

PETITIONER:
GWVALIER I. J. IYYAPPAN & ANOTHER

Vs.

RESPONDENT:
THE DHARMODAYAM COMPANY

DATE OF JUDGMENT:
27/03/1962

BENCH:
KAPUR, J.L.
BENCH:
KAPUR, J.L.
GUPTA, K.C. DAS
DAYAL, RAGHUBAR

CITATION:
1966 AIR 1017 1963 SCR (1) 85

ACT:

Company-Director a trustee and in a fiduciary position Trust if could be created on anothers hand-License-of irrevocable where there has been change of purpose-indian Easements Act 1882 (5 of 1882),, ss. 60 (b), 62(f).

HEADNOTE:

The respondent, a Company with charitable objects owned certain lands and the appellant who was the Chairman of the Board of Directors, was asked to construct a building on the said land. It was subsequently found that the cost. would be more than the estimated amount, which probably the Company was not prepared to spend. At that stage the

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appellant made an offer that he would finish the construction of the building at his own cost and hand it over to the Company as trust property of which the Directors of the company would be the trustees and the Company will manage the affairs in accordance with the conditions laid down in his offer. The offer was accepted, but for some reason or other certain members of the Company were not prepared to stick to the original arrangement and some of the members filed a suit and obtained an injunction against the appellant and the company not to execute the trust deed as proposed by the appellant. Thereafter the appellant resigned from Chairman ship and also ceased to be a Director, two days before his resignation he appellant registered a trust deed and made himself the first trustee with powers to appoint other trustees. The trust deed inter alia, recited that a rent of Rs. 88/- per annum was to be paid to the Company for the compound where the building had been erected. Thus the appellant created a trust by which the trust became a tenant of the respondent Company without any transfer from the Company to the trust. The respondent Company called upon the appellant to hand over the building to the Company and file a suit for possession of properties, damages and mesne profit.

The respondent Company's case was that the appellant had wilfully contravened the terms of his offer, and the right of the appellant therefore 'was only to recover the money from the Company to the extent to which he may be entitled

in equity and the trust deed was inoperative. The defence of the appellant inter alia was that the respondent company was estopped from claiming the building after having accepted the aforesaid offer pursuant to which the appellant had invested a large sum of money in constructing the building; and that as the offer of the trusteeship of the property in dispute made by the appellant and accepted by the Board of Directors had afterwards been cancelled as a result of the resolution passed by the general body of members, the appellant could not constitute the respondent company as trustee and therefore he was entitled to implement his original intention by executing the deed of trust. In the Supreme Court, the appellant relied on the plea that he had been granted a license and acting upon the license he had executed a work of permanent character and incurred expenses in the execution thereof and therefore under s. 60(b) of the Indian Easements Act, 1882, the license was irrevocable.

Held, That a Director is also a Trustee of the assets of the company and is in a fiduciary relationship with the company; therefore he could not do anything in regard

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to the assets of the Company which would prejudicially affect its rights.

A person cannot create a trust in regard to land which belonged to another person nor could he by an unilateral act create a lease in his own favour in regard to the land over which he has raised a super-structure.

The offer and the acceptance of the terms of the trust deed being wholly different from what had been executed by the appellant and from the manner in which the new trust had been constituted into a lessee of the company without the company's agreement it was not possible for a Court in equity to accept the new trust as a bar to the respondent's claim for possession and there are no equities in the appellant's favour which he is entitled to enforce by way of defence to the suit.

Held, further, that no case of license really arises but if it does, the license was to construct the building and hand it over to the respondent company as trust property. There was no license to create another kind of trust which has been sought to be created. It cannot be said, therefore, that there was an irrevocable license which fall under s. 60(b) of the Indian Easements Act. Even such a license is deemed to be revoked under s. 62(f) of the Act where the license is granted for a specific purpose and the purpose is attained or abandoned or becomes impracticable.

G. E. By. v. Rurner (1872) L.R. 8 Ch. App. 159, Manzoor Ahmad v. Muhammad. Abdul Jamil, (1933) 1. L. R. 56 All. 207 and Dominion of India v. B. B. Sohan Lal, A. 1. R. 1950 E.P. 40, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 565 of 1960. Appeal from the judgment and decree dated September 26, 1956, of the former Travancore Cochin High Court in A. S. No. 57 of 1954.

A. V. Viswanatha Sastri, P. K. Subramania Iyer, R. Ganapathy Iyer, C. S. Ananthakrishna Iyer and G. Gopalakrishnan, for the Appellants.

M. E. Nambiyar, Rameshwar Nath, S. N. Andley and P. L. Vohra, for the respondent.

1962. March 27. The Judgment of the Court was delivered by

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KAPUR, J.-This is an appeal against the Judgment and decree of the High Court of Travancore Cochin modifying the decree of the District Judge, Trichur. The appellant was defendant No.1 in his personal capacity and defendant No. 2 in the capacity of a trustee of a trust. Defendant No. 5 was a tenant of the building which is the subject matter of dispute between the parties, defendant No.10 was its successor-in-interest and the present respondent was the plaintiff in the suit.

The suit out of which this appeal has arisen was filed in the Court of the District Judge, Trichur, on' October 31, 1945. The suit was for possession of properties described in schedules A & B and for damages and mesne profits with interest. The defence was that the appellant was not liable to restore possession on the basis of a document Exhibit X which was a deed of trust executed by the appellant, creating a trust and constituting himself the trustee of the trust. The 5th defendant claimed Rs.20,000 and Rs.1019 as value of improvements and extensions made on the building. A large number of issues were framed by the trial court and it passed a decree of which the most important part was as follows:-

(a) The plaintiff is allowed to recover possession of A & B schedule items from the defendants in possession and to utilise the income from the B schedule item according to the terms mentioned in Exhibit II.

(b) The 5th & 10th defendants are permitted to remove within a period of 2 months from today the constructions and additions made in the (A and B schedule items by them without causing any damage to the plaint properties.

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Again this decree three appeals were filed one by the appellant, the other by the 10th defendant

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and the third by the plaintiff-respondent. The High Court in appeal modified the decree of the trial court and held that the only claim which the appellant could put forward was for compensation for the structure he had erected. The amount of Compensation was R.46,686-2-0. The High Court also held that the respondent was entitled to recover mesne profit,% as against the appellant at the rate of Rs.88/- per annum till the recovery of property mentioned in schedule A and B at the rate of Rs.1500/- per annum in regard to schedule B buildings. It is against this decree that the appellant has come in appeal to this court by special leave.

In order to understand the points in controversy it will be helpful to give certain facts which led up to this litigation' The respondent is a nonprofit sharing company, the main object of which seems to be to provide pecuniary assistance to the poor for educational and other charitable purpose. The respondent company owned survey No. 465 in the revenue estate of the village Trichur abutting on the public road in 1944-45. It was 55 cents in area. The respondent company erected buildings on the South and which had been

rented to the then Imperial Bank of India' now the State Bank of India, and in the middle portion there was a building which has been leased out to the Post Office. In the North there was a vacant plot measuring 20 cents which has been described as schedule A. A building was sought to be put up and was ultimately put up on about 7 or 8 cents out of this area which has been described in schedule B. Schedule A is the whole of the land measuring 20 cents with the building on it on an area of 7 or 8 cents which is schedule B. In 1942 the appellant became the Chairman of the Board of Directors of the respondent company and was entrusted with the construction of the building which the respondent company wanted to put up

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on 7 or 8 cents out of schedule A property which the appellant agreed to construct. The cost of the building at that time was estimated to be Rs.12,000. It was also resolved to entrust to the appellant the construction of a latrine, a kitchen, gate, compound and partition wall of schedule A property which was constructed at a cost of Rs.2,000 expended by the respondent company. At the meeting of the Board of Directors of January 9, 1944 the directors of the respondent company were told by the appellant that Rs. 12,000 was insufficient for the completion of the building. On April 1944, the appellant made an offer to the Directors of the respondent company that he would meet the entire cost of the construction of the building and hand over the building to the respondent company which would be a 'trust. This offer is contained in Exhibit AB. In this offer he stated that the estimated expenditure of the Dew building will be about Rs.30,000 and that he would meet the expenses and then he stated:-

"I shall entrust this building with the company as my trust property in accordance with the conditions mentioned below, and the company shall take over the above trust property and manage the affairs in accordance with three conditions mentioned below".

One of the conditions was that the minimum income of the property shall be calculated at Rs.1500/- per annum which would be spent for the education of poor students according to the rules framed by the company and then he set out certain rules. He also stated what the name of the trust would be. The document ended as follows.

"I shall execute at my own expense a trust deed and sign and give the same to the company, entering therein, all the above mentioned particulars and conditions. The

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company shall accept the same and shall mention the fact of acceptance in the deed in writing and shall get the same registered".

On the same day the directors seem to have resolved as follows:-

"It is decided to accept this trust property

in accordance with the conditions, mentioned in it. Copies of this resolution and the application, may be sent to the applicant".

The company agreed to accept the trust and a sum of Rs.7672-7-3 which had been given to the appellant by the respondent company was returned on April 30, 1944. On July 2, 1944, the appellant placed before the Board of Directors a draft of the trust deed which is Exhibit IT. The draft of the trust deed was approved by the company as follows:-

"The company has accepted the properties as 'Trust' with all the above conditions. To this effect, the Directors (Trustees) who have been authorised as per the decision of the Director Board, on behalf of the Dharmodeyam Company.

The draft of the 'Trust deed' has been perused and accepted. Four Trustees have been empowered to prepare the original deed and present it in the Registrar's Office " .

It appears that at a meeting of the General Body of the Members of the Company this trust deed was approved. Later on February 25, '1945 another meeting was held and certain changes were suggested in the trust deed. On October 7, 1944, certain members of the respondent company filed a suit in" the court of District Munsif of Trichur and obtained an injunction both against,

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the appellant and the company not to execute the trust deed as had been proposed by the appellant as contained in the draft (Exhibit II). Thereafter the appellant resigned his Chairmanship of the respondent company on May 25, 1945 and also ceased to be a Director on May 28, 1945. Two days before i.e. on May 23, 1945 the appellant registered a trust deed in regard, to the property which is Exhibit X. It is there stated that he had constructed the building at his own expense at a cost of Rs 75,000/- and it was to be named Dharmodayam Company Silver Jubilee 11 Iyyappan Trust Building. The first trustee was the appellant with power to appoint other trustee or trustees. The estimated income of the property was Rs. 3600/- out of which a rent of Rs 88/- per annum was to be paid to the appellant company for the compound where the building had been erected and then provision was made in regard to the income and how it was to be spent. This was registered and thus a trust was created of the properties in schedule A & B in which the trust became a tenant of the respondent company without any transfer from the respondent Company to the trust.

The suit for injunction which had been filed by some of the members was dismissed for default on March 25, 1946. The respondent company on August 13, 1945, called upon the appellant to hand over the building to the respondent company and it is stated that on August 22, 1945, during some holidays the appellant inducted the 5th defendant as a tenant. The respondent thereupon filed the suit out of which this appeal has arisen.

The plaintiff in his plaint, after reciting the facts which have been above set out, stated that the appellant as an agent of the respondent company had misconducted himself by the breach of his duties and had thereby lost any right he had regarding the building described in schedule B;

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that he had wilfully contravened the terms of his offer ; that the right of the appellant therefore was only to recover the money from the company to the extent to which he may be entitled in equity and the trust deed (Exhibit X) was

inoperative. The respondent further stated that it was ready and willing to pay such sum of money as the court may find the appellant to be entitled to.

The defence of the appellant was that the offer of the appellant to construct the building and to constitute the company as trustee to carry out the trust according to the terms and conditions detailed in his offer dated 2, 1944 having been accepted by the Board of Directors, it put an end to any previous relationship which might have existed between the appellant and the respondent company and could not therefore be enquired into. It was also submitted that the respondent company was estopped from claiming the building after having accepted the aforesaid offer pursuant to which the appellant had invested a large sum of money in constructing the building; that as the offer of the trusteeship of the property in dispute made by the appellant and accepted by the Board of Directors of the respondent company had afterwards been cancelled as a result of the resolution passed by the General Body of Members the appellant could not constitute the respondent company as trustee and therefore he was entitled to implement his original intention by executing the deed of trust (Exhibit X.). He therefore pleaded that the deed of trust was perfectly valid: that the rental value of the site in schedule A was not even Rs. 10/- a year and that he had not been a tenant and the word "verumpattom" had been used for the want of a better word and that the trust had undertaken the liability to pay to the respondent company Rs. 88/- a year. On these grounds it was submitted that the respondent company was not entitled to any relief. These then are the facts of the case.

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The appellant in this Court has mainly relied on the plea that he had been granted a licence and acting upon the license he had executed a work of a permanent character and incurred expenses in the execution thereof and therefore under s. 60(b) of the Indian Easements Act, 1882 (5 of 1882), hereinafter referred to as the 'Act', which was applicable to the area where the property is situate and therefore the license was irrevocable. Now in the trial court no plea of license or its irrevocability was raised but what was pleaded was the validity of the trust in Exhibit X. In the judgment of the trial court no such question was discussed. In the grounds of appeal in his appeal to the High Court which the appellant took against the decree of the trial court the relevant grounds are 9 to 13. In the 9th ground it was pleaded that the first defendant's case of lease should have been upheld; in any event s.60 of the Act should have been applied. In Ground No. 10 it was stated that Rs. 88/- was a reasonable compensation. Grounds 11 to 13 dealt with the question of trust. Thus it is for the first time in his grounds of appeal that s. 60 of the Act was sought to be raised as an alternative plea. At the time of the argument before the High Court the appellant abandoned his case in regard to the lease and relied on the irrevocability of the license and insisted that the trust deed (Exhibit X) was a valid document. Now it is not open to a party to change his case at the appellate stage because at the most the case of the appellant in the trial court was what was contained in paragraph II of the Written Statement where the question of estoppel was raised and the plea taken was that the respondent company was estopped from claiming any right to the building after accepting the offer of the appellant pursuant to which the appellant had expended a large amount of

money, That was not a plea of license at that stage. it is not for us to say what the ease of the parties would have been if the case of

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license had been specifically raised but the fact remains that the plea of license was not raised in the trial court nor was it adjudicated upon there.

The appellant was a Director of the company and it is now impossible to dispute the proposition that the Directors are in some sense, trustees a proposition which has been established by a long series of cases. See Palmer's Company Law p. 158, Ed. 19th. This two fold character of directors is, perhaps, best expressed in Lord Belborne's words in

G. E. Ry. v. Turner⁽¹⁾ where he said:--

The directors are the more trustees or agents of the company-trustees of the company's money and property ; agents in the transactions which they enter into on behalf of the company. And this is the way in which it is put by Sir George Jessel in the case of Re Forest Of Dean etc., Co. (1878) 10 Ch. D. 450. Directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control".

Thus when the appellant was making the offer for creating a trust he was not merely an agent of the company; he was also a trustee of the assets of the company and was in a fiduciary relationship with the respondent. Therefore the appellant could not, do anything in regard to the assets of the company which would prejudicially affect its rights. The appellant made an offer that he would erect the building on the land belonging to the respondent which is in schedule A, the building being schedule B. He also offered that it would be a trust property i.e. the super structure would be the trust property. He could not create a trust in regard to land which belonged to the company nor could he by a unilateral act create a lease in his own favour in regard to

(1) (1872) L.R. 8 Ch. App. 149, 152.

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the land which is in schedule A. Thus when a complaint is made that the appellant has unilaterally acted to deprive the company of some of its right the complaint. is not wholly without foundation, although the company also may not be entirely without blame. But the fact comes to this the appellant was asked to construct the building at a cost of Rs. 12,000; it was subsequently found that the cost would be more than the estimated amount which probably the company was not prepared to spend. It is not that the building had not yet commenced, it had commenced and probably not completed. At that stage the appellant made an offer which was accepted but the offer was that he would finish the construction of the building and hand it over to the respondent company as trust property of which the trustees would be the Directors of the company. The transaction therefore was confined to the offer as contained in Exhibit AB and in Exhibit 11. It is true that for some reason or another certain members of the company were not prepared to stick to the original arrangement and wanted certain modifications but in spite of that it was not open to the appellant to ignore his offer altogether and create a wholly new trust which he has done. His right, if any, if they could be enforced would only be in Exhibit 11 which the appellant himself has abandoned. He cannot now be heard to

say that because the company after accepting his offer had refused to abide by the agreement, he was entitled, to appropriate by means of the trust created by him the land in schedule A by constituting the trust a tenant and deprive the company of which he was at that time a Director and therefore a trustee. In these circumstances it is impossible to say that there were any equities in his favour which he is entitled to. enforce by way of defence to the suit of the respondent.

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In our opinion no case of license really arises but if it does what is the license which the appellant obtained and what is the license, which he is seeking to plead as a bar. The license, if it was a license, was to construct the building and hand it over to the respondent company as trust property. There was no license to create another kind of trust which the appellant has sought to create, It cannot be said therefore that there was an irrevocable license which falls under s. 60 (b) of the Act. Even such a license is deemed to be revoked under s. 62 (f) of that Act where the license is granted for a specific purpose and the purpose is attained or abandoned or becomes impracticable. In the present case the purpose for which the license was granted has either been abandoned or has become impracticable because of the action of the appellant.

In these circumstances the cases which were cited on behalf of the appellant are of little assistance. The appellant relied on *Manzoor Ahmad v. Muhammad Abdul Jamil* (1) which was a case under s. 60 (b) of the Easements Act where a license had become irrevocable under s. 60 (b) and it was held that it could not be revoked on payment of compensation. The *East Punjab case. Dominion of India v. B. B. Sohan Lal* (2) again is not of much assistance of the appellant. It was there stated that in every case the terms of the license have to be examined and the law applied to such terms. It was also observed by Das, C. J. (as he then was) that in order to be irrevocable under s. 60 the license has to be coupled with a transfer of property whereas under the English law it was enough if it was coupled with a grant or interest in the nature of profit and in every case the irrevocability whether under the English law or under the Indian' statute will give way to the special

(1) (1933) I. L. R. 56 ALL. 207. (2) A.I.R. 1950 E.P. 40, 47.

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agreement if any of the parties but it is unnecessary to go into these cases because the offer which was originally made by the appellant and accepted by in the respondent company has not been adhered to and the appellant is not proceeding on an entirely new basis.

In our opinion the offer and the acceptance of the terms of the trust deed being wholly different from what has now been executed by the appellant and from the manner in which the new trust has been constituted into a lessee of the company without the company's agreement it is not possible for a court in equity to accept the new trust as a bar to the respondent's claim for possession. In this case the appellant has suffered no loss. The amount which he has expended has been returned to him.

In our opinion the judgment of the High Court was right and we therefore dismiss this appeal with costs.

Appeal dismissed.