

APPELLATE CIVIL

Before S. K. Kapur, J.

RANCHHODDAS SHAMJI KHIRIANI AND ANOTHER,—Appellants

versus

RAM BALKRISHNA PHATAK AND ANOTHER—Respondents

S.A.O. 207-D of 1965

1965
December, 8th.

Limitation Act (XXXVI of 1963)—S. 10—Scope and applicability of —Specific purpose—Meaning of —Suit by transferee of shares against transferor for declaration that defendant is trustee for the plaintiff in respect of all property rights in the shares transferred and for recovery of dividends received by defendant after transfer—Whether covered by S. 10—Companies Act (I of 1956)—S. 111—Dismissal of appeal of the transferee of shares by Central Government—Whether acts as res judicata—Refusal by the company to register transfer of shares—Whether terminates the relationship of trustee and cestui que trust.

Held, that the term 'specific purpose' in section 10 of the Limitation Act is really, more or less, intended to convey the idea of an 'express trust' as known to the English lawyers. A trust arising by operation of law would, therefore, be not a trust for a 'specific purpose'. The words 'specific' appears to have been used in contradistinction with the word 'general' and the word 'purpose' stands for the object with which a trust is created as distinguished from the object which is intended to be benefited. Inferences drawn from the conduct of the parties may be sufficient to establish an express trust. Section 10 has a very limited application. It is available only as against persons in whom property has become vested for a purpose which is specified or expressed by the author; it has no reference to trusts which are founded on an unexpressed but implied intention of the party creating them or to trusts which are raised by construction of equity without any reference to the intention of the parties. In other words section 10 will apply where trust has been created for some specific purpose and the property has become vested in trustee with the object of carrying that purpose into effect. A relevant consideration would, therefore, be : has the trust been created by act of a party for a performance, that is for a person or cause intended to be benefitted ? Yet another factor to be noticed for distinction between the two types of trustees may be : is the possession of trustee in virtue of any right of his own or is it coloured from the first by the trust and confidence in virtue of which he received it ? In case of trust for a specific purpose, it is directed to benefit a particular person or a cause, but in case of trust arising by operation of law, it is not conceived with reference to any particular individual or cause but only in a general way.

Held, that the transferors of shares possessed the shares before sale in their own right. By transfer they became constructive trustees of the said shares and the rights attached thereto. The writing given by the transferors to the transferees at the time of the sale of the shares was merely a declaration of certain objectives which the sellers are obliged to carry out as a consequence of their becoming trustees. Such a declaration of obligations cannot change a constructive trust into an express trust or a trust for a specific purpose. A suit by the transferee of shares against the transferors thereof for declaration that the transferors are trustees for the transferee in respect of all property rights in the shares sold and for the recovery of dividends received by the transferors after the sale is not governed by section 10 of the Limitation Act.

Held, that the dismissal of the appeal of the transferee of shares against the decision of the company refusing to register the transfer by the Central Government under section 111 of the Companies Act, 1956, does not operate as *res judicata*. The relief sought under section 111, was against the refusal by the company to transfer shares. That subject matter and cause of action had nothing to do with the subject matter and cause of action in the present suit. The judgment, apart from other matters, cannot on this ground alone operate as *res judicata*.

Held, that the relationship as trustee and *cestui que trust* continues between the transferor and transferee of shares even after the registration of transfer is refused by the company. The act of the company in declining to register the transfer cannot vitiate that relationship.

Second Appeal from the order of Shri Des Raj Dhameja, Additional District Judge, Delhi, dated 23rd August, 1963, modifying that of Shri H. C. Gupta, Sub-Judge, 3rd Class, Delhi, dated 30th March, 1963, and holding that the rest of the suit, apart from the declaration as to trust or recovery of dividend and interest thereon prior to the meeting of 14th March, 1957 to be within time and remanding the case for further trial in accordance with law.

Y. DAYAL AND SHIV RAJ BAHADUR, ADVOCATES, for the Appellants.
D. P. WADHAWA, ADVOCATE, for the Respondents.

JUDGMENT

KAPUR, J.—The two appeals, being S.A.O. 207-D of 1963 and S.A.O. 209-D of 1963, arise out of two suits, being suits Nos. 80 and 81 of 1962, respectively. The said suits were consolidated and proceedings ordered to be recorded in suit No. 80 of 1962. The transactions in suits Nos. 80 and 81 were the purchase of twenty and twenty-six shares, respectively, by the appellants in Brihan Maharashtra

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Sugar Syndicate Limited from the defendants-respondents. Both the suits were for a declaration that the defendants held the shares, the property rights annexed thereto and the dividends accruing in respect thereof in trust for and for the benefit of the plaintiffs. It was also prayed in the suits that the defendants be restrained from exercising any property rights annexed to the said shares, including right to vote, and they be directed to pay all future dividends realised by them on the said shares. The dividends recovered by the defendants were also claimed in the suits. The real controversial issue between the parties is issue No. 3:—

“Whether the suit is within limitation ?”

The trial Court dismissed the suits on the ground that they were barred by time. When the matter went up in appeal before the Additional District Judge, Delhi, he concurred with the trial Court to the extent that the plaintiffs were not entitled to the benefit of section 10 of the Limitation Act, as the property in shares did not vest in the defendants in trust for any specific purposes. He, however, held that the trial Court was not justified in dismissing the suits *in toto*. He said “as the suit was instituted on 19th January, 1963, it would be within limitation so far as the dividends declared in the meeting of the company held on 14th March, 1957 or afterwards are concerned. The article applicable is article 120 of the Limitation Act. The suit for the dividends for the prior period would be barred by time because the last of these was payable on 25th September, 1956. Therefore, the suit must be held barred by time only in respect of the prayer for a declaration that the defendants are trustees in respect of these shares for the plaintiffs and for dividends declared at meetings prior to that held on 14th March, 1957. For the rest, the suit is within time.....” The suits were, therefore, remanded for further trial.

At the time of the sale of the shares, the defendants delivered the share certificates together with blank transfer deeds, duly signed, to the plaintiffs. Simultaneously with the handing over of the share certificates, the defendants signed and delivered a letter dated 12th October, 1954 (exhibit P. 7) to the plaintiffs, in which it was, *inter alia*, stated—

“We also undertake to sign all such documents as may be required to complete your title to these

shares and to enable you to exercise your rights as a shareholder. We also undertake to execute such Power of Attorney as you may desire in respect of these shares. We hereby authorise you to exercise on our behalf all our rights as holders of the said shares. In case the company hereafter decides to issue further capital and offers the new shares to the existing share-holders, before the shares hereby sold by us to you are transferred to your name in the books of the company, we hereby undertake to hand over to you all the papers such as application for new shares etc., in connection with such issue which we may receive and also to execute all such documents and papers as you may require to enable you to apply for and obtain allotment of such new shares.

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We also undertake to deliver to you duly endorsed all dividend warrants in respect of these shares, which we may hereafter receive, till these shares are transferred to your name in the company's records."

These transfers were, however, not registered by the company in their books and the plaintiffs' appeal to the Central Government under section 111 of the Companies Act, 1956, also failed. After the sale by the defendants, a number of dividend warrants were received by them and they withdrew the dividends due thereon. It is in these circumstances that the above two suits were filed.

The only contention raised by Mr. Yogeshwar Dayal on behalf of the appellants is that the two Courts were in error in holding that the plaintiffs were not entitled to the benefit of section 10 of the Limitation Act. He says that the property in shares vested in the defendants in trust for "specific purpose" and in any event the letter exhibit P. 7 made the defendants express trustees and, therefore, there was no limit of time for filing the suit in view of section 10. He has principally relied on *E. D. Sassoon and Company Limited v. K. A. Patch* (1). In that case it was held that a shareholder, who sells his shares in a joint stock company and hands over the share certificates and

(1) 45 B.L.R. 46.

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transfer forms to the purchaser but the company refuses to transfer them, occupies the position of a constructive trustee of the shares for the purchaser. I have no quarrel with this proposition. Here, the question is not whether the sellers were trustees or not, but whether the transaction constituted them as express trustees.

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Reference is then made by the learned counsel for the appellants to *Kishtappa Chetty v. Lakshmi Ammal* (2), *Soar v. Ashwell* (3), and *R. Mathalone and others v. Bombay Life Assurance Company Limited and others* (4). In *Mathalone's case*, their Lordships of the Supreme Court held that on the transfer of shares, the transferee becomes the sole beneficial owner of those shares sold by the transferor, the legal title to which is vested in him. Thus, the relation of trustee and 'cestui que trust' is thereby established between them. The transferor holds the shares for the benefit of the transferee to the extent necessary to satisfy the demands of section 94, Trusts Act, 1882. As the transferee holds the whole beneficial interest and transferor has none, the transferor must comply with all reasonable directions that the transferee may give. In this situation if he becomes a trustee of dividends, he is also a trustee of the right to vote because the right to vote is a right to property annexed to the shares and as such the beneficiary has a right to control the exercise by the trustee of the right to vote. In *Soar's case*, Lord Esher formulated the test thus—

"The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised a fiduciary relation with regard to it, and has command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge

(2) 44 M.L.J. 431.

(3) (1893) 2 Q.B. 390.

(4) A.I.R. 1953 S.C. 385.

himself by accounting to his *cestui que trusts* for all such money or property without regard to lapse of time."

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In the same case, Bowen L.J. observed—

"It is not necessary in the present appeal to discuss the somewhat fluctuating expressions that can be discovered in equity authorities on the subject of constructive trusts. One thing seems clear. 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....."

In *Kishtappa Chetty's case*, certain jewels were in possession of the defendant and he agreed under a written instrument that the plaintiff should enjoy the jewels for her life and that after her death they should be divided among the defendant and other parties to the instrument. It was held in that case that the defendant was an express trustee of the jewels for the plaintiff and that a suit by her for the jewels or their value fell within section 10 of the Limitation Act.

The term 'specific purpose' in section 10 of the Limitation Act is really, more or less, intended to convey the idea of an 'express trust' as known to the English lawyers. A trust arising by operation of law would, therefore, be not a trust for a 'specific purpose'. The words 'specific' appears to have been used in contradistinction with the word 'general' and the word 'purpose' stands for the object with which a trust is created as distinguished from the object which is intended to be benefitted. Inferences drawn from the conduct of the parties may be sufficient to establish an express trust. Section 10 has a very limited application. It is available only as against persons in whom property has become vested for a purpose which is specified or expressed by the author; it has no reference to trusts which are founded on an unexpressed but implied intention of the party

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creating them or to trusts which are raised by construction of equity without any reference to the intention of the parties. In other words section 10 will apply where trust has been created for some specific purpose and the property has become vested in trustee with the object of carrying that purpose into effect. A relevant consideration would, therefore, be: has the trust been created by act of a party for a performance, that is for a person or cause intended to be benefitted. Yet another factor to be noticed for distinction between the two types of trustees may be: is the possession of trustee in virtue of any right of his own or is it coloured from the first by the trust and confidence in virtue of which he received it? In case of trust for a specific purpose, it is directed to benefit a particular person or a cause, but in case of trust arising by operation of law, it is not conceived with reference to any particular individual or cause but only in a general way. The principles enunciated have been couched in fluctuating expressions and there is lot of inconsistency and variety used in demarcating the lines of distinction. That appears more due to the variety available in the language than due to any dispute about the basic principles. What then is the position here? The transferors of shares, namely, defendants, possessed the shares before sale in their own right. By transfer, they became constructive trustees of the said shares and the rights attached thereto. The writing, exhibit P. 7, is merely, in my view, a declaration of certain obligations which the sellers are obliged to carry out as a consequence of their becoming trustees. Such a declaration of obligations cannot change a constructive trust into an express trust. By the said letter, the sellers merely say "there are some of the obligations which we are bound to carry out and we promise to do so." It does not thereby become a trust for a specific purpose. It may be pointed out that in *Soar's case* the solicitor was entrusted by the nominated trustees to take and have in his hands the trust money, with a direction on their behalf to deal with it according to the terms of the trust. That makes all the difference. Applying the above tests, it must be held that the lower appellate Court was right in the view it took regarding applicability of section 10.

In the cross-objections filed by the respondents, the learned counsel urged that—

- (1) the suit was barred by *res judicata*, and

(2) after refusal by the company to register the transfer of shares, the transferor ceased to be trustees either express or constructive.

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In support of the first plea, the learned counsel says that against the refusal to transfer shares, the plaintiffs went up in appeal to the Central Government under section 111 of the Companies Act, 1956, and the Central Government decided against the plaintiffs. That judgment, according to the learned counsel, operates as *res judicata*. There is no merit in this contention. The relief sought under section 111 was against the refusal by the company to transfer shares. That subject matter and cause of action had nothing to do with the subject matter and cause of action in the present suit. The judgment, apart from other matters, cannot on this ground alone operate as *res judicata*.

The learned counsel then contended that in terms of the letter, exhibit P. 7, the defendants had undertaken to be trustees till the shares were registered. Once registration was refused, they ceased to be so. I am afraid I cannot agree. The relationship as trustee and *cestui que* trust continues between the parties even after the registration has been refused. The act of the company in declining to register the transfer cannot, in my opinion, vitiate that relationship.

In the result, I must hold that the judgment of the learned Additional District Judge was correct and the appeals and the cross-objections fail. They are, therefore, dismissed, but the parties will bear their own costs.

B.R.T.

FULL BENCH

Before S. B. Kapoor, Inder Dev Dua, and D. K. Mahajan, JJ.

RAM BHAGAT,—Petitioner

versus

THE COMMISSIONER OF INCOME-TAX, PUNJAB AND
ANOTHER,—Respondents

Civil Writ No. 1085 of 1962

Income-tax Act (XI of 1922)—S. 35(5)—Whether retrospective—Assessment of a partner completed before 1st April, 1952, and that of the firm after that date—Mistake in the assessment of the partner becoming apparent only from the record of the firm—Whether can be rectified—Income-tax officer—Whether can re-open the assessment of the partner as a consequence of the assessment of the firm in which he is a partner.

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December, 15th.