

Ord Vs Ord

Court: Calcutta High Court

Date of Decision: Aug. 10, 1869

Judgement

Sir Barnes Peacock, Kt., C.J.

This is an appeal against so much of the judgment and decree of Mr. Justice Phear, in the exercise of the

original jurisdiction of the Court, as declares that the defendant is a trustee for the plaintiff of all the business, stock-in-trade, &c., of the testator,

and directs an account of all the said business and of the furniture, and orders payment of the costs by the defendant.

We have nothing to do with

the other part of the decree which relates to the household furniture, jewels, &c. The only question we have to decide is. whether, under the terms

of this will, the husband upon his marriage became the trustee of the wife, and is bound to account to her in respect of the said business from the

time of the marriage to the time of the decree. The plaintiff in her plaint does not charge, as I understand it, that the husband was a trustee, or acted

as a trustee for her, in respect of the business, until their separation; for she says, that, from the time of their marriage till the year 1867, when they

separated, they lived in harmony and peace, and that the husband assisted her in the business. The husband, on the other hand, states that he

considered the business as his Own, and therefore there is a conflict between the plaintiff and the defendant as to whether down to 1867 the

husband carried on the business as his own, or whether he assisted his wife in carrying it on. But it appears to me that this is not very material,

inasmuch as I think that, according to the true construction of this will, the stock-in-trade and the liberty to carry on the business were not

bequeathed to the wife for her sole and separate use independent of any husband that she might afterwards marry.

2. It is clear that the testator, or those who prepared his will, knew the use of the words absolute use of the person to whom the bequest was

made independent of the control of any husband with whom she shall intermarry. ""Those words were used in the 2nd paragraph of the will with

respect to the bequest to the piece, Jane Dowling, who was then unmarried. They were also used with regard to the bequest in the 3rd paragraph

to his daughter, who was then a married lady; for in that bequest it was directed that his daughter should receive during her life the rents of the

house at Barrackpore for her sole use and benefit independent of the control or debts of her present husband or any future husband with whom

she shall intermarry.

3. Having used those words in the 2nd and 3rd clauses of the will, the testator omitted to wish regard to his wife in the 4th and 5th clauses

immediately succeeding; and then again in the 6th clause of his will he used them in regard to his wife, and directed that the bequest in that clause

should be for her own sole use, benefit, and disposal, irrespective of the debts or control of any future husband she may intermarry "with," so that

he contemplated that she might marry again, and he provided against it in the 6th clause, as he had provided with respect to his niece and daughter

in the 2nd and 3rd clauses.

4. It is said that, in one of the cases cited, on argument in *re Tarsey's Trust* 1 L.R. Eq. 561 it was contended that in one part of the will the words

sole use were employed, and in another part of that will the words sole and separate use independent of the control of any future husband, "and

that it was still held in that case that the words sole use," ought to be construed as "sole and separate use. "That was a construction of the words

Sole use in that particular case. But I apprehend it was never intended to lay down that the words "sole use" must be construed in every will in the

same manner, or that they must necessarily mean by law sole and separate use.

5. In the 4th clause of the will the testator directed his executrix and executor to sell and dispose of in such manner as they should think best, and

for the best price they could obtain, his house and premises at Raneeunge in the Zilla of Bancoora and gave and devised the proceeds thereof to

my dearly beloved wife for her own sole use and benefit. "It is not very important to consider whether the words her own sole use and benefit in

this clause should be construed as her sole and separate use.

6. In the 5th clause of the will, as I read it, he omits altogether the words sole use or sole and separate use. He says, I give, devise, and bequeath

to my dearly beloved wife all the stock-in trade, furniture, mourning coaches, horses belonging thereto, stones, marbles, tools, implements and

materials connected with my trade and business, and all my right and interest therein.

7. There the words for the sole use and benefit of his wife are not made use of. He goes on with a fresh sentence "and after payment of my debts

and other expenses, as mentioned in the first paragraph of this my will, I give, devise, and bequeath the rest and residue of my outstandings and

collections for her sole use and benefit. ""These words the rest and residue of my outstandings and collections refer, in my opinion, to the 1st

paragraph of the will, in which he directed his executor to collect the outstandings and thereout to pay his debts and funeral expenses. Ho does not

confine the outstandings to the debts due to his business. The rest and residue, as I understand it, mean the rest and residue of his outstandings

after paying the debts and funeral expenses. He then proceeds, with liberty to continue and carry on such trade, and business, and for such

purpose my request is, that ""she should continue to employ certain apprentices who were to get each a three-anna share out of the proceeds and

profits of the business. Here the words with liberty to continue and carry on such trade and business"" are not restrained by the words ""for her sole

use.

8. It is contended that the word ""sole,"" in the middle of the 5th paragraph, following the words of the devise of the rest of the outstandings and

collections, applies not only to that portion of the 5th paragraph, but also to the first portion by which the stock-in-trade was devised, and also to

the subsequent part of the clause with liberty to continue the trade and business."" I certainly cannot read that word sole,"" which comes after fresh

words of devise and bequest, as intended to apply to the distinct devise and bequest of the stock-in-trade. It therefore appears to me that the

stock-in-trade was neither given for the sole use nor for the sole and separate use of the wife; and it would be a very unreasonable construction to

put on this will to say, that the testator intended to give the stock-in-trade not for her sole use but to give liberty to carry on the trade for her sole

and separate use. It is very difficult and unreasonable to separate those two parts, and to say that this lady was to carry on the trade for her own

sole and separate use, and also to say that the Stock-in-trade with which she was to carry on the business, was not given for her sole and separate

use.

9. Now the nature of the bequest in the 5th paragraph, so far as it relates to the stock-in-trade and continuing the business, is very different from

the bequest as to the proceeds of the house at Raneegunge, and the cash which might be collected on account of the outstandings. It might well be

intended that the wife should take for her own sole and separate use the proceeds of the house at Raneegunge, and any supplies of collections after

paying the debts and funeral expenses of the testator, but that the stock-in-trade, with liberty to continue the business, should not be for her sole

and separate use. It certainly would be a very difficult thing for the widow if she married again (and her marriage was contemplated) to carry on

after her marriage a business of this nature for her sole and separate use and benefit; and it would be rather unreasonable to direct that the stock-

in-trade, which would be certainly constantly changing, and with which the business was to be carried on, was to be for her separate use.

10. It was contended, in argument, that all the profits arising from the business were affected by a trust for the wife's separate use. It is

unnecessary to express any opinion as to whether if stock-in-trade were given to an unmarried woman for her sole and separate use, any profits

realized by carrying on the business would be vested in her for her separate use, so that, in the event of her marriage without settlements, the

property would not pass to the husband. Property given to an unmarried woman for her sole and separate use may be sold and disposed of by her

whilst she is unmarried, and it does not by any means follow that the money realized by the sale, and everything which she may purchase with the

money, is vested in her for her sole and separate use.

11. Putting the best construction I can on the will, it appears to me that the stock-in-trade and the liberty to carry on the business was not settled

for the separate use of the wife, and consequently that the defendant did not become a trustee for the wife in respect of the business and stock-in-

trade. It appears to me that it would be very unreasonable to strain the words of this will, and to put such a construction on it as that the husband,

who for nine years has been carrying on this business, and for seven of those nine years has been living in peace and harmony with his wife, both

probably living out of the profits realized by the business, the bus-band devoting his sole time to the management of it as if it were his own, and not

having any other occupation or employment, should, at the expiration of nine years, in consequence of a quarrel between him and his wife, be

called upon to render an account to his wife of that business from the time of their marriage."

12. It appears to ma that this decree ought to be reversed so far as it declares that the defendant is a trustee for the plaintiff of the stock-in-trade,

furniture, and fittings, and of her property in the business of Murdoch and Co., in the pleadings mentioned; and also so far as it proceeds to ""direct

an account of the said business of Murdoch and Co., commencing from the 3rd day of October, 1860 and of the gains and profits of the said

business, which, since the date aforesaid, have come to the hands of the defendant or to the hands of any other person or persons, by his order, or

for his use, and how the same respectively have ""been applied and disposed of.

13. The only question which now remains is the question of costs. An account was asked for of the household furniture,--the words " household

furniture"" are used only in that part of the prayer of the plaint which asks that a receiver may be appointed. The decree directs an account of the

household furniture and fittings, carriages, cows, plates, jewels, precious stones, ornaments, and other property of the said Alexander ""Mackenzie

Murdoch which had from the 15th day of June 1867, come to the hands of the defendant or to the hands of any other person or persons by his

order, or for his use, and what has become of the same ""respectively, and how the same respectively have been applied and disposed of.

14. We have nothing to do with that part of the decree, no appeal having been preferred with regard to it. But there is an appeal so far as relates to

the costs, and it is urged that the costs ought to have been paid by the next friend. Now it appears to me that although the plaintiff has succeeded in

obtaining a decree for an account of the household furniture, there is no evidence of the defendant having appropriated any of this furniture to his

own use. The defendant says, that there was some furniture which was very old and that he sold part of it and bought other in its place. In

particular he mentions one old table which he sold and replaced by a better one. It may be that the plaintiff is entitled to an account, but it does not

follow that she is entitled to the costs in the lower Court. It appears to me that so much of the decree as orders the defendant to pay the costs of

this suit ought to be reversed, and that each party ought to bear his own costs in the lower Court and of this appeal. The costs as between attorney

and client will be taxed according to scale No. 2. The decree appointing a receiver and making the injunction perpetual so far as it relates to the

business and stock-in-trade must be discharged.