object of creating the office it is removed by Section 1 of that Act. That section has already been referred to. Briefly it says that in all cases in which any property is subject to any trust, and there is no trustee willing to act or capable of acting, it shall be lawful for the Supreme Court of each of the Presidencies on petition to appoint an officer of the Court to be a trustee. So that, taking the preamble and Section 1 of the Act of 1843, the intention of the legislature clearly seems to me to be that where there is already a trust and trust property vested in trustees, if the trustees are not willing to act or incapable of acting, then an officer of the Court should be appointed as Official Trustee to carry out the trust and in order to protect the trust property. But this clearly implies a pre-existing trust and the appointment of the Official Trustee as a trustee in place of original trustee. The preamble of the Act of 1843 read with Section 1 of that Act seems to me to be against the contention of the learned Advocate General.

11. Section 7 of the present Act prescribes the powers and duties of the Official Trustee. By that section the Official Trustee may, if he thinks fit, (a) act as an ordinary trustee, (b) be appointed trustee by a Court of competent jurisdiction.

Sub-section (2) says that the Official Trustee shall have the same powers, duties and liabilities, and be entitled to the same rights and privileges, and be subject to the same control and orders of the Court as any other trustee acting in the same capacity. Sections 8 and 9 are cases in which he may act as a trustee as in Section 7, Sub-section (1), Clause (a) provided. Thus, u/s 8 the Official Trustee may with his consent be appointed a trustee by a settlor who creates a trust. Section 9 allows the Official Trustee to be appointed a trustee under a will.

12. Section 10 lays down the circumstances in which the Official Trustee may be appointed a trustee by the Court, and provides that if there is property subject to a trust, and there is no trustee willing or capable of acting in the trust, the High Court may on application make an order for the appointment of the Official Trustee with his consent to be the trustee of such property. In this connection I may refer to the provisions of an analogous statute, and that is Section 73 of the Indian Trusts Act of 1882. Under that section a principal civil Court of original jurisdiction can appoint new trustees under the circumstances therein mentioned, those circumstances broadly considered being similar to those mentioned in Section 10 of the Official Trustees Act.

13. Then comes Section 12 of the Official Trustees Act under which a donor or an executor or administrator or a trustee can transfer a gift or legacy or share of the assets of a deceased person to which an infant or a lunatic is entitled to the Official Trustee with his consent, and upon such transfer the property will vest in the Official Trustee and shall be subject to the same provisions as are contained in the Act as to other property vested in the Official Trustee. The provisions referred to are those contained in Sections 8, 9 and 10. So that, even as to this kind of property, the Official Trustee becomes a trustee of such property.

14. A careful examination of these sections shows that in all cases in which the services of the Official Trustee are requisitioned as under Sections 8, 9 and 10, or where certain property is transferred to him as u/s 12, and the Official Trustee consents to act, or be appointed a trustee or to accept property so transferred to him, he does so as a trustee with the same rights and privileges and subject to the same duties and liabilities as any other private trustee.

15. A statute is the will of the legislature, and the fundamental rule of construction followed by the Courts is that the statute is to be expounded "according to the intent of them that made it." And if the words of the statute are precise and unambiguous, then no more is necessary than to expound them in their natural and ordinary sense, the words themselves in such cases best declaring the intention of the legislature (see *Commissioners for Special Purposes of Income Tax v. Parnell* (1891) A.C. 531

16. In *Maxwell on the Interpretation of Statutes*, 6th Edn., at p. 3, it is stated :?

The first and most elementary rule of construction is, that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning;

and, secondly, that the phrases and sentences are to be construed according to the rules of grammar.

17. The question then is, what is the meaning to be attached to the expression "trust" and "trustee" under this Act? I think it is open to me to refer to the definition of these terms under the analogous statute, namely, the Indian Trusts Act, which is a defining Act. The presumption which is always followed by the Court in such cases is that the legislature uses the same language for the same words in the same sense when dealing at different times with the same subject, and that any change of language is some indication of a change of intention. And the principle is that if the legislature has attached a particular meaning to certain words in a cognate Act, then that meaning should be taken as the legislative declaration of the meaning to be attached to the same words in a later statute. Section 8 of the Indian Trusts Act of 1882 defines "trust" in these terms :

A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner :

the person who reposes or declares the confidence is called the "author of the trust": the person who accepts the confidence is called the "trustee":... and the instrument, if any, by which the trust is declared is called the "instrument of trust".

18. Section 6 says that a trust is created when the author of the trust indicates an intention to create a trust and when certain conditions mentioned therein, to which I need not refer, are fulfilled.

19. It is argued that when an order appointing a person the guardian of the property of a minor is made by a Court, that order is an instrument of trust, and in that case the position of the Court is analogous or similar to that of the settlor. I am unable to accept the argument in view of the definitions in the Trusts Act to which I have referred. There is no section in the Trusts Act which authorizes a Court to create a trust. All that the Court can do is to declare a trust where one exists and some doubt is felt regarding the dispositions of property made by the owner thereof or the nature of the transaction. The only sections under the Trusts Act under which the Court is called upon to give effect to a trust are Sections 73 and 74 by which under certain circumstances new trustees are appointed. But it is clear from those provisions that they imply that there is a pre-existing trust and that circumstances have arisen which make it necessary for the Court to interfere and appoint new trustees in order that the trust may be carried out.

20. Chapter IX of the Indian Trusts Act deals, as the heading shows, with certain obligations in the nature of trusts. Section 80 says that an obligation in the nature of a trust is created in the following cases. Omitting cases which do not bear on the question under consideration, I come to Section 88 which shows that certain persons such as a trustee, executor, partner, agent etc. are bound to

protect the interests of other persons and if by availing themselves of their position they gain for themselves any pecuniary advantage, then they must hold for the benefit of the other persons the advantage so gained. These persons are said to stand in a fiduciary character to the person whose interests they are bound to safeguard. Illustration (h) to that section says :

A, a guardian, buys up for himself incumbrances on his ward B's estate at an undervalue, A holds for the benefit of B the incumbrances so bought, and can only charge him with what he has actually paid.

Then comes Section 94 according to which where there is no trust, but the person having possession of property has not the whole beneficial interest therein, (and the case is not covered by any of the previous sections), then the person holds the property for the benefit of the persons having such interest or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

21. It is clear, taking these sections and the illustration (h) to Section 88, that a guardian stands in a fiduciary relationship to his ward in regard to any advantage gained by him by reason of such relationship, and as between him and his ward "an obligation", to use the words of Section 80, "in the nature of a trust, is created."

22. I may point out that this Chapter under the Indian Trusts Act has been held to apply to all cases of constructive trusts and resulting trusts. The position is the same in English law. The following statement about the position appears at p. 173 of Underhill's Law of Trusts and Trustees, 8th Edn. :?

Where a person has the management of property, either as an express trustee, or as one of a succession of persons partially interested under a settlement, or as a guardian, or other person clothed with a fiduciary character, he is not permitted to gain any personal profit by availing himself of his position and he will be a constructive trustee of any profit so made for the benefit of the persons equitably entitled to the property.

23. I now turn to consider the provisions of the Guardians and Wards Act VIII of 1890. The word "guardian" is defined in Section 4, Sub-clause (2), as follows : "Guardian" means a person having the care of the person of a minor or of his property, or of both his person and property. Section 17 gives power to the Court to appoint a guardian, and it is true, as argued, that under that section the dominant test seems to be the welfare of the minor, and it is open to a Court to appoint any person to be the guardian of a minor. But it is clear that that person must be an eligible person having regard to the other provisions contained in the section.

24. Section 20 runs thus :?

A guardian stands in a fiduciary relation to his ward and, save as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he

must not make any profit out of his office.

And this fiduciary relation under that section "extends to and effects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent." Section 22, Sub-clause (2), contemplates the appointment of an officer of Government to be a guardian, but excepting the Collector there is no other officer expressly named who can be appointed a guardian under the Act. Sections 18 and 23 refer to the appointment of the Collector as guardian of the person or property of a minor.

25. The Guardians and Wards Act was passed in 1890, and the Official Trustees Act was passed in 1913, and if it was the intention of the legislature that the Official Trustee as such should be appointed also the guardian of the property of a minor, I think that intention would have been expressed by appropriate terms.

26. The various sections with which I have dealt show that a guardian stands in a fiduciary relation to his ward. A guardian as well as other persons mentioned in the Indian Trusts Act holding such a fiduciary position are often called trustees, but, as pointed out by Lord Westbury, the term is so used only by a convenient but deceptive metaphor. The two positions, in my opinion, are entirely distinct.

27. It is not necessary for me to refer in detail to the differences in the position of a trustee and that of a guardian. But a few instances will suffice. u/s 29 of the Guardians and Wards Act, no guardian as such can sell or mortgage the property of his ward without the leave of the Court, nor can he make a lease thereof for a period more than five years. u/s 36 of the Indian Trusts Act, the trustee has full authority to sell the property of the beneficiaries, subject of course to the instrument of the trust. The only restriction which is placed by statute upon his power is that if a trustee wants to lease trust property beyond a term exceeding twenty-one years from the date of executing the lease, he has to come to the Court and obtain leave. A trustee again has full power to compound any debts or claims without leave of the Court. A guardian, on the other hand, has to obtain the permission of the Court before he can do that. Then it is clear that a guardian of the property in all his dealings is subject to the orders of the Court. (See Sections 27, 32, 34 and 43 of the Guardians and Wards Act). But generally speaking the trustee as such is not (see Section 36 of the Indian Trusts Act). Then again the benefit of Section 10 of the Indian Limitation Act cannot be claimed by a constructive or a resulting trustee, or, in the case of an implied trust, by a person standing in a fiduciary relationship as guardian. And it is clear that the rights of the ward against his guardian may, under the various Articles of the Indian Limitation Act, be clearly barred.

28. The object of all interpretation is to find out the intention of the legislature, and that can only be done by words and language used in a statute. And where the words are clear and unambiguous, then it is not open to the Court to

speculate as to what the intention of the legislature would be. All that the Court has to do is to construe the words as it finds them in their ordinary and natural meaning, and where they have acquired a technical meaning, to give it to them, even though the result of such a construction may lead to inconvenience or where any other construction would be less arbitrary. The office of the Official Trustee was created for the purpose of protecting property which was subject to a trust created by a settlor and the Official Trustee was intended to be appointed with his consent either as an original trustee or in place of a trustee who is not willing to act or has become incapable of acting, and therefore, in my opinion, the answer to the second question is in the negative.

29. After disposing of the two questions, I should like to make a few remarks in connection therewith. To those who are familiar with the practice of our Courts, it must be obvious that cases frequently arise in which the greatest difficulty is experienced in regard to the appointment of guardian of the person or property of a minor, and frequently where a suitable person is not found the Courts have to appoint somebody who is not connected by ties of blood with the minor. In my opinion in each cases it is desirable that there should be some independent officer of Government in whom the parties could have confidence. In the mofussil invariably this difficulty is met by the appointment of the Collector. I do not know if in Bombay the Collector of Bombay has ever been appointed guardian of the property or person of a minor. In my opinion, the Official Trustee would be a suitable person to be appointed the guardian of property of a minor in such cases. He has got a well set up establishment competent to manage the property of a minor and for carrying out the functions of such a guardian and has all the facilities for that purpose. The Official Trustee seems to me to be a proper person to be appointed the guardian of the property of a minor where no other appointment is possible or expedient. And it is for consideration whether provision should not be made for such appointments. All that is necessary is, a slight amendment of Section 7 of the Official Trustees Act. But that is a question with which I have nothing to do.

30. Costs of all the parties to come out of the estate.