ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

1895.
September 30

HORMUSJI NOWROJI DA'VUR (PLAINTIFF) *v.* DA'DA'BHOY NOWROJI DA'VUR AND OTHERS (DEFENDANTS).*

Deed of settlement—Trust—Beneficiary—Proviso for forfeiture of interest in case of insolvency—Insolvency of beneficiary—Subsequent withdrawal of petition in insolvency—Effect of withdrawal of petition.

By a deed of settlement executed by the plaintiff's father, certain property was conveyed to trustees upon trust to recover the income thereof and to pay it to the settlor for life, and after his death to his seven sons, in equal shares, for the maintenance of them and their respective families. The deed provided that, in case any beneficiary became insolvent, "or do or suffer anything whereby his share or any part thereof would through his act or default or by operation of law" become vested in or payable to other persons, then the share and interest of such person should cease, and for the remainder of his life should be paid for the maintenance and support of the family of such persons. In July, 1894, the plaintiff, who was one of the sons of the settlor, filed his petition in insolvency, but on the 5th December, 1894, he withdrew it.

Held, that the forfeiture clause did not take effect, and that the plaintiff was entitled to be paid by the trustees his share of the income of the trust property.

ONE Nowroji Ardeshir Dávur, a Pársi inhabitant of Bombay, the father of the plaintiff and the first defendant, by a deed dated 24th January, 1877, reciting that he was desirous of settling certain lands, &c., for the benefit of himself and his seven sons, conveyed the said lands, &c., to himself and three others, *viz.* his eldest son Dádábhoy (the first defendant), Mancherji Sorábji Wádia and Dádábhoy Bomanji Mottábhoy as trustees upon trust to receive the income thereof and to pay the same to himself for life, and after his death to his seven sons in equal shares for the maintenance of them and their respective families. The said deed contained the following clause:—

"And it is hereby declared that in case any person entitled under the trusts herein contained to any share or interest in the residue of the income of the said trust premises shall become a bankrupt or insolvent debtor within the meaning of some Act of Parliament or of the Legislative Council of India or Bombay for the relief of insolvent debtors, or shall convey, assign, charge or incumber such his or her share of the residue of the said income of the said trust premises, or shall do or suffer anything whereby the same or any part thereof would through his or her act or default or by

* Suit No. 146 of 1895.

operation or process of law or otherwise if then belonging absolutely to him or her become vested in or payable to any other person or persons, then the share and interest of any such person in the residue of the said income shall cease and determine and the trustees or trustee for the time being of these presents shall during the remainder of the life of the person whose share and interest in the said residue of the said income shall have so determined, pay such share and interest to and for the maintenance and support of the wife and the son of the said person."

On the 10th July, 1894, the plaintiff, who was one of the sons of the settlor, filed his petition in the Court for the Relief of Insolvent Debtors in Bombay, but on the 5th December, 1894, he withdrew it.

In March, 1895, the plaintiff brought this suit against the trustees of the deed (defendants Nos. 1 and 2) praying for a declaration that he was entitled to be paid $\frac{1}{7}$th of the income of the trust premises, and that the trusts created in his favour by the said deed might be enforced, and for a declaration that he had not forfeited his right under the said deed by filing his petition in insolvency.

The first and second defendants were the trustees of the deed at the date of suit, and the third and fourth defendants were the wife and son of the plaintiff.

At the hearing the questions discussed were—(1) whether on his becoming insolvent the plaintiff's interest under the deed had ceased, (2) whether on the withdrawal of his petition his interest under the deed had revived, and (3) whether the trustees should pay the plaintiff's share to him or to the other beneficiaries under the deed.

Inverarity and *Lowndes* for plaintiff:—The plaintiff is entitled. The deed gives him the share for life. Any conditions inconsistent with the gift are void—*Brandon* v. *Robinson*[1]; *Bradley* v. *Peixoto*[2]; *In re Machu*[3]. Davidson's Conveyancing, Vol. III, Part 2, p. 797, shows the proper form to be adopted for the alleged purpose of the settlor—Tudor's Leading Cases on Real Property (3rd Ed.), 968. On the dismissal of the petition the vesting order became null and void—Section 7 of the Insolvent Act (Stat. 11 and 12 Vic., c. 21); *White* v. *Chitty*[4]. There was no for-

(1) 18 Ves., 429, at p. 433.
(2) 3 Ves., 324.
(3) 21 Ch. D., 838.
(4) L. R., 1 Eq., 372.

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feiture on insolvency—*Lloyd* v. *Lloyd*(1) ; *Ancona* v: *Waddell*(2) ; *Robertson* v. *Richardson*(3); *In re Parnham's Trusts*(4) ; *In re Otway*(5).

Macpherson (Acting Advocate General) and *Scott* for first and second defendants (trustees):—The plaintiff's interest ceased on his insolvency—*Dommett* v. *Bedford*(6) ; *Joel* v. *Mills*(7) ; *Hurst* v. *Hurst*(8) ; *Dugdale* v. *Dugdale*(9) ; *Metcalfe* v. *Metcalfe*(10).

B. TYABJI, J.:—This suit was filed by the plaintiff Hormusji Nowroji Dávur on the 22nd March, 1895, for the purpose of having it declared that the plaintiff is entitled to be paid by the first and second defendants $\frac{1}{7}$th of the net residue of the rents of the trust premises mentioned in the plaint and also for a declaration that the plaintiff has not forfeited his rights and interests under the indenture of trust in the plaint mentioned, and further that the first and second defendants may be ordered to account for the rents received by them since the last distribution of rents among the *cestuis que trust*, and that the sum due to the plaintiff may be ascertained and paid to him.

The undisputed facts of the case are that one Nowroji Ardeshir Dávur, the father of the plaintiff, settled certain properties upon certain trusts by deed of settlement dated 24th January, 1877 (Exhibit A). The said settlor died in the year 1884, and the first and the second defendants are the present trustees of the said indenture. The trust-deed directs that the trustees should stand possessed of the trust premises as follows:—

"Upon trust to receive the income thereof, and thereout in the first place to re-imburse themselves or pay and discharge all the costs and expenses incurred in or about the administration of the trusts, and subject thereto upon trust to pay the residue of the said income of the said trust premises unto the said Nowroji Ardeshir Dávur for his life, and after the decease of the said Nowroji Ardeshir Dávur upon trust after such reimbursements and such payment of such costs and expenses as aforesaid to pay the said residue of the said income unto Dádábhoy Nowroji Dávur, Nánábhoy, Mancherji, Hormusji, Dorábji, Kharsedji and Ardeshir Nowroji Dávur in equal shares as tenants-in-common for the maintenance of Dádábhoy Nowroji Davur, Nánábhoy, Mancherji, Hormusji, Dorábji, Kharsedji and Ardeshir Nowroji Dávur and their re-

(1) L. R., 2 Eq., 722.
(2) 10 Ch. D., 157.
(3) 30 Ch. D., 623.
(4) L. R., 13 Eq., 413.
(5) 64 L. J. Ch., 529.
(6) 6 T. R., 684.
(7) 3 Kay and J., 458.
(8) 21 Ch. D., 278.
(9) 38 Ch. D., 176.
(10) L. R. (1891), 3 Ch., 1.

spective families * * * Provided always and it is hereby declared that in case any person entitled under the trusts herein contained to any share or interest in the residue of the income of the said trust premises shall become a bankrupt or insolvent debtor within the meaning of some Act of Parliament or of the Legislative Council of India or Bombay for the relief of insolvent debtors, or shall convey, assign, charge or incumber such his or her share of the residue of the said income of the said trust premises, or shall do or suffer anything whereby the same or any part thereof would through his or her act or default or by operation or process of law or otherwise if then belonging absolutely to him or her become vested in or payable to any other person or persons, then the share and interest of any such person in the residue of the said income shall cease and determine, and the trustees for the time being shall during the remainder of the life of the person whose share and interest in the residue of the said income shall have so determined, pay such share and interest to and for the maintenance and support of the wife and the son of the said person."

The plaintiff filed his petition in the Bombay Insolvent Court (Exhibit B) on the 10th July, 1894, but he withdrew it under the order of the Court (Exhibit C) on 5th December, 1894, and sent a notice of demand (Exhibit D) on the 1st February, 1895, and having received an unsatisfactory reply on the 12th February, 1895, he filed this suit, as already stated, on the 22nd March, 1895.

Under the circumstances the first question for my consideration is whether the proviso for the cesser of the plaintiff's interest under the trust-deed is void as repugnant, and, secondly, whether such proviso, if valid, took effect and came into operation on the insolvency of the plaintiff notwithstanding the fact that his petition was soon afterwards withdrawn as above stated.

It was contended on behalf of the plaintiff that the trust-deed contains a clear gift of a life-estate to the plaintiff, and that, therefore, the attempted defeasance of that estate by the proviso must be held void as being repugnant to the previous gift. Mr. Lowndes relied upon the case of *Brandon* v. *Robinson*[1] in which Lord Eldon said: "There is no doubt that property may be given to a man, until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life-estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest, short of a life-estate, neither

(1) 18 Ves., 429 at pp. 433-34.

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the man nor his assignees can have it beyond the period limited." The general doctrine as to repugnant conditions being void is illustrated by the leading case of *Bradley* v. *Peixoto*(1).

The distinction, however, between the gift of a life-estate "until bankruptcy" and a life-estate with a proviso for its cesser or forfeiture on bankruptcy has been considered as too fine and technical, and has accordingly been disregarded in later cases, which construe the original gift and the proviso together as a conditional limitation; and I think it is now clear, on the authorities, that the estate will be determined in the event of bankruptcy, no matter which of the two forms of gift is adopted. I think this proposition is borne out by the case of *Wilkinson* v. *Wilkinson*(2) where the Master of the Rolls (Sir Thomas Plumer) said: "With respect to the validity of the proviso," (of forfeiture or cesser) "it is clear that a testator may thus modify the estate he gives; for though, in a case which has been mentioned, it is stated as the opinion of a very great Judge, that if an estate is given for life, the incidents of a life-estate cannot be taken away, and though it is better, therefore, when such a limitation is intended, to give the estate until bankruptcy or alienation, and not first to give it for life, and then to prohibit the attempt to alien, yet this is answered by considering that, in a will any condition or modification may be annexed which does not offend against any rule of law; and it is immaterial by what form of words the intention is executed, whether by a devise until the devisee shall have charged or encumbered it, or by a proviso with a limitation over upon such an event. Each mode is equally valid, and of the same effect." It is true that this was the case of a will and not of a deed *inter vivos*; but I don't think that any distinction can be usefully drawn on that ground, and I find that in Tudor's Leading Cases on Real Property (3rd Ed.,) p. 978, the doctrine is laid down broadly in these words: "The principle" that of a grant conditions are void "would not be violated by a provision limiting over or making to cease a life-interest * * on the bankrupcy or insolvency of the owner, and it has accordingly been clearly held that a limitation over or a proviso determining a life-interest on bankruptcy is valid."

(1) 3 Ves., 324. (2) 3 Swanston, 515 at p. 522.

I am of opinion, therefore, that the proviso for cesser is not invalid on the ground of repugnancy.

The question, however, arises whether the clause in question took effect in consequence of the plaintiff's insolvency on 10th July, 1894. It was contended on behalf of the plaintiff that in as much as the insolvency was annulled on 5th December, 1894, and that no distribution of the income took place during the insolvency, therefore the forfeiture clause never took effect. The facts bearing on this point are that the last distribution of the trust fund prior to the insolvency was made on 31st March, 1894, and that the next distribution was not made till the 1st February, 1895, that is to say, till after the withdrawal of the plaintiff's petition. No distribution took place in the interval owing to the fact that there was no fund to distribute, as repairs to the trust premises were being made, and the income not being sufficient, money to the extent of about Rs. 1,200 had to be borrowed. Now, I think the cases of *White* v. *Chitty*(1), *Lloyd* v. *Llyod*(2) and *Ancona* v. *Waddell*(3) clearly decide that if a bankruptcy is annulled in the interval between the time when the title to a fund accrues and the time when it becomes payable, the bankrupt is in the same position as if he had never been bankrupt, and is entitled to receive the fund if it has not been interrupted in the meantime. On the other hand, the cases of *In re Parnham's Trust*(4), *Robertson* v. *Richardson*(5) and *Otway* v. *Otway*(6) establish that forfeiture will not be prevented unless the annulment takes place before the fund becomes "an interest in possession" or at least before any payment in respect of it actually becomes due. I have had some difficulty in coming to a conclusion as to which of the two classes of cases the present case falls under. Considering, however, that the object of the settlor was to benefit his own sons directly and as long and as far as practicable; that all the authorities concur in laying down that the Court should strive to carry out the intention of the settlor as far as the law will permit; that no distribution was made during the pendency of the plaintiff's insolvency proceedings; that no money is proved to have been actually due or

(1) L. R., 1 Eq., 372.
(2) L. R., 2 Eq., 722.
(3) 10 Ch. D., 157.
(4) L. R., 13 Eq., 413.
(5) 30 Ch. D. 623.
(6) 64 L. J. Ch., 529.

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become payable during the insolvency; that no claim or attempt to intercept it was ever made on behalf of the Official Assignee or by the donees under the limitation over; that the plaintiff was a free man and perfectly able to receive the money at the time when the next distribution did, or according to the deed could, take place, and considering that I should be better carrying out the intentions of the settlor by continuing the property direct to the plaintiff rather than to his wife and children—I have on the whole come to the conclusion that the mere filing of the petition and withdrawal of it within less than five months without the fund being in any way claimed or interrupted by the Official Assignee, or by the other donees is not such an insolvency as was contemplated by the settlor, and that the plaintiff's interest has not, therefore, ceased under the proviso, and that he is still entitled to his rights under the deed as if he had never become insolvent.

Attorneys for the plaintiff and third and fourth defendants:—Messrs. *Janardan and Ardeshir.*

Attorneys for defendants Nos. 1 and 2:—Messrs. *Payne, Gilbert and Sayáni.*

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Before Mr. Justice B. Tyabji.

1895. *October* 3, 7, 8, 10.

TRIBHOVANDA'S MANGALDA'S AND PURSHOTAMDA'S MANGALDA'S (PLAINTIFFS) *v.* YORKE SMITH AND OTHERS, DEFENDANTS.*

Hindu law—Undivided family—Ancestral property—Self-acquired property made ancestral by agreement—Operation of such agreement—Effect of such agreement on accumulations and accretions of the property—Election—Estoppel—Minor members of undivided family—Interest of minors in property made ancestral by agreement—Minor bound by acts of his father as to such property.

Sir Mangaldás Nathubhoy and his three sons Tribhovandás, Purshotamdás and Jugmohandás lived together as an undivided Hindu family. In 1881 the youngest son, Jugmohandás, filed a suit for partition (No. 444 of 1881) against his father and his two brothers. Being apprehensive that his other sons (the plaintiffs) might make a similar claim, Sir Mangaldás on the 28th June, 1881, entered into an agreement with

* Suit No. 114 of 1895.