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THE FIBROSA CASE AND AFTER.

It was ruled in *Chandler* v. *Webster*[1] that "in cases of frustration the loss lies where it falls" and moneys advanced under a contract which subsequently was frustrated were not recoverable. This doctrine propounded by Collins, M.R. had been followed in a great variety of cases for nearly four decades though it had occasionally come in for vigorous denunciation, as for instance, in the *Cantiare San Rocco case*[2], where Lord Shaw of Dunfermline spoke of the principle as a maxim which "works well enough among tricksters, gamblers and thieves". The mills of the law no doubt grind slowly, none the less surely; and recently in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*[3], the justness of the rule fell to be considered by no less than seven law lords (Viscount Simon L.C. and Lords Atkin, Russell of Killowen, Macmillan, Wright, Roche and Porter) who were unanimous in their opinion that the principle had no true basis and held that in respect of money paid in advance under a contract the payer cannot be deprived of the right to recover it as money received to his use, where the consideration for which it had been paid had wholly failed. While some of the law lords based their conclusion on the theory of quasi-contract arising out of terms implied in the contract, others preferred to rest it on the doctrine against unjust enrichment. It is noteworthy that the Court of Appeal itself had in its judgment in the case while feeling bound by the rule in *Chandler* v. *Webster*[1] hinted a hope that the House of Lords might be able to substitute "a more civilised rule". The wish was answered and the rule in *Chandler* v. *Webster*[1] passed away in the language of an English Journal "unwept, unhonoured and unsung".

In the course of his speech the Lord Chancellor had observed: "It must be for the legislature to decide whether provision should be made for an equitable apportionment of pre-paid moneys which have to be returned by the recipient in view of the frustration of the contract in respect of which they were paid". It will be noted with interest that the Government accepted this broad hint and promptly introduced in Parliament the Law Reform (Frustated Contracts) Bill. The Bill incidentally implements the 7th Interim Report of the Law Reforms Commission made in May, 1939. It is made applicable only to contracts frustrated after July, 1943, at whatever time they might have been made. Its provisions are directed mainly at the adjustment of the rights and liabilities of the parties to the contract on frustration. All sums paid by one party to the other under the contract before it was discharged are made recoverable but if the payee had incurred expenses before the discharge in regard to the performance or

1. (1904) 1 K.B. 493 (C.A.).
2. (1924) A.C. 226, 229.
3. (1943) A.C. 32.

attempted performance of his part of the contract, the Court may in its discretion allow him to retain all or any part of the money paid and to recover the excess where more had been spent than what was advanced. The Bill is however limited in its operation. It does not apply to charter parties or contracts of carriage by sea or to contracts for sale of goods which perish before the risk passes to the buyer.

In India, however, the main principles underlying, the Bill are already part of the law of the land (see section 65, Contract Act and the decision of the Privy Council in *Muralidhar Chatterjee* v. *International Film Co., Ltd.*[1]).

TIRUMALAI—TIRUPATI DEVASTHANAMS ACT (AMENDMENT) BILL, 1944.

Stating that "the Tirumalai—Tirupati Devasthanams Committee is desirous of establishing and maintaining a first grade residential college at Tirupati and has requested Government to amend the Tirumalai—Tirupati Devasthanams Act, 1932, so as to enable the Committee to do so", the Government have published the aforementioned Bill designed to give the Committee the necessary authority. The Bill proposes to insert in section 36 of the Act after clause (*i*) the following clause, namely:—

"(*i-a*) the establishment and maintenance of a first grade college at or near Tirupati which shall be mainly residential in character and shall be open to all persons whether Hindus or not".

The Bill is open to criticism in a number of respects. In the first place it is questionable policy to seek to divert the funds of a religious institution to a wholly secular purpose without the sanction of a legislature composed of the representatives of the people. When the question of extending the provisions of the Hindu Women's Rights to Property Act, 1937, to the devolution of agricultural lands in this presidency was mooted, we believe, that the Government took the view that it was a matter with which the legislature alone should deal and that the Government should not take the responsibility for promulgating such a measure, notwithstanding that in some other provinces where also section 93 administration was in operation such legislation had been made, with a view to secure uniformity in the laws of inheritance applicable to the Hindus.

In the present case there is no special urgency. Nor has there been to our knowledge any demand for such a measure from the Hindu public. It is really Hindu public opinion and not the opinion of the Devasthanams Committee that should be paramount in the matter; for, it is not the covering of any loopholes or the curing of any lacunæ in the administration of the Act that has dictated the Bill under notice.

The Bill seems to be opposed to the very object which underlies the Act which it proposes to amend. The Tirumalai—Tirupati Devasthanams Act had been conceived exclusively in the interests of the Hindus and their religion. The amending Bill apparently is intended for the benefit of non-Hindus also. In the original Act the application of the Devasthanam funds is dealt with in two sections, 36 and 37. The first of these provides for the application of the funds in the first instance on certain objects and section 37 governs the utilisation of the surplus funds. Clause (*i*) of section 36 provides among other things for the maintenance of the educational institutions mentioned in Schedule II, two of such institutions being secular. Section 37 authorises the utilisation of the surplus without prejudice to the purposes set out in section 36, *inter alia* on "the establishment of a university or college in which special provision is made for the study of Hindu

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1. (1943) 2 M.L.J. 369 (P.C.).

religion, philosophy and sastras and for promoting the cultivation of Indian arts and architecture". Will not these provisions indicate that diversion of the temple funds for educational purposes outside these provisions is intended to be prohibited? Is it not a legitimate contention that if the Devasthanams have ample funds, even after expenditure warranted by section 36, the aim of the committee should be rather to spend them on the objects set out in section 37 in the first instance than to seek an enlargement of the range of the purposes set out in section 36? Will it not be pertinent criticism that while the objects pertaining to Hindus and the Hindu religion to which the temple funds can be properly applied are yet to be completely carried out a diversion of the temple funds for wholly secular purposes concerning not the Hindus merely but members of all faiths without distinction should not be made?

The amendment of section 36 instead of section 37 might lend point to the criticism that it is designed to avoid any interference or review of the Committee's acts by the Courts. Section 37 (4) provides that against an order of the Committee directing the use of surplus funds for any purpose, it is open to any person having interest, to institute a suit within the prescribed time to modify or set aside such order. But expenditure for any purpose under section 36 cannot come in for scrutiny by the Courts. Again utilisation of the surplus can be only for purposes *ejusdem generis* with those set out in section 36. Nor will an application cy-pres justify user of the funds for a non-religious purpose. Nor can the Hindu Religious Endowments Board sanction such expenditure; for, it will be contrary to the provisions of section 18 of the Madras Hindu Religious Endowments Act which directs the Board to see that all religious endowments are properly administered and duly appropriated to the purposes for which they were founded or exist. There seems to be no sufficient justification for ignoring these considerations and authorising by an amendment of section 36 the utilisation of temple funds to a purpose the propriety of which is very doubtful. The Bill if enacted will also have wide repercussions on the future of denominational foundations and institutions like wakfs, etc., which shall have to be carefully studied. In the circumstances, it is to be desired that the Government should drop the Bill and not proceed any further with it.

SUMMARY OF ENGLISH CASES.

FITZWILLIAM'S COLLIERIES *v.* PHILLIPS, (1943) 2 All.E.R. 346 (H.L.).

Income-tax—Payment by way of liquidated damages for easement to let down surface under mining lease—Is rent.

The amount paid as liquidated damages for exercising the right to let down surface in working a mine under a lease is "rent" within the meaning of the Finance Act, 1934, section 21.

(1942) 1 All.E.R. 648, affirmed, Lord Romer dissenting.

GARBETT *v.* HAZEL, WATSON AND VINEY, LTD., (1943) 2 All.E.R. 359 (C.A.).

Tort—Libel—Publication of photographs side by side—Writing underneath each photograph—Innuendo—Assessment of damages—Principles.

The defendants published in their monthly magazine a photograph of the plaintiff (an outdoor photographer) behind a camera carrying the placard, with a lady on each side of him looking at the photographs which he was showing to them and a couple of children in the front. On the opposite page was a photograph of a naked woman standing in a mountain stream. Under the photograph of the plaintiff were the words "Of course for another shilling madam" and the sentence was continued on the opposite page under the naked lady: "you can have something like this". In an action for libel,

Held, that the publication was defamatory of the plaintiff and the defendants were liable.

Held, further, that evidence that after the publication the plaintiff was addressed as "Smutty" instead of "Sydney" was admissible as evidence of the measure of the damage done.

The innuendo is that the plaintiff-photographer has with him a pocketful of what are called smutty photographs which he is willing to show to people who go up to and deal with him.

Damages for libel should bear some relation to the actual damage or loss sustained by a plaintiff, while of course being of sufficient amount to mark the seriousness of the occasion.

BRADLEY EGG FARM, LTD. *v.* CLIFFORD, (1943) 2 All.E.R. 378 (C.A.).

Contract—Unincorporated company—Executive Committee—Liability for negligence of servant.

Per Scott and Goddard, L.JJ. (*Bennet, J., dissenting*): The businessmen who accept the office of being on the executive council of an unincorporated society must be regarded in law as pledging their own credit in order to perform the duties which they voluntarily undertake for their so-called society just as do the committee-men of a club. The members of the executive committee are liable for damages caused by the negligence of servants appointed by them in carrying out contracts.

HARRISON *v.* LIVERPOOL CORPORATION, (1943) 2 All.E.R. 449 (C.A.).

Practice—Admission of liability and payment into court—Judgment cannot be for smaller sum.

Practice—Trial—Order for agreed medical report—One report only to be filed.

If money is paid in with an admission of liability, it follows that liability is admitted upto the amount paid in and judgment cannot be given for less, which is not the case where it is paid in with a denial of liability.

Where there is an order for an agreed medical report, only one report should be filed. If there are likely to be points of controversy, then if the agreement is to be completed the parties could only solve them by agreeing and if they cannot come to an agreement there can never be an agreed report. The order should refer to "an agreed medical report" and not to "agreed medical reports". (Proper procedure indicated).

PETTY *v.* PETTY, (1943) 2 All.E.R. 511 (P.D.).

Divorce—Decree after contest—Re-hearing on the ground of availability of fresh evidence—Jurisdiction of divisional court.

In a case in which a Judge has seen both spouses and their respective teams of witnesses and has deliberately attached the credibility to one side and not to the other, he cannot be asked to order a re-hearing on the ground that the production, it may be of a document or a new set of witnesses—is going to induce some other tribunal to say that the Judge believed the wrong set of witnesses. It cannot be said that there was any "error of the court" at the hearing justifying a re-hearing. It is neither desirable nor possible to define the words "error of court", so as to embrace all cases which fall within them and exclude those which do not. It may be easy to say that a particular case was on one side or the other of any line that could possibly be drawn.