

(1898) 04 CAL CK 0016
In the Calcutta High Court

William Robert Fink

APPELLANT

Vs

Moharaj Baliadur Singh.

RESPONDENT

Date of Decision : 30-04-1898

Acts Referred:

Citation : (1898) ILR (Cal) 642

Hon'ble Judges : P. O'Kinealy, J

Bench : Single Bench

Judgement

O'Kinealy, J.—The first question I have to consider is whether the plaintiff can maintain this suit in his own name; and I am of opinion that he can. The orders by which he was granted liberty to institute this suit gave that power to him in express terms, and the authority to give that power is, in my opinion, conferred on the Court by the provisions of Section 503 of the Code of Civil Procedure. By that section the Court has power to grant to the receiver "all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing as the owner himself has;" and I read that as meaning that power is conferred upon the Court to substitute the receiver for the owner for those purposes, always supposing that the ownership of the property is completely represented in the suit in which the receiver is appointed. I am not disposed to put a narrow construction on this part of Section 503, as it is often a great saving of time and trouble, so far as the receiver is concerned, and of expense to the estate in his hands, that he should have the power of bringing and maintaining suits in his own name. That the Court can give such a power is treated as clear by Mr. Justice Wilson in the case of *The Oriental Bank v. Gobind Lall Seal* (1884) ILR 10 Cal 710 733.

2. The next question is, taking the plaintiff to be a creditor of Rai Dhunput Singh in respect of a debt existing at the time the deed of trust was executed, can he claim that he and the other creditors are beneficiaries under that deed, and can

lie call upon the Court to have the trusts contained in it administered for their benefit? I am of opinion that he cannot. This is a question depending upon the construction of the deed and the conduct of Rai Dhunput Singh and his creditors upon and after its execution.

3. In that document Dhunput Singh gives his reasons for executing it. He says: "I was adjudicated an insolvent by an order of the Hon^{ble} High Court, Original Side, at Calcutta in its Insolvent Jurisdiction, dated the 16th day of February, year 1893, in consequence of which I became heavily involved in debts. I have managed to pay off many of the debts by sale and mortgage of properties; but there is still left a large amount of debts, and in order to pay off those debts to the best of my ability it is necessary for me to make some arrangement. Being myself troubled in body and mind, I am unable to manage (my) affairs properly any longer, and most of my creditors are desirous that I should make over the estate into the hands of trustees with a view to liquidation of my debts. for these reasons I make over all my moveable and Immovable properties, that is to say, whatever properties I am at present possessed of, to Srijoot Gopi Chund Bathra, son of the late Fakir Chund Bathra of Azimgunj, by caste Aswal, by occupation service holder, and Srijoot Kerut Chund Srimal, son of the late Mungni Ram Srimal and Srijoot Surji Kumar Adhicary, son of the late Bhogoban Chunder Adhicary, at present of Baloochur, by caste Brahmin, by occupation service holder, by appointing them trustees." That is to say, ill-health and mental anxiety having unfitted him for carrying out the work of paying off all his debts---a work which he himself had carried on up to that time---and bis creditors being desirous that that should be carried on by the trustees, he appoints the trustees to carry on that work to completion. In other words, they are put in the place of Dhunput Singh himself so far as he could do so, and occupy the same position towards the creditors, and that position was certainly not that of a trustee. The deed then directs the manner in which the trustees are to proceed for the purpose of liquidating his debts and recovering his outstandings, and declares that neither himself nor his heirs shall have power to interfere with the acts of the trustees, until all his debts shall have been paid. This last clause was strongly relied on by the plaintiff as showing an intention to create a trust for the creditors. It is equally consistent with the case for the defendant, it is, I think, nothing more than a clause confirming the trustees in the powers given to them by the deed. Then there is this provision: "In order to prepare a list of my debts, the trustees shall ascertain the same by looking into my books of accounts; and they shall not admit any debt without roka, hatchitta or hundi, bearing the signature of myself or my monib gomastas, or without decree." This shows that the creditors were to be ascertained on a future investigation to be made by the trustees in accordance with certain tests laid down by which they were to be guided. It seems tome that this provision is against the plaintiff's contention, for it shows that every person who claimed to be a creditor of Rai Dhuuput Singh at the date of the deed was not intended to be provided for by it, but only those whose debts should have been ascertained in the manner of investigation

pointed out in the deed. There is no evidence before me that any such investigation has ever been undertaken. I think that the true way to look at this provision is, to take in as indicating the course of proceeding which the trustees were to take, not for the purpose of finding out their beneficiaries but for the purpose of liquidating the debts on behalf of Rai Dhunput Singh their real and only beneficiary. The remaining provisions of the deed point in the same direction. I do not see any indication that these trustees were intended by Rai Dhunput Singh to be trustees for his creditors; in my opinion they were and were intended to be (so far as I can gather his intention from the construction of the deed) trustees for himself for the purpose of carrying out the provisions of the deed of trust, and that he was, and his heir is, the only person who under the terms of that deed could call the trustees to account as trustees. There is no evidence before me to show that the deed of trust was communicated to the creditors, or that any of them accepted the position of beneficiaries under it. The evidence given by Heera Lall, the gomasta of Sew Bux Sureeka, is too shadowy to be relied upon as establishing the existence of any trust for the creditors or for Sew Bux Sureeka. This case is one of a class the best known example of which is *Garrard v. Lord Lauderdale* (1830) 3 Sim. I.

4. According to the view I have taken of this case the plaintiff cannot claim to rank as a beneficiary under the deed of the 19th of July 1896, and he is, therefore, not entitled to say that his claim on the hundi for Rs. 1,200 is not subject to the ordinary law of limitation.

5. The result is that the plaintiff's suit fails as regards the hundi for Rs. 1,200 but he is entitled to a decree for the amount of the other two hundis, with interest at 6 per cent, per annum down to the filing of the plaint, together with the costs of the suit and interest on decree. The decree will be against the defendant Moharaj Bahadur Singh as the legal representative of Rai Dhunput Singh for the amount indicated above to be paid out of the property of Rai Dhunput Singh. I shall make no order as to the costs of the trustees. They did not sever in their defence from the infant, and there is no doubt that the estate of Dhunput Singh has benefited by the amount of the hundi for Rs. 1,200 being barred by limitation.

6. It must be understood that, although I give no relief to the plaintiff as against the trustees, I do so on the ground that the deed did not constitute them trustees for him, but trustees for Rai Dhunput Singh of the property included in the trust-deed. I decide nothing further as between the plaintiff and the trustees, and all questions which may arise between them regarding the execution of the decree in the suit remain untouched by me.