
(1975) 03 MAD CK 0044
In the Madras High Court

The Official Assignee

APPELLANT

Vs

S.P. Kannappa Mudaliar (deceased) by Bagiammal, legal representative

RESPONDENT

Date of Decision : 19-03-1975

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 56

Citation : (1975) 2 MLJ 115

Hon'ble Judges : S. Mohan, J

Bench : Division Bench

Judgement

S. Mohan, J.—The following facts required to be noted for a proper appreciation of the issue involved in this matter. On 24th September, 1957 the respondent herein executed a general power of attorney in favour of the insolvent (Manicka Mudaliar) wherein one of the powers that is given is, to the purchase or sell the properties, to borrow and to lend and to execute necessary document in that regard.

2. On 21st December, 1967 the respondent herein lent a sum of Rs. 25,000 to the insolvent which was repaid to her on the 12th of July, 1972 and on the 27th July, 1972 the debtor (Manicka Mudaliar) filed a petition for adjudication and the actual order of adjudication is dated the 28th July, 1972. Under these circumstances, it is contended by the learned Official Assignee that this payment just 15 or 16 days prior to the actual order of adjudication would amount to fraud-lent preference within Section 56 of the Presidency Towns Insolvency Act and is therefore liable to be set aside. In the counter-statement by way of reply to the report of the Official Assignee, it is stated that inasmuch as the power of attorney had been executed on the 24th September, 1957 the relationship is that of an agent and principal. Where the agent is entrusted specifically with the moneys to lend them to 3rd parties on money-lending transactions the relationship becomes that of a trustee and beneficiary and consequently there cannot be a debt much less when that amount is repaid there is no question of

"with a view to prefer" as required u/s 56 of the Act.

3. The question that arises for my determination is, where the moneys belonging to the principal are entrusted to the agent for the specific purpose of investing it in money-lending transactions, could it be said that the relationship is that of trustee and beneficiary or merely that of an agent under the principal alone. I may first refer to the leading case in *Burdick v. Garrick* V Chancery Appeals 233 v. wherein the facts are more or less similar. The agent who was a solicitor in London, held a power of attorney from his principal in America to sell his property and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1898 she filed a bill against the agent for an account. It was held:

A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is ordinary course of trade to make use of them for his own profit. He does make use of them, and he invests the money deposited with him, and his customer does not require from him those very coins or exchequer bills which he deposited with him. But in the present case we have an agent who is entrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock ; and which moneys the factor or agent is bound to keep totally distinct and separate from his own money ; and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstance differs from one in an ordinary fiduciary position I am unable to see.

4. The next case to which reference could be made is *Kerswich North American Land and Timber Company, Ltd. v. Watkins* (1904) 1 Ch.D. 242.

5. In that case it was held thus:

Of the other authorities cited the only one which I think it necessary to notice is *Soar v. Ashwell* (1893) 2 Q.B. 390. Of this case *Stirling, J.*, in *Friend v. Young* (1897) 2 Ch. 421, remarked that the plaintiffs' claim was of such a nature as could only be asserted in a Court of Equity, and that this was pointed out by *Lord Esher, M.R.*, in the commencement of his judgment. The Master of the Rolls certainly did this, and there are other passages in his judgment which show that he was throughout determining how a Court of Equity would treat that claim ; but I cannot think that the Master of the Rolls could have intended to mean more than that the case was one of trustee and cestui que trust to be decided according to the principles guiding the Court, which ordinarily takes cognizance of that relation. In the concluding sentence of his judgment, he says that he is clearly convinced by the evidence that the defendant became, on receipt of the money, a trustee of it. I conceive the point of *Stirling, J.*'s, remark to be that he

himself in *Friend v. Young* (1897) 2 Ch. 421, was not dealing with a case of that character but with one quite different, involving fiduciary relation, but not that of trustee and cestui que trust, and which might therefore properly be the subject of a common law action. On the point that the case of *Soar v. Askwell* (1893) 2 Q.B. 390 was one of trustee and cestui que trust, and therefore outside the Statute of Limitations, the judgment of Bowen, L.J. is perfectly clear. Like the Master of the Rolls, he relies on *Burdick v. Garrick* L.R. 5 Ch. App. 233, but before referring to that case he says:

It has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and [confidence in virtue of which he received it. He never can discharge himself except by restoring the property which he never has held otherwise than upon this confidence, and this confidence or trust imposes on him the liability of an express or direct trustee." These authorities, altogether consistent with others to which I have not thought it worth while here to refer, lead inevitably to the conclusion that in this case an express trust was constituted as between the plaintiffs and defendant, and that as regards the moneys remitted by the former to the latter for investment the plea of the Statute of Limitations cannot prevail.

6. It is interesting to note that this decision in *Burdick v. Garrick* L.R. 5 Ch. App. 233, has been followed by a Division Bench of this Court as seen from the decision in *A.M.M. Murugappa Chettiar Vs. Arangaraja Kumaranandaswami and Another*, wherein the facts were : P. being the founder and head of a certain mutt, and with a view create an endowment for that mutt, collected subscriptions from several persons and the amounts so collected were paid to the makers of four hundies in favour of P.P. endorsed those four hundies to R. with instructions to him to realize the amount thereof and to invest the amount so collected on P's behalf and on account with a firm N.R. however put the money into his own account in the firm and not to the credit of P.P. thereupon brought a suit against firm N. for recovery of the amount realized and standing in the account of R. Under those circumstances it was held:

The money was entrusted to Ramanathan Chetty for that purpose and in putting the money into his own account he was guilty of a breach of trust and any difficulty there might have been in identifying this money after it got into the hands of defendant 1 is removed by reason of the fact that Ramanathan Chetty had two accounts with defendant 1, viz., a tavanai account and a tanathu account. The latter was an account of Ramanathan Chetty's own dealings.

7. Instead of multiplying the authorities I need only to refer to the illuminating passage occurring in page 214 of *G.W. Keeton the Law of Trusts*, 9th edition .

The question whether an agent is a trustee for his principal has provoked

considerable discussion. It is certainly clear that an agent cannot make a profit out of his position as agent, and if he does, he is accountable for that profit to his employer. Unless there is some evidence of a fiduciary relationship, however, the position of the parties in respect of the profit unlawfully made is that of debtor and creditor, and not that of trustee and cestui que trust. It has been suggested also that an agent is always a constructive trustee of property of the principal, committed to his charge, but the better view would seem to be that he is only a trustee where there is some special, confidential relationship, e.g., where the principal gives the agent property for safe custody, sale or investment, but where there is no such specially confidential relationship, there is no relationship of trustee and beneficiary, and the principal's remedy is at Common Law for money had and received.

8. From the facts of this case it is clear that the respondent in view of the confidence and the relationship as her brother came to entrust the money. According to her the moneys were specifically entrusted for the purpose of doing money-lending business to 3rd parties and in cross-examination she adds as to the reason why she took back the same with interest. According to her since her brother (Insolvent) had the advantage of her money lending it to the 3rd parties she demanded interest which was repaid to her on 12th July, 1972 after much insistence over which a quarrel also ensued.

9. Mr. M.S. Venkatarama Iyer, is right in his submission when he says that where there was a duty on the part of the trustee to invest by lending it to the 3rd parties, but he merely looked after his own self-interest, the self-interest must be put aside. This has been eloquently put by Dr. Waters as follows:

All agents, it is submitted, are by the nature of their function obligated to put self-interest aside when acting within the scope of their agency or otherwise utilising their office in any particular. The concomitant of this obligation is breached and proprietary advantage ensues. It is for the instant Court to decide whether the particular principal has not imposed the full gamut of this obligation.

The learned Official Assignee would argue that there is nothing on record to show that there was any entrustment pertaining to the power-of-attorney executed on 24th September, 1957. On a reading of the power-of-attorney it shows that there were prior transactions and the specific power was conferred to lend or borrow money and to execute documents in that regard. Exhibits R-2 to R-5 are various mortgage deeds executed by third parties in favour of the respondent Bagyammal represented by the insolvent the power-of-attorney agent. Therefore this argument fails,

10. The result is this application will stand dismissed. However, there will be no order as to costs.