

1941

*Present : Soertsz and Keuneman J.J.*

## THE PUBLIC TRUSTEE v. WALLEES.

119—D.C. (Inty.) Colombo, 1,489.

*Trustee—Application to remove trustee from office—Burden of proof—Breach of duty—Application for relief by trustee—Trusts Ordinance (Cap. 72), ss. 15 and 31.*

Where an application is made for the removal of a trustee under section 76 of the Trusts Ordinance, the burden is on the petitioner to prove that the trustee committed a breach of the duty to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own.

A trustee, who has acted honestly but not reasonably is not entitled to relief under section 31 of the Trusts Ordinance.

Where a trustee was found guilty of negligence the District Court is justified in withholding costs from him.

**A** PPEAL from a judgment of the District Judge of Colombo.

*H. V. Perera K.C.* (with him *J. E. M. Obeyesekere* and *M. M. I. Kariapper*), for first respondent, appellant.

*C. Suntheralingam* (with him *S. P. Wijewickreme*), for petitioner, respondent.

*Cur. adv. vult.*

September 11, 1941. KEUNEMAN J.—

The appellant is the Public Trustee who had been duly appointed by the Court as trustee of the trust estate left under the will of the late Vincent William Perera (P 2 of 1899). The petitioner made application under section 76 of the Trusts Ordinance, *inter alia*, for the removal of the appellant from the office of trustee, and for an accounting. The main charge with which we are concerned in this appeal is that the appellant failed to exercise reasonable diligence in collecting the rent due under lease P 8 of March 10, 1932, from the lessee G. A. Caldera. This was a lease of Kendalande estate of about 40 acres. There were some other charges. In respect of Kendalande estate, the learned District Judge held that there was gross negligence and supineness on the part of the appellant in not taking active steps to collect Caldera's rent as it fell due, and that this had resulted in the loss of Rs. 1,312.54 to the estate. The appellant was ordered to make good that amount to the estate. On the other issues the District Judge held in favour of the appellant, in one instance (which will be mentioned later) the District Judge held that there was a technical breach of the terms of the trust instrument, but the appellant was exonerated from liability in the circumstances of the case.

Further, the District Judge refused to remove the appellant from the office of trustee, and ordered each group of the parties to bear its own costs.

The appellant now appeals against the order requiring him to bring in Rs. 1,312.54, and the order relating to costs.

As regards Kendalande estate, the appellant, together with the beneficiaries under the will, leased to G. A. Caldera, Proctor, this estate for the period of ten years. As the will P 2 forbade a lease for more than two years, the consent and approval of the Court was obtained. The consideration for the lease was payable as follows:—

Rs. 480 in advance.

Rs. 480 on or before February 10, 1933.

Rs. 960 on or before February 10, 1934.

Rs. 960 on or before February 10, 1935.

Rs. 960 on or before February 10, 1936.

Rs. 960 on or before February 10, 1937.

The lease was on the basis of Rs. 480 a year, but the whole of the lease money was payable on or before February 10, 1937.

Further the lessee, Caldera, undertook to carry out certain specified improvements to the bungalow on the leased premises, without having any claim to compensation.

It was also agreed that if the rent was in arrears for thirty days, it was lawful for the lessors at any time thereafter to enter into possession of the premises.

It will be noted that the first payment of Rs. 480 was made in advance. A second payment of Rs. 480 was due on or before February 10, 1933. Caldera failed to pay this amount. As far as can be ascertained from the documents, the appellant made no attempt to recover this amount till June 26, 1933, when Caldera was requested by letter to send the amount without delay. Nothing further appears to have happened till about December, 1933, when, according to the office minute of December 18, 1933, the attention of the Public Trustee was called to the state of affairs. It runs as follows:—

“The lease money due from Mr. G. A. Caldera not received yet. When Mr. Caldera last time he saw you stated that he was losing on the lease and finds it difficult to pay one year's money at once, he was permitted to pay even by monthly instalments. Invite his attention please.”

To this the reply of the Public Trustee was “Yes”.

It appears from this that Caldera had alleged that he was losing on the lease, and that the Public Trustee had allowed him the concession of paying the amount due by monthly instalments, but that Caldera had not even availed himself of that concession.

After the attention of Caldera had been invited on several occasions, he wrote a letter (not produced) on January 20, 1934, by which apparently he paid the sum of Rs. 250. It is important to remember that Caldera never again paid any amount to the Public Trustee, until after action had been instituted against him. To judge from subsequent letters written by the Public Trustee, Caldera had also promised to make a further remittance, and had also applied for a reduction of the rent. By I. R. 42 of January 30, 1934, the Public Trustee declined to consider the question of reduction of rent, unless consent was obtained direct from the heirs. It was not till March 9, 1934 (letter I. R. 43) that the Public Trustee reminded Caldera of his promise to send a further remittance. On April 12, 1934 (I. R. 43), Caldera asked for a further two weeks, time. On this the Public Trustee endorsed the following minute:— “await till 26th instant and B. O. if no payment received by then”. Attention was invited on May 3.

In June, 1934, we find a query by the Public Trustee, as regards the amount due from the lessee up to May 31, 1934. To this the somewhat astonishing reply is received from the office that Rs. 390 is due, and a letter was written by the Public Trustee on June 20, 1934, requesting Caldera to remit this amount. It has to be remembered that on February 10, 1934, under the lease a further sum of Rs. 960 had become due from Caldera, and that the amount due then was Rs. 1,920, less the sums of Rs. 480 and 250 paid by Caldera, viz., a net sum of Rs. 1,190. It certainly appears that the Public Trustee regarded the arrangement with Caldera as including the supersession of the agreement under the lease to pay the lease money on fixed dates and in fixed amounts, and the establishment of a new arrangement to pay the rent in monthly instalments of Rs. 40. Such an alteration had neither the approval of the Court, nor the consent of the beneficiaries.

On June 22, 1934, Caldera wrote a letter (I. R. 178) to the Public Trustee, regretting that he was unable to send a remittance owing to expenses connected with his wife's serious and prolonged illness but asked for three weeks to make a substantial payment. He again asked for a reduction of rent, on the ground that he was losing on the lease, or in the alternative for a surrender of the lease. He added that fees were due to him in a testamentary case, and requested, if possible, that the amount due to him should be transferred to the lease account.

On July 16, 1934, Caldera saw the Public Trustee, and was apparently asked to furnish a statement showing the income and expenditure in respect of the land. Caldera promised to send a communication in the course of the week, but though his attention was invited on several occasions and he was telephoned to many times, nothing happened till March, 1935 (*vide* minute I. R. 50). Eventually, Caldera saw the Public Trustee on March 9, 1935, but only to say that he would send the required statement early in that week (*vide* minute I. R. 51). There is a suggestion in the case that the statement was eventually sent, but when it was sent is not clear, nor do we know the details of the statement.

On June 26, 1935, the Public Trustee summoned a meeting of the beneficiaries for July 8, 1935 (P 9). About six of the beneficiaries attended and agreed to the Public Trustee getting a surrender of the lease from Caldera as from August 1, 1935, or any other convenient date shortly afterwards, Caldera paying rents right up to the date of surrender (*vide* I. R. 14). The Public Trustee informed the remaining beneficiaries of the meeting in question, and requested them to say whether they agreed to the proposal (*vide* P 10). Eventually this proposal could not be carried out and on September 20, 1935, the Acting Public Trustee sent a peremptory letter to Caldera, claiming the sum of Rs. 2,150 as lease money on the basis of the lease, and demanding a substantial payment immediately, failing which legal steps would be taken (I.R. 53). No reply was received though Caldera's attention was repeatedly called to this matter, and on November 11, 1935, the Public Trustee entrusted the matter to his Proctor (I. R. 56).

Action D. C. Colombo, No. 5,264 was eventually brought on June 25, 1936, but I do not find any evidence of undue delay in the institution of the action; or in the subsequent proceedings or in execution of the decree.

These are the facts as they arise on the documents. The Public Trustee who officiated as trustee during the material period was not called to give any explanation of his conduct.

There was considerable discussion in appeal as to the incidence of the burden of proof in this case. Counsel for the petitioner argued that, in view of the fact that the Court had been consulted with regard to the terms of the lease, and had given approval to those terms, there was an injunction of Court imposed on the appellant to collect the rents due on the specified dates, and that the resulting position was similar to that of a trustee who had been directed under the terms of the trust to call in trust moneys on a given date. I think it is not possible to put the case so high, nor in fact do the issues suggest that such a view was entertained. Counsel for the petitioner in the lower Court quite rightly undertook the

burden of proving that "the Public Trustee failed to exercise reasonable diligence in the collection of the rents". In my opinion the petitioner had to prove that the Public Trustee failed to exercise the care required under section 15 of Chapter 72, viz., committed a breach of the duty "to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own".

Can we say there was such a breach of duty? The evidence in the case establishes that from February, 1933, to September, 1935, the action of the Public Trustee was dilatory in the extreme. No real pressure was used on Caldera to make him pay the rent. The concession was given to Caldera of paying by monthly instalments and the terms of the lease were not enforced and even when Caldera failed to take advantage of the concession, no real effort was made to secure payment. Caldera was permitted to make one excuse after another, and each time he made an excuse and asked for a short time to pay, it took several months before the Public Trustee satisfied himself that the excuse was not valid, and by then, not only had the period of time asked for been exceeded by a large margin, but in fact nothing was done by Caldera. The main contention of Caldera, viz., that he was losing on the lease, was obviously a mere excuse, as his failure to provide the figures for a considerable period shows. It is very important to remember that since the inception of the lease Caldera only made one payment, viz., Rs. 250 on January 20, 1934. No threat of legal proceedings was made until September, 1935. On the evidence before me it appears that prior to September, 1935, the appellant was satisfied with mere inactivity, or at most contented himself with writing some letters, which it must have been obvious had no effect in securing payment. During that time a period of nearly two and a half years had elapsed, since the first failure of Caldera to pay.

Counsel for the appellant argued that the lease was very profitable to the estate, and that even if no payment was received, there was at the time every prospect of the eventual recovery of the lease money, and that the appellant was acting wisely in letting the lease run on, and not adding to Caldera's embarrassment by filing action, which may have had the effect of ruining Caldera's professional income.

It is not possible to accept this argument for two reasons. First, the Public Trustee who functioned during this period has not been called, and there is no evidence that the idea suggested by Counsel ever influenced his mind. Next, though it is true that the Public Trustee at the time Caldera's offer was first received considered that it was a good proposition, and though it may be regarded as a good proposition, if the rents were paid in accordance with the lease, I think it ceased to be a good proposition, when there was a persistent failure to pay the lease money.

The beneficiaries were entitled to regular payments under the terms of the trust, and it was impossible to make the payments, if the rent was withheld, and this was particularly hard on the beneficiaries, who were entitled to payment during their life time alone. The further suggestion of Counsel that so good a rent could not have been obtained outside cannot be supported on the evidence. It is true that at a later stage only a lesser rent was obtained, but by this time the estate had been considerably neglected and the lease was for a shorter period. The claim of

Caldera that he was entitled to compensation for improvements cannot be seriously entertained, and was not persisted in at the subsequent trial.

In my opinion the conduct of the appellant fell very far short of the conduct which may be expected of a prudent man dealing with this property as his own. The District Judge has held that the loss was due to the gross negligence and supineness of the appellant, and I cannot say that that finding, is not justified on the evidence.

One further point was argued regarding the amount ordered to be brought in. The appellant has failed to show that if active steps were taken against Caldera at an earlier period, the same result would have ensued. So far as the evidence goes, Caldera was regarded as a Proctor in good standing at the material time. He has, since these proceedings started, been prosecuted to conviction, but there is no evidence that at the material time, he was unable to pay the amounts due. To judge from his letters, Caldera although subject to temporary financial embarrassment, was not incapable of paying the rents, if continuous and sufficient pressure was applied to him, but it is difficult to resist the conclusion that even these letters were mere excuses made in order to avoid payment.

The District Judge also held that the appellant was not entitled to relief under section 31 of the Trusts Ordinance. This section states that a trustee who has acted honestly and reasonably may be excused in whole or in part. There is no question but that the appellant acted honestly, but the District Judge held that he did not act reasonably. I agree with this finding.

Further, the District Judge held that section 45 of the Trusts Ordinance was not applicable. Under that section a trustee is empowered to allow time for payment of a debt, provided he acts in good faith and without negligence. In this case there has been positive evidence of negligence.

The findings of the District Judge on this aspect of the case are affirmed.

Counsel for appellant addressed another argument to us on another finding of the District Judge which he suggests may have influenced the order for costs, viz., that there had been a technical breach of trust in that the appellant failed to make payments to the beneficiaries in the terms of the will P. 2. Under the will the trustee was to recover, receive and take rents, income and profits of the estate, and to pay monthly one-fifth shares thereof to each of the three daughters of the testator, one-fifth to the testator's wife, and one-fifth was to be held by the trustee until the period of distribution mentioned later, and was to form a reserve fund and be applied towards the payment of all taxes and the upkeep and repairs of the real properties, any balance being invested on mortgage. The period of distribution referred to was the distribution set out in the will, on the deaths of the wife and daughters. It is, I think, clear under the will that rates and repairs were to be paid out of one-fifth of the income, and the remaining four-fifth was to be distributed to the beneficiaries mentioned. It was however found in practice that rates and repairs took up considerably more than one-fifth of the income. This was largely due to the increase in rates. The trustee was compelled to allocate considerably more than one-fifth of the income to this purpose.

The beneficiaries accordingly received less than the four-fifth specified in the will. I think the District Judge was right in holding that the appellant was guilty of a technical breach of trust, in disregarding the express terms of the trust, and in acting on his own initiative without the sanction of the Court. The District Judge further held that the action of the appellant in this matter was inevitable, if the corpus of the trust property was to be preserved, and was such as would have been sanctioned by the Court. The appellant had accordingly acted honestly and reasonably and was entitled to be excused under section 31. Not only do I think that this finding is right, but I am unable to see that it has influenced the District Judge in arriving at any conclusion relating to costs adverse to the appellant.

There is one other matter to which it is necessary to refer. The District Judge has used strong language in describing the conduct of the present holder of the office of Public Trustee in relation to the lease of Kendalade given at a later date to Mrs. D. E. Perera. No doubt this offeror was treated with some leniency, but, on a study of the evidence, I do not think the Public Trustee was influenced by any other motive than that of giving consideration to the moral claim of Mrs. D. E. Perera, who apparently was the real, but not the nominal, previous lessee, and had in writing some claim to have her offer considered. I do not think it was an option. I cannot find any justification for the suggestion that the Public Trustee's personal interests came into conflict with his duty as trustee, or that the Public Trustee was compelled to give the lease to Mrs. Perera in order to avoid the matter going further, when awkward questions could be raised with regard to the alleged option. Nor can the interview given by the Public Trustee be regarded as immoral, although it was perhaps a little irregular. As I said, some leniency was shown to this offeror, but the Public Trustee was careful to see that no loss resulted to the estate. Further no specific charge was made against the Public Trustee on this point, nor has any issue been framed in this connection.

The only matter that remains for consideration is the order relating to costs. The District Judge carefully considered the circumstances of the case, and came to the conclusion that the appropriate order was that each party should bear his own costs. It is impossible to interfere with this exercise of discretion, and I think myself that the finding in one respect that the Public Trustee was guilty of negligence justified the withholding of costs from him although he has succeeded on other matters.

The appeal is dismissed with costs.

SOERTSZ J.—I agree.

*Appeal dismissed.*