Privy Council Appeal No. 104 of 1921

Annada Mohan Roy	- - - - - - -	*Appellant*
	v.	
Gour Mohan Mullick	- - - - - - -	*Respondent.*
Same	- - - - - - - - -	*Appellant*
	v.	
Panchanan Mullick	- - - - - - -	*Respondent*
Same	- - - - - - - - -	*Appellant*
	v.	
Giri Mohan Mullick	- - - - - - -	*Respondent.*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH JUNE, 1923.

Present at the Hearing:

LORD SUMNER.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD SUMNER.]

Three points have been argued on these appeals, one by Mr. de Gruyther, the leading counsel for the appellant, and two others by Dr. Abdul Majid, the junior counsel.

The plaintiff, the present appellant, had agreements with three persons, who are the respondents, only two of whom, however, appear, by Counsel, under which he purported with great elaboration to purchase from them their expectations under the will of their uncle, or alternatively their rights as his nephews expectant

upon the termination of the surviving widows' rights in the property of the uncle, and among many other purposes, which are recited in this agreement, for which advances are agreed to be made, one, and apparently the principal one, was that an appeal might be prosecuted ultimately to His Majesty in Council for the purpose of establishing a will which the deceased was said to have made. Unfortunately their Lordships, affirming the decision in the Court below, found that that will was a forgery. That therefore reduced the expectations of the three respondents to their interest in the property after the widows' rights should come to an end, and as a matter of fact after a time one widow died and a compromise was entered into with the approbation of the Court in respect of the rights of the other widow, the effect of which was to accelerate the time when the nephews became entitled to the inheritance.

In the present suits in India the trial Judge stated ten issues. The first four of those issues were argued and dealt with by him. The point in substance upon which those four issues turned was whether or not the agreements were illegal or void on the ground that they dealt with an expectancy. There were a number of others—as a matter of fact, eleven in all—but the remaining seven were not dealt with by the learned Judge. An application was made to him that he should pronounce a decree giving effect to his determination of the first four issues, which he declined to do upon the ground that there remained some issues in the case which had not been dealt with, one of them, for example, being an issue whether the plaintiff was entitled to a refund of the amounts which he had in fact paid or any of them, and another whether his rights were barred by limitation.

The present appellant was advised that his best course was to obtain an immediate decree upon the four issues, which had been dealt with and appeared at that time to be the only substantial ones, in order that he might prosecute his appeal to the High Court, and ultimately to His Majesty in Council, and he therefore elected to abandon all the other issues, whatever they might be; in fact, he never called any evidence in support of them, and a formal order was made upon his petition disposing of them all in that way. We are told, and very likely it may be so, that at that time the advice was largely influenced by the consideration that it was still thought to be an open question before their Lordships whether, apart from the Transfer of Property Act, it might be held competent to these heirs, according to the ordinary Hindu law, to contract to transfer, and ultimately to transfer their expectation, such as it was, and no doubt, if that was the real point of the litigation, it was worth while to abandon minor points in order to get that issue determined. Between the time when the decree was asked for and obtained and the present time there has been a decision of their Lordships' Board in the case of *Harnath Kuar* v. *Indar Bahadur Singh* (50 I.A. 69), and although, as it appears to their Lordships, it simply restates what had

frequently been stated before, the appellant now recognises that the last word has been said, so far as he is concerned, about the possibility under Hindu law of such an interest being transferred.

Under these circumstances an application was made to their Lordships by Mr. de Gruyther to allow the petition which had been presented to the High Court to be recalled, and the decree that was made upon that petition to be set aside and so to allow in some shape or form discussion, if not proof, of the remaining issues in the case, the object being to show that there were, or might be, circumstances in which it possibly could be held that the time of the discovery of the illegality of the contracts was not the time when the contracts were made and the parties knew the law or must be presumed to have known it, but at a later date (what date their Lordships are not exactly told). It was urged that, if such circumstances could be suggested here, a view similar to that which the Board took in the case above mentioned might be taken in favour of the present appellant also. In that case, however, there were special circumstances, wholly different from those in the present case, circumstances which were proved in evidence and were sufficient for their Lordships to act upon and to enable them to say that the discovery in the case was later than the date of the contract itself. There has been no suggestion anywhere in the course of the present proceedings that any such facts occurred as could alter the view which must normally be taken of the meaning of the word "discovery" and of the time at which that discovery must be held to have occurred. Not only so, but it was by the deliberate act of the appellant himself, for considerations which at the time were very likely wise considerations, that he closed the door to any investigation of that issue at all. Their Lordships are content to dispose of the first point by saying that the additional issues cannot be gone into now and that upon the face of the matter the appeal must be dealt with upon the question whether, either under the Transfer of Property Act or under the Hindu law applying to purchases of expectations of inheritances, there is any ground upon which these contracts can be supported.

Dr. Abdul Majid has developed these points, and his points appear to be two, setting aside for the moment the Transfer of Property Act, upon the ground that it deals with an actual transfer or conveyance and not with a contract to transfer. It is contended that there is nothing in the reason of the thing to prevent two parties, who are concerned in the way in which these parties were concerned, from entering into a contract for the future sale of future expectations. It is admitted that there is no authority to be found anywhere which supports the view that such a contract is possible, and it is admitted that there is authority in India to the contrary, the authority in question being the case of *Sri Jagannada Raju* v. *Sri Rajah Prasada Rao* (I.L.R. 39 Madras, 554), which so satisfied the learned Judge at the trial that he expressed his assent to the reasoning, without further discussion, and the High Court

in its turn was satisfied also. The reasoning of that decision may well be summed up first in a quotation from the judgment of Chief Justice Wallis, and secondly, in a quotation from that of his colleague, Mr. Justice Tyabji.

The learned Chief Justice says, at page 558:—

> "On this question, looked at apart from authority, I should not entertain any doubt, as it seems futile to forbid such transfers of expectancies if contracts to transfer them are to be enforced as soon as the estate falls into possession. In these circumstances it seems to me that it is our duty to give effect to what we consider plain provisions of our statute law instead of following a course of English decisions which would appear to have been based, from the very first, on a regard for long established practice rather than on principle, and to have failed to commend themselves to Lord Eldon."

Then Mr. Justice Tyabji, at page 559, says:—

> "The Transfer of Property Act does not permit a person having expectations of succeeding to an estate as an heir to transfer the expectant benefits; when such a transfer is purported to be made an attempt is in effect made by the two persons to change with each other their legal positions, and an attempt by the one to clothe the other with what the Legislature refuses to recognise as rights, but styles as a mere chance incapable of being transferred. It would be defeating the provisions of the Act to hold that though such hopes or expectations cannot be transferred in present or future, a person may bind himself to bring about the same results by giving to the agreement the form of a promise to transfer not the expectations but the fruits of the expectations, by saying that what he has purported to do may be described in different language from that which the Legislature has chosen to apply to it for the purpose of condemning it. When the Legislature refuses the transaction as an attempt to transfer a chance, it indicates the true aspect in which it requires the transaction to be viewed."

Their Lordships think that they are only following out numerous other passages which have been referred to in earlier judgments of this Board when they accept that reasoning and that conclusion. It is impossible for them to admit the common sense of maintaining an enactment which would prevent the purpose of the contract, while permitting the contract to stand as a contract, or to see how by appealing to Section 65 of the Indian Contract Act, or to the nature of the bargain as a mere bargain *de futuro*, they could uphold it as a contract when it is a contract as to which, not only must specific performance be refused under the Transfer of Property Act, but as to which damages can never be recovered, because the contract is not a performable contract until the realisation of the expectation occurs.

There is another way in which the learned counsel for the appellant puts the point, namely, that there is here a contract wholly distinguishable from any contract as to *spes successione*, because, after carefully providing for all eventualities, the documents deal with the possibility of the widows, or one of them, relinquishing their life interests either jointly or severally, or selling them to the reversionary heirs, in which event from the date of the relinquishment or sale, the heirs would become the

present owners of the estate by right of inheritance. It is suggested that this provision ought to be read as relating to a transaction with strangers, embedded in the middle of a much longer contract with the parties to this appeal and relating to their hopes of inheritance; in other words, that it should be treated as though it read: " Further, if we can obtain by purchase from total strangers to the family a portion of our late uncle's property, then we undertake to sell it to you on the same terms as those upon which we have undertaken to sell our *spes successione*." It is not necessary to discuss how far such a contract might be supportable, because it is quite plain upon the documents that this is not such a contract, and therefore the point, ingenious though it is, is sufficiently dealt with by dismissing it.

The result, therefore, is that on all the points the appeals fail. As they have been consolidated in India and before their Lordships there will be one set of costs only, and the two successful respondents who appear by Counsel will get that set of costs, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

ANNADA MOHAN ROY

v.

GOUR MOHAN MULLICK.

SAME

v.

PANCHANAN MULLICK.

SAME

v.

GIRI MOHAN MULLICK.

(*Consolidated Appeals.*)

DELIVERED BY LORD SUMNER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1923.