

# The Union Of India (Uoi) vs S.M. King And Anr. on 30 July, 1952

**Equivalent citations: AIR1953ALL1, AIR 1953 ALLAHABAD 1**

## JUDGMENT

Bind Basni Prasad, J.

1. This is a Letters Patent Appeal arising out of a matrimonial suit for judicial separation. The facts are as follows : On 30th January 1951, Mrs. King brought a suit against her husband, S.M. King, who was an engine driver in the East Indian Railway, praying for a decree for judicial separation, alimony and custody of the children and order for their maintenance. After the progress of the suit up to a certain stage, a compromise was reached between the parties and it was filed in the Court on 17th July 1951. The relevant terms of the compromise were as follows :

"(a) That both the petitioner and the respondent have agreed to go to U. K. together or wherever it may be so decided to live together with their children.

(b) That out of the sum of Rs. 18,450 to the account of the respondent's provident fund money in the Railway, about which an injunction was issued to the Railway by this Hon'ble Court, the respondent agrees to give Rs. 13,000 to the petitioner including cost of suit to be placed at her account at the Grindlays Bank, Bombay, and a sum of Rs. 5,000 to be placed at the account of the three minor daughters to be kept in trust for them at the Grindlaya Bank, Bombay, and to be given to each of them equally on attaining majority.

(c) That the petitioner agrees not to claim any maintenance or allowance for her and for the minor children in future, or for the past and agrees to maintain and look after her three minor children properly and relieves the respondent from any responsibility for payment on this account.

(d) That the petitioner agrees to bear all costs of the suit and the respondent will not be liable to pay any such costs of the petitioner or her debts or liabilities on her behalf.

(e) That the petitioner agrees to withdraw her suit mentioned above on payment of all costs of parties settled at Rs. 1,000 and agrees that the said amount be paid in Court by the Railway out of the amount of Rs. 13,000 to be transferred to Grindlays Bank on her account."

2. It may be mentioned that along with the plaint a petition was presented by Mrs. King for an injunction to Mr. King to restrain him from withdrawing Rs. 18,450 out of his provident fund

deposited with the Railway Administration. The same day a learned Judge of this Court ordered a temporary injunction to restrain Mr. King from withdrawing the sum of Rs. 18,450 from his provident fund and the Railway Administration from paying the same to him. When the compromise was filed this Court passed the following order :

"The petition is allowed to be withdrawn. The railway administration shall be ordered to send a sum of Rs. 13,000 to Grindlays Bank Limited, Bombay, to be deposited to the credit of the petitioner and a sum of Rs. 5,000 to be deposited to the credit of the three minor children named in the petition. The balance of Rs. 450 shall be released. No order as to costs."

3. When the order was communicated to the Railway Administration it applied to the Court for the recall of the order passed on 17th July 1951. In the affidavit filed in support of the application it was mentioned that according to the rules of the fund an employee of the Railway is entitled to 90% of the provident fund due to him on his proceeding on leave preparatory to retirement and the balance of 10% is payable when he finally retires from the service. Mr. King took leave preparatory to retirement from 1st December 1960 and was thus entitled to get 90% of his provident fund from the Railway Administration. The total sum due to him under the provident fund account was Rs. 29,184. The Railway Administration mentioned that in compliance with the Court's order Rs. 18,450 out of the provident fund money had been withheld. It was contended that under Section 3, Provident Funds Act, 1925, provident fund money is not in any way capable of being assigned 'or charged and is not liable to attachment under any decree or order of any Court in respect of any debt or liability incurred by the subscriber or depositor, and that under Section 4 of the said Act the provident fund money is payable to the subscriber or the depositor and in the event of his death to his nominee. It was pointed out that in view of these statutory provisions, the Railway Administration was not in a position to send the money to the Grindlays Bank or deposit in the name of Mrs. King or of her minor children, because the statute casts a duty upon the Railway Administration to pay the money only to the depositor or the subscriber.

4 This application came up for hearing before a learned Single Judge on 1-8-1951, who in partial modification of the order dated 17-7-1951, directed that one cheque of Rs. 13,000 and another of Rs. 5,000 shall be drawn up by the Railway Administration in favour of the Registrar of this Court and after these cheques have been received learned counsel for Mrs. King should take steps to get the money deposited in Grindlays Bank in terms of the compromise arrived at in the case.

5 Against the last mentioned order the Railway Administration has preferred this appeal. The contention is that the order of the learned single Judge directing the Railway Administration to pay the provident fund money due to Mr. King in Court is wholly without jurisdiction because the money is not liable to be attached or assigned and the order amounts to a virtual attachment of Mr. King's provident fund money.

6. Respondent 1 Mr. King contends that Mrs. King has not carried out her part of the compromise inasmuch as she is not living with her husband and so she is not entitled to the reliefs asked for.

7. Respondent 2 Mrs. King contends that the compromise was not conditional and that she is entitled to the money without being called upon to live with her husband. She states that the treatment of Mr. King is so bad that it is not possible for her to live with him. She disputes also the point of law urged on behalf of the Railway administration.

8. This appeal came up for hearing before a Division Bench on 5-9-1951, and on that date the parties agreed as follows :

"The Railway Administration will draw two cheques for Rs. 13,000 and 5,000 respectively in the name of Mr. S.M. King, and these cheques will be delivered to the Registrar of this Court within three days. Mr. Man Singh (counsel for Mrs. King) will request Mr. S.M. King to endorse the first cheque in favour of Mrs. T.A. King in her personal capacity and the second in favour of that lady as guardian of the infant children. Should he fail to do so, Mrs. King will take such steps as she may be advised."

9. Learned counsel for the Railway Administration made it clear that if the amounts for which the cheques were drawn were not realised by Mrs. King, the Railway Administration would not, when this appeal came up for hearing, raise the plea that its liability to Mr. S.M. King had been discharged. Counsel for Mrs. King undertook that in such circumstances he would not contend that the drawing of the cheques was evidence that the amounts for which they were drawn were not provident fund money.

10. On 6-9-1951, learned counsel for Mrs. King wrote to Mr. King to come to Allahabad and to endorse the two cheques in possession of the Registrar of the High Court in favour of his client. But Mr. King declined to make endorsements and contended that the compromise was conditional,

11. The first question for determination is whether the order dated 1-8-1951, passed by the learned single Judge is capable of being enforced against the Railway Administration. That order was passed upon the compromise dated 17-7-1951, arrived at between Mr. and Mrs. King. The Railway Administration was no party to it. The second question is as to what is the effect of the agreement reached on 5-9-1951, during the pendency of this appeal.

12. Sub-section (l) of Section 8, Provident Funds Act, 1925, provides ;

"A compulsory deposit in any Government or Railway Provident Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to or have any claim on, any such compulsory deposit."

13. Learned counsel for the appellant relies upon the Dominion of India v. Mahabir Lall, A. I. R. 1951 cal. 285, and a recent decision of the Supreme Court in Union of India v. Hiradevi, 1952 S. C. J. 326.

The first case is of no help in the present appeal because there the Court had ordered the Chief Accounts Officer of the East Indian Railway to make over to the receiver appointed in the execution of a decree the provident fund money due to the judgment-debtor. This order was made before the money had become payable to the depositor. The case was decided by the Calcutta High Court on the simple ground that as the money had not become payable according to Section 4, Provident Funds Act, the execution Court was wrong in appointing a receiver.

14. In *The Union of India v. Hira Devi*, 1952 S. C. J. 326, the facts were as follows: Hira Devi held a money decree against one Ram Grahit Singh, who retired on 31-1-1947, as a Head Clerk in the Dead Letter Office, Calcutta. On 1-2-1949, she got a receiver appointed for collecting the money standing at the credit of the judgment-debtor in the provident fund with the Postal Authorities. The Union of India intervened with an application for setting aside the order appointing the receiver. That application was dismissed for reasons given in *The Union of India v. Sm. Hira Devi*, 54 Cal. W. N. 840. The view taken by the Court was that a receiver could be appointed in execution of a decree in cases where attachment in execution of the decree had been expressly prohibited by Statute. Against this decision there was an appeal to the Supreme Court which has held that a receiver cannot be appointed in execution in respect of provident fund money due to a judgment-debtor as it cannot be assigned or charged and is not liable to any attachment. The prohibition against the assignment or attachment of such compulsory deposit contained in Section 3 of the Act is based on grounds of public policy. Where the interdiction is absolute, to allow a judgment-creditor to get at the fund indirectly by means of the appointment of a receiver would be to circumvent the statute.

15. The distinguishing feature in the present case is that here the amount in the provident fund of Mr. King is not sought to be taken in execution of any decree or order of any Court "in respect of any debt or liability incurred by the subscriber or depositor." It is in pursuance of a compromise reached between him and his wife that the latter asks for the payment. But Section 3, Provident Funds Act, 1925, prohibits also an assignment of the deposit in the provident fund. The word "assign", according to Webster's Dictionary, means "to transfer or pass over property to another, whether for the benefit of the assignee or of the assignor's creditors, or in furtherance of some trust."

16. In *The Union of India v. Hira Devi*, (1952) S. C. J. 326, it has been held by the Supreme Court that the provident fund money not paid to the subscriber after the date of his retirement is "compulsory deposit" within the meaning of the Provident Funds Act, 1925. There can, therefore, be no doubt that the money in deposit with the Railway Administration is provident fund within the meaning of the Act although Mr. King has retired. The real effect of the compromise dated 17-7-1951, is to assign a part of the money due to Mr. King on account of the provident fund to his wife and children because according to it the property in the fund to the extent of Rs. 18,000 was transferred by Mr. King to his wife and children. The fact that subsequently by the order dated 1-8-1951, the Court directed the two cheques to be drawn in the name of the Registrar of this Court can make no difference because the essence of the transaction was to pay RS. 18,000 to Mrs. King and her children. We must see to the pith and the substance and not to the form of the matter.

17. Learned counsel for Mrs. King relies upon *N.A.M. Moore v. A. It, Moore* A. I. R. 1938 Oudh 48. That was a case where a divorce decree provided that the respondent should secure to the applicant

a gross sum of RS. 3,000 and that he should execute a proper instrument securing that payment. In execution of that decree the wife applied praying that as Mr. Moore had failed to provide her with RS. 3,000 for her and her children's maintenance the Court may under Order 21, Rule 34, Civil P. C., execute an instrument on behalf of Mr. Moore for securing the said sum to her. She suggested that the document should take the form of a special power-of-attorney in favour of the applicant authorising her on behalf of the judgment-debtor to withdraw a sum of Rs. 3,000 out of the provident fund of the judgment-debtor in the Railway Company in which he was employed. The Oudh Chief Court granted this request and held that it did not offend against Section 3(i), Provident Funds Act. The reason assigned was as follows:

"In the first place the manner in which the money is sought to be recovered by the applicant is neither an assignment nor a charge nor an attachment. In the second place the amount decreed against the judgment-debtor cannot also be said to have been decreed in respect of any debt or liability ' incurred by the subscriber '. The words ' incurred by the subscriber ' appear to us to show that the prohibition is against realization of money in respect of any debt or liability that the subscriber himself incurred voluntarily, but in the present case the liability of the judgment-debtor to pay Rs. 3,000 to the applicant was imposed on him by this Court's decree and was not incurred by him voluntarily."

In the present case the transfer of RS. 18,000 out of the provident fund of Mr. King was voluntarily agreed to by him in the compromise and the decree of the Court only recorded that compromise. It does not appear that in the case before the Oudh Chief Court there was any compromise between the parties. Moreover having regard to the principles enunciated by the Supreme Court in *The Union of India v. Hira Devi* (1952 S. C. J. 326) the view taken by the Oudh Chief Court in the aforesaid case is no longer good law, for their Lordships of the Supreme Court observed :

"It is obvious that the prohibition against the assignment or the attachment of such compulsory deposit is based on grounds of public policy. Where the interdiction is absolute, to allow a judgment creditor to get at the fund indirectly by means of the appointment of a receiver would be to circumvent the statute. That such a frustration of the very object of the legislation should not be permitted was laid down by the Court of appeal as early as 1886 in the case of *Lucas v. Harris*, ( 1887) 18 Q. B. D.

127), where the question arose with reference to a pension payable to two officers of Her Majesty's Indian Army."

18. It is true that in the present case there is no request for the appointment of a receiver. But when the cheques were directed by the learned single Judge to be drawn in the name of the Registrar he was virtually to act as a receiver to collect the funds for the benefit of Mrs. King and her children. The direction in the decree of this Court dated 17-8-1951, to the Railway Administration to send a sum of Rs. 13,000 to Grindlays Bank Limited to be deposited to the credit of Mrs. King and a sum of Rs. 5,000 to be deposited to the credit of the three minor children is, therefore, not binding upon the Railway Administration because it contravenes the provisions of Section 3(i), Provident Funds

Act, inasmuch as it amounts to an assignment of this sum from the provident fund of Mr. King to his wife and children. So long as Mr. King is alive he alone is entitled to realise the amount from the provident fund; vide Section 4 of the Act. Nor does the order dated 1-8-1951, passed by the learned single Judge make any difference in the position for although the cheques may be in the name of the Registrar the two sums of Rs. 13,000 and Rs.5,000 are meant really for Mrs. King and her children.

19 The second question is whether the position as stated above has been altered on account of the compromise reached during the pendency of this appeal on 5-9-1951. This appeal was presented to the Court on 6-8-1951. It was directed to be listed for hearing on 20-8-1951. As one of the Hon'ble Judges of the Bench was not present in Court on that date it was directed to be listed as early as possible. It came up for hearing on 31-8-1951, 3rd September and 4th September 1951, but it could not be reached. From the order sheet it appears that on 5-9-1951, learned counsel for the Railway Administration and for Mrs. King were heard. Mr. King was not present. Nor is the presence of his counsel noted in the order sheet. It appears to have been mentioned before the Court that the parties were likely to compromise and so the Division Bench passed the interim order dated 5-9-1951. In compliance with this order, the Railway Administration deposited the two cheques in the name of Mr. S.M. King with the Registrar. But when Mr. King did not agree to endorse them in favour of his wife the latter made an application to the trial Judge on 28-9-1951, requesting that Mr. King may be directed to endorse the aforesaid two cheques and sign the receipts and on his default this Hon'ble Court may be pleased to execute the receipts and endorse the cheques mentioned above. Notice was issued to Mr. King. He appeared and repeated that the compromise was a conditional one. As the agreement relied upon by Mrs. King had not been arrived at before the learned trial Judge, he directed on 26-10-1951, that Mrs. King's petition be laid before the Letters Patent Bench. When this appeal came up for hearing before a Bench on 12-5-1952, it was pointed out by the learned counsel for the appellant that Mr. King had not been formally served with the notice of the appeal. Notice was, therefore, directed to go to him and after the service of notice on him this appeal was heard. It is evident from the above narration of facts that when the order was passed by the Division Bench on 5-9-1951, Mr. King was not present and he had no notice of the appeal. He was no party to the agreement reached on 5-9-1951. He is, therefore, not bound by it and as such under no obligation to endorse the two cheques in favour of his wife. The agreement of 5-9-1951, therefore, falls to the ground as it was not subscribed by all the necessary parties.

20. The last question is whether the compromise dated 16/17th July 1951, gives an unconditional right to Mrs. King to have a sum of RS. 18,000 -- RS. 13,000 for herself and Rs. 5,000 for her children--from her husband, or is that right dependent upon her living with her husband. It may be noted that at present they are living apart, the wife is at Kanpur, while the husband is at Jabbulpore. The terms of the compromise have been set out in detail at the beginning of the judgment. The very first term provides that the petitioner and the respondent would "live together with their children." Mrs. King blames her husband for her inability to live with him, while Mr. King accuses his wife for this. It is not necessary to go into this question, as the compromise falls for failure of consideration, since the agreed payment of money to Mrs. King and her children is not enforceable at law.

21. It is unfortunate that owing to the disputes that have arisen the whole of this family is suffering. But there is no help for this. Having regard to the terms of the compromise and the provisions of

Section 3, Provident Funds Act, it is not possible for the Court to direct the payment of the sums to Mrs. King and her children. The solution lies in the hands of Mr. and Mrs. King. They should compose their differences, forget the past and live amicably with each other. We trust that Mr. King will not then grudge to place all what he has for his wife and children.

22. The question now arises as to what order should be passed. In view of the findings reached above the order dated 1-8-1951, which modified the order dated 17-7-1951, passed on compromise falls to the ground. In fact the very compromise becomes inoperative because one of its terms, namely, requiring the Railway Administration to deposit a sum of Rs. 18,000 in Grindlays Bank Limited, Bombay, is contrary to law. With the failure of that important condition of the compromise the whole compromise falls to the ground, the illegal condition being inseparable from other conditions. For reasons given above, the agreement reached in this appeal on 5-9-1951, also become inoperative. We think that the ends of justice demand that as all these three orders have become inoperative, the matrimonial suit may be restored and heard from the stage at which it had reached before the petition of compromise dated 16-7-1951, was filed in Court.

23 The appeal is allowed. The order of the learned trial Judge dated 1-8-1951; is set aside. The order dated 17-7-1951, and the agreement reached during the Letters Patent Appeal between the Railway Administration and Mrs. King on 5-9-1951, are also declared inoperative. Matrimonial suit no. 1 of 1951, Theodora Aimee King v. Sidney Martin King, is restored to its original number and the learned trial Judge shall proceed with the case from the stage it had reached before the deed of compromise dated 16-7-1951, "was filed in Court and order passed on it on 17-7-1951. During the pendency of the matrimonial suit, the interim injunction restraining the Railway Administration from paying RS. 18,000 to Mr. King shall remain in force. In the circumstances of the case parties will bear their costs.