

(1959) 07 CAL CK 0017
In the Calcutta High Court
Case No : Suit No. 9 of 1959

T.C. Hornby and Another

APPELLANT

Vs

Mr. E.T. Farmer and Others

RESPONDENT

Date of Decision : 20-07-1959

Acts Referred:

Trusts Act, 1882 — Section 9

Citation : AIR 1960 Cal 36

Hon'ble Judges : G.K. Mitter, J

Bench : Single Bench

Judgement

G.K. Mitter, J.—This is an originating summons taken out by the trustees of a trust instrument. The defendants are three in number. The first defendant Mrs. E.T. Farmer was at one time the wife of one Mr. Gardner, deceased, a principal director of the defendant No. 3 Kettlewell Bullen and Company Limited. The second defendant is a company appointed executors under the will of the said Mr. Gardner. The third defendant is a company which acts as the managing agent of many industrial concerns of repute.

2. The central question in this summons is whether or not the 1st defendant is entitled to any benefits under a trust created by the third defendant on 25-11-1949, the object whereof was to provide for and pay to the said Mr. Gardner a pension for life and other benefits for himself and his wife. Counsel appearing for the plaintiff put the case very fairly. He cited authorities both in favour of the first defendant and against her and so did counsel for the third defendant. In fact, counsel for the defendant No. 1 had very little submission to make in view of the arguments already addressed to the Court. Counsel for the second defendant said that his client was leaving the matter to the Court and had no particular submission to put forward.

3. The facts are few and not in dispute. Mr. Gardner had for many years past rendered valuable service to the third defendant in recognition whereof the deed of trust was executed. At the time of the execution of the same, the first

defendant was the wife of Mr. Gardner. This marriage was dissolved by a court of law in the year 1955. In 1956 the former Mrs. Gardner remarried and became Mrs. Farmer. On 8-3-1956, Mr. Gardner made a Will appointing the second defendant as executors to it and providing for substantial benefits for Mrs. Farmer. Mr. Gardner died in July 1957.

4. The trustees want to ascertain whether under the trust deed the benefits which were reserved for "Mrs. Gardner" or "Mr. Gardner's wife" are available to first defendant.

5. The original trustees left India few years back and as and when a trustee went abroad a trustee was appointed to succeed him, the plaintiffs being the present trustees.

6. The trust deed was executed by two trustees and the company. The recitals in the deed are inter alia:

(a) In respect and consideration of the services rendered by Mr. Gardner the Company had subject to certain contingencies, agreed in conjunction with its associates to provide for and pay to him a pension for life and other benefits for himself and his wife.

(b) In order to provide for such pension and other benefits the company had paid to the trustees the sum of three thousand four hundred and ninety four pounds nineteen shillings and nine pence and circumstances permitting had further undertaken to pay to the trustees annually the rupee equivalent of the said sum of the three thousand four hundred and ninety four pounds nineteen shillings and nine pence until seven such annual payments have been made or until Mr. Gardner's death if earlier.

7. The declarations made by the trust deed are, inter alia, as follows:

(2) The trustees declared that they held the said sum of three thousand four hundred and ninety-four pounds nineteen shillings and nine pence and would hold the said rupee equivalent of three thousand four hundred and ninety four pounds nineteen shillings and nine pence per annum payable to them upon trust to expend the sum in taking out with the Prudential Assurance Company Limited, an Endowment Policy and a Deferred Annuity Policy which together would provide the following:

(a) In the event of the death of Mr. Gardner before the first of December one thousand nine hundred and fifty six an income of one thousand two hundred and fifty pounds per annum payable by quarterly instalments of three hundred and twelve pounds and ten shillings for fifteen years plus a cash payment of approximately one thousand and sixty-eight pounds for each annual premium paid prior to the date of death.

(b) In the event of Mr. Gardner's survival payments of three hundred and twelve pounds and ten shillings per quarter for fifteen years from the first December

one thousand nine hundred and fifty six at the end of which time either a cash payment of ten thousand three hundred and twenty three pounds or, alternatively, an annuity payable for the remainder of Mr. Gardner's life of three hundred and twelve pounds and ten shillings per quarter,

(c) In the event of Mr. Gardner's death between first December one thousand nine hundred and fifty six and first December one thousand nine hundred and seventy one the quarterly instalment of three hundred and twelve pounds and ten shillings to continue for the balance of fifteen years together with a cash payment of not less than seven thousand four hundred and seventy six pounds.

4. In the event of Mr. Gardner surviving for the full period of fifteen years after first December one thousand nine hundred and fifty six the cash payment then accruing to the trustees would be paid to Mr. Gardner or if Mr. Gardner so preferred and informed the Trustees accordingly in writing the Trustees would exercise their option under the policy and secure an annuity of three hundred and twelve pounds and ten shillings per quarter or such smaller sum as might be payable if the benefits under the policy had been reduced and would pay the said annuity to Mr. Gardner as and when received from the Insurance Company.

5. In the event of Mr. Gardner predeceasing his wife the quarterly instalments received by the Trustees under the policies after his death would be paid by the Trustees to Mrs. Gardner, and the Trustees would stand possessed of the cash payments payable under the policy Upon Trust at their discretion either to pay the same to Mrs. Gardner Or purchase therewith an annuity for Mrs. Gardner, the first payment under which would fall due three months after the date upon which the last instalments due under the policy would be payable.

6. In the event of Mrs. Gardner predeceasing Mr. Gardner the Trustees on the death of Mr. Gardner would stand possessed of the remaining quarterly payments and the cash payments payable under the policy Upon Trust for Mr. Gardner's personal representatives and the receipt of such personal representatives would be a full and complete discharge to the Trustees therefore.

7. In the event of Mr. Gardner predeceasing Mrs. Gardner and the death of Mrs. Gardner occurring before the final quarterly instalment due under the policy had been received the Trustees would stand possessed of all sums receivable under the Policies subsequent to the date of death of Mrs. Gardner upon trust for Mrs. Gardner's personal representatives and the receipt of such personal representatives would be a full and complete discharge to the Trustees therefore.

(8) The questions which have been framed for answer by this Court are as follows;

(a) Whether on a true construction of the said deed of trust dated 25-11-1949 and in the events that have happened the defendant No. 1 is entitled absolutely to receive the trust estate covered by the said Deed of Trust?

(b) Whether on a true construction of the said Deed of Trust dated 25-11-1949

and in the events that have happened it must be deemed that the trusts created thereby have failed and that there has been resulting trust in favour of the defendant No. 3 who is entitled to receive the said trust estate absolutely?

(c) Whether on a true construction of the said Deed of Trust dated 25-11-1949 and in the events that have happened the defendant No. 2 has any and, if so, what interest in the said Trust Estate?

(d) What on a true construction of the said Deed of Trust and in the events that have happened are the rights of the defendants and each of them in the said trust estate and how is such trust estate to be administered?"

9. Apart from any authority it would appear clear that no one who was not Mrs. Gardner could claim any benefit under Clause 5 mentioned above. In my view the object of the trust was principally to benefit Mr. Gardner and in the event of his death before receipt of the benefits in full his widow was to come in for a share of the same. The trust deed was not aimed at providing for benefits for Mr. Gardner and the particular person who answered the description of his wife at the time when the instrument was created. Mr. Gardner might have had the misfortune of losing his wife after the execution of the trust deed. If so, he might have married again. It does not appear to me that the second Mrs. Gardner was to be excluded from the benefits of the trust deed. It might have so happened that Mr. Gardner had to divorce his first wife or was divorced by her and had re-married. There might be another divorce between Mr. Gardner and his second wife. Mr. Gardner then died leaving two persons who had been his wife before. Could the first Mrs. Gardner take the property as being the person in existence at the time when the document was created to the exclusion of the second Mrs. Gardner, or would the latter take the benefit as being the person who had replaced the first Mrs. Gardner? In my view none of the persons could claim any benefit under the trust.

10. The authorities cited were all English cases. Apart from one or two which have subsequently being disapproved, then all go to show that Mrs. Farmer cannot claim any interest under the trust deed. Dealing with the question as to whether a woman can take as a legatee by the name of the "wife" of a person the learned commentators of J. Williams on Executors and Administrators thirteenth Edition Vol. 2 p. 567 state that "sometimes a person who answers the description in the will has ceased to answer that description at the time of the testator's death, or at the time when the gift was to take effect. Thus in *Re Morrison, Hitchins v. Morrieson* (1888) 40 Ch D 30 a testator bequeathed a share of his residuary personal estate in trust for his son for life, and after his decease in trust to pay unto or permit any wife of his son to receive the annual income of his share during her life. The son married a woman from whom he was afterwards divorced on his petition. He died without having married again. It was held that the woman was not entitled to the income of the son's share."

11. In *Lewin on Trusts* 15th Edition page 256 the matter is thus put "A trust to

pay the income after the husband's death to the wife "if she shall survive the husband or until she marry again" is not determined by the remarriage of the wife during the life-time of the husband after the dissolution of the marriage, but, where upon the construction of the instrument it is clear that the power or trust is for the benefit of a surviving husband or wife who fulfils that status at the date at which the trust or power takes effect, a divorced person is not entitled to benefit."

The cases relied upon are those which were cited at the bar including in (1888) 40 Ch D 30 On the facts of *Morrieson's* case (1888) 40 Ch D 30 Kay, J. said "I confess that I have not a moment's hesitation about this case." His Lordship went on to observe.

"Now, the life interest was evidently meant for a widow or widower; the will says "wife or husband," but the life interest is to commence at the death of the son, and therefore the will does not mean any wife the son might marry; he might marry a wife who died in his lifetime, and after her death he might marry again; he might marry again two or three times; but none of these wives could possibly have any interest unless she were at the moment of his death in the status and position of a wife. x x x The question is, to whom this interest is to be given? Is it given to a person who was at one time his wife, but at the time of his death was so no longer, or to a person who then could say, I was the wife and am now the widow?" In my opinion, it is clearly a gift to the latter."

His Lordship disapproved of the judgment in the case of *Bullmore v. Wynter* (1883) 22 Ch D 619 In that case there was a gift to the testator's daughter by name during her life for her separate use without power of anticipation, and after the death of his said daughter in trust for any husband with whom she might intermarry, if he should survive her, for his life. She did marry, and her husband petitioned for a divorce, and an absolute decree was made for the dissolution of the marriage. Then she died, and Fry J. held that the husband was entitled to the property for his life. Kay, J. observed in *Morrieson's* case that he did not understand the reasons of that decision and could not help supposing that the learned Judge was influenced by the circumstance that the husband was the petitioner, and that it was hard on the husband that he should lose the property because of the guilt of his wife.

12. Both the above cases were considered by Eve J., in *Re Williams Settlement, Greenwell v. Humphries* (1929) 2 Ch 361 In this case a wife made a marriage settlement reserving power in herself in the event of there being but one child of the then intended marriage, to revoke the trusts of the settlement as to three quarters of the settled funds and to resettle the same for the benefit of any husband who might survive her, but so that he should not take more than a life interest therein, and any child or other issue of such future marriage. The wife was divorced and remarried in 1908. She then exercised the power in favour of her second husband. In 1923 the second marriage was dissolved upon the husband's petition, and the wife again remarried. She died in 1928, leaving her

first second and third husband surviving her. The question on the originating summons was whether the second husband was entitled to the enjoyment of the life interest created in his favour. Disallowing the claim of the second husband Eve J. said

"to be so entitled, he must, I think fulfil two conditions. He must be her husband, and he must survive. It is conceded that he must survive in order to make any interest under the appointment, but it is argued on his behalf that so long as he was her husband at the time of the appointment and survives, he is entitled. I cannot so hold. I think that he ceased to be her husband on the dissolution of the marriage, and thereafter he could make no claim under the appointment."

13. The above judgment was upheld in appeal Both Lord Hanworth M. R. and Lawrence L. J. distinguished the case of (1883) 22 Ch D 619 and both the learned Judges observed that in Bullmore's case the "controlling qualification was not the status of the survivor, but the fact that there had been a marriage." Both the learned Judges further approved of the decision of Maugham J. in *Bosworthick v. Clegg*, 1929 WN 133

14. 1929-2 Ch 361 was followed in *re Slaughter* 1945 Ch 355 In this case a testator, who settled a share of his estate in favour of a son and his children, gave his son a power by deed or will to appoint a life or lesser interest in the fund to or for the benefit of any wife of his who might survive him. The son married, and three years later exercised the power by deed and irrevocably appointed a life interest in the fund after his death to, his wife. 3 years later the marriage was dissolved on the wife's petition, and shortly afterwards the son died. Vaisey J. doubted the correctness of the decision in Bullmore's case (1883) 22 Ch D 619 and felt himself bound to follow the judgment in 1929 2 Ch 361

15. All the above cases were again considered in *In re Allan* 1954 Ch 295 In this case "a testator by his will made in 1933 gave to each of his children the following power of appointment in respect of their life interests in the settled residue of his estate: "Each child may by any deeds or deed, revocable or irrevocable, executed prior to and in contemplation of marriage or by will or codicil, appoint to or for the benefit of any wife or husband who may survive him or her an interestsubject to any conditions such childmay think fit". The testator died in 1934. In 1937 his son exercised the power in favour of his intended wife one A. V. Duret, by a deed made in contemplation of marriage and expressed to be irrevocable. The appointment was to take effect if the marriage was solemnized, and if the said A. V. Duret should survive the son, after the termination of an overriding life interest. The marriage was solemnized but was subsequently dissolved on the petition of the wife. The appointer husband died without having remarried and the appointee survived him. Danckwerts J., held that the appointee would not be qualified to take the interest appointed to her because when the appointer died, she was no longer his wife. His judgment was upheld in appeal. Evershed M. R. observed

"by exercising remedy available to her in the courts of terminating her marriage, she forfeited her chance of a very substantial life interest. But those considerations cannot be conclusive; indeed, they may not even be relevant. The question is one of construction ***** in the light of the authorities, I am quite satisfied that only one answer can be given to that question."

16. My attention was also drawn to the judgment in *In re Coley* in 1903 2 Ch D 102 There "a testatrix gave her residuary estate to trustees to pay the income to her son for life, and after his decease to his wife for her life, with remainder, as to the capital, for such of his children as should attain twentyone equally. At the date of the will the son had a wife living and well known to the testatrix. The wife died after the testatrix and the son remarried." Kekewich J. held that second wife took no interest under the gift and his judgment was upheld in appeal. Vaughan Williams, L. J. observed that (at page 108) "by the words used in this will the testatrix meant to describe the particular person who was the wife of her son both at the date of her will and at her death, and that she did not mean to refer to any one else who might stand in the relation of wife to her son."

17. The last case was relied on by Mr. Chatterjee for Mrs. Farmer. In my view, however, this case does not help Mr. Chatterjee. The above observation of Vaughan Williams L. J. will show that the testatrix intended to benefit a particular person who was the wife of her son both at the date of her will and at her death; consequently nobody who answered the description only at one of the two points of time could take.

18. Mr. Chatterjee referred me to a passage in Theobald on Wills, Eleventh Edition, page 259 reading

"Prima facie a gift to the wife of A, who has a wife living at the date of the will, goes to that wife and no other, whether the gift is in possession or after a life interest to the husband or absolute or for life only. The same rule applies in the case of a husband. IE there is anything on the face of the will to show that an existing person is referred to the case is clear; for instance, a reference to the "beloved" wife of A, or a reference to daughters as the wives of named husbands."

19. In my view, the above does not help Mr. Chatterjee's client at all. The deed of trust does not show that the particular person who was Mrs. Gardner at the date of the instrument was to be the object of the benefit in all circumstances. To take the benefit under Clause 5 of the trust deed she had to be the wife of Mr. Gardner at the time of the death of the latter; otherwise it could not be said that there had been "the event of Mr. Gardner predeceasing his wife." If at the date of his death Mr. Gardner had no wife, his former wife having already become somebody-else's wife, the provision in Clause 5 of the deed of trust would fail.

20. The answers to the questions raised are as follows:

(a) No.

(b) Yes.

(c) No.

(d) The trust estate has become the property of the defendant No. 3.

21. No Indian decision was cited at the bar and so far as this court is concerned it seems to be a point of first impression. In the circumstances of this case I shall order that costs of all parties on this originating summons be taxed as between attorney and client and paid out of the trust estate.