

Dora Constantino - - - - - *Appellant*

*v.*

Andre Alexandroff and others - - - - - *Respondent*

FROM

THE FULL CONSULAR COURT OF HIS BRITANNIC  
MAJESTY AT ALEXANDRIA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1945

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*Present at the Hearing:*

LORD SIMONDS

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

[*Delivered by* LORD SIMONDS]

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This appeal is brought by Dora Constantino, formerly Dora Ralli, from an order of His Britannic Majesty's Full Consular Court at Cairo made on the 27th February, 1943, dismissing an appeal by her from a judgment of his honour Judge Besly given on the 29th January, 1942, whereby he dismissed with costs an action brought by her for such relief as is hereinafter mentioned.

In the course of the proceedings many events that happened long ago have been subjected to a detailed examination, but in the view which their Lordships take of the primary issue in the case they do not think it necessary to observe upon the greater part of the matters that have been the subject of controversy.

It is nevertheless necessary to refer in some detail to the essential facts of a somewhat complicated story.

Ambrose Antonio Ralli, a merchant of Alexandria, who died on the 14th August, 1912, and will be called "the testator," had two daughters (1) Catherine, the wife of André Alexandroff, who is a respondent to this appeal; and (2) the appellant. In the year 1912 the appellant was 28 years of age and was unmarried. Her sister Catherine was older. She had in the year 1900 married Alexandroff, and on the 28th May of that year a settlement had been made on her marriage. To this settlement, which will be called "the Alexandroff marriage settlement," further reference will be made. She had in 1912 at least one child living.

The testator had also a sister, Marietta, who married Stephen Augustus Ralli. Stephen had at some time before his death in the year 1902 lent the sum of £15,000 to the firm of Ralli Son & Co., of Alexandria, but had agreed with the testator that the loan should be discharged by the debtor firm by payment to the testator, to whom the loan would be continued. At the date of Stephen's death the firm had paid off £10,000 to the testator, and the sum of £5,000 still outstanding was payable to him. By

his will of the 23rd October, 1901, Stephen specifically bequeathed this debt to his wife Marietta. A narration of these facts is a necessary introduction to the events that follow.

On the 18th November, 1902, after the death of Stephen, a deed of arrangement in relation to the debt was made between the testator of the 1st part, Marietta of the 2nd part, and the appellant and Catherine of the 3rd part. This long and elaborate document contained two recitals that may be mentioned, the first, that Marietta was minded to make provision for Dora and Catherine, and the second, that the testator was desirous that the repayment of the full sum of £15,000 should be postponed. He had not yet received the full sum from the firm and in any case was not desirous himself then of discharging his debt. The operative provisions so far as they are material are as follows: (1) a covenant by the testator with Marietta that his executors or administrators would upon his decease, if Marietta should then be living, pay her the sum of £15,000 or such lesser sum as he might have actually received from the firm; (2) a covenant by the testator with the appellant and Catherine and also with Marietta that if Marietta predeceased him without receiving the said £15,000 or lesser sum, his executors or administrators would on his decease pay to the appellant if she should be then living, and, if she should be then dead leaving a child or children then living, would pay to such child or children in equal shares the sum of £12,000 or such sum not exceeding £12,000 as he might have actually received from the firm, and would pay to Catherine, if she should be then living, and, if she should be then dead leaving a child or children then living, would pay to such child or children in equal shares the residue of any moneys which he might have actually received from the firm and, if either the appellant or Catherine should be then dead without leaving a child or children then living, would pay the sum which would be payable to her if she were then living to the executors or administrators of Marietta as part of her estate. These covenants are followed by an agreement by Marietta that the sum of £15,000 or lesser sum should not be recoverable or demandable except in accordance with the provisions of that deed and that in the event of her predeceasing the testator the receipts of the appellant and Catherine or their respective children should be a good discharge to the testator, and by a declaration by her that if during her lifetime the sum of £15,000 or lesser sum should be paid to her she would hold the sum in trust as to £12,000 or any lesser amount so paid to her for the appellant if she should be then living or for her child or children equally if she should be then dead leaving a child or children and in trust as to the residue (if any) of the amount so paid to her for Catherine if then living or for her child or children equally if she should be then dead leaving a child or children. Then follows the clause which is of decisive importance: "But with power for the said Marietta Ralli to require or cause any sum so held in trust to be settled on or for the benefit of the person or persons beneficially entitled thereto, and her his or their issue in any form and manner usual in English settlements which the said Marietta Ralli may think fit." Finally it was agreed that any provision which the testator might thereafter make by deed or will for the appellant or Catherine whether the same should be for her alone or for her and her issue by way of settlement should be taken to be and should be a satisfaction wholly or pro tanto as the case might be of the sum or sums payable to her or her child or children or to Marietta in trust for her or her child or children as the case might be under the covenants by the testator therein contained.

The testator died as already stated on 14th August, 1912. He had not paid any part of the £15,000 to Marietta who survived him. Nor had he made any provision by deed for his daughters or their children in satisfaction of his covenants. But by his will dated the 15th January, 1909, of which his brother-in-law, the respondent Antonio Theodore Ralli, and his son-in-law, André Alexandroff, were executors, he made certain

provisions which, though they were not accepted as being in satisfaction of his covenant, must be referred to as part of the history of this case. After briefly reciting the deed of arrangement of 1902 and that under it in the event of Marietta's predeceasing him his executors were to pay the sum of £15,000 to his daughters and that in that event the appellant or her children would receive £12,000 and Catherine or her children £3,000, and that he had received repayment of the whole sum of £15,000 from the firm, the testator proceeded to direct his executors to carry out as soon as might be the terms of the deed of arrangement and explained the unequal division between his daughters by saying that Catherine had already for dowry or otherwise received £9,000 "in round numbers." If he had stopped there, it could not have been suggested that the will in any way operated in satisfaction of his covenant, but he then proceeded to make dispositions and give directions which are not easily reconcilable with the primary direction to carry out the terms of the deed of arrangement, for that involved nothing more or less than immediate payment of £15,000 to the still living Marietta. However the testator after bequeathing the residue of his estate to his daughters in equal shares upon the trusts thereafter created then declared that with regard to the appellant her share of the residue of his estate "together with the sum of £12,000 which she is to receive in accordance with the terms of the deed of arrangement," should be held by trustees as appointed below in trust for her benefit. The testator then appointed as trustees his executors and any third person they might mutually agree on, and after giving directions as to investment declared that the trustees should hold the fund in trust for the appellant for her life and after her death for her child or children in equal shares with a provision that in the event of the appellant predeceasing him without leaving issue the whole of the fund should pass to the trustees of the Alexandroff marriage settlement to be held upon the trusts thereof. The testator then gave directions in regard to Catherine's share of residue and the sum of £3,000 which she was to receive under the deed of arrangement.

The testator's will was duly proved by the executors named in the will in His Britannic Majesty's Provincial Court at Alexandria. The estate was declared to be of the value of £6,653, after deducting funeral expenses and debts amounting to £17,613, which included £14,606 due to Marietta under the deed of arrangement. The small difference between this figure and £15,000 is in the exchange between pounds sterling and pounds Egyptian.

Immediately the question arose what was the position in regard to the £15,000.

The executors were represented by a Mr. Leveaux, a lawyer of Alexandria. The appellant was at the time of the testator's death staying in Switzerland with her sister. Marietta was living at Hove and was throughout advised by a solicitor, Mr. C. C. Davie of the firm of Griffith Davie & Smith of Brighton. A situation which was in any case difficult enough was made more difficult by the fact that there was grave apprehension lest the testator's estate might be depleted by claims arising out of a commercial venture in which he had been interested. It is unnecessary to say more about this than that for sufficient reasons it genuinely appeared to the executors to be important that the will should not be regarded as a satisfaction of the covenant. Mr. Leveaux was of opinion that this was in fact the legal position and advised that the sum of £15,000 should be paid to Marietta to be held upon the terms of the deed of arrangement. Marietta being informed by André Alexandroff of this advice instructed Mr. Davie accordingly and he in turn instructed Sir Benjamin Cherry (then Mr. Cherry), a very experienced conveyancing counsel of Lincoln's Inn, to settle a proper settlement. The instructions given to Sir Benjamin have not survived, but it is clear that he had before him the terms of the deed of arrangement and of the testator's will. Sir Benjamin took the view that the combined effect of the deed of arrangement and the will was

that nothing was payable to Marietta and said so. Mr. Leveaux did not agree, and eventually it was arranged that Sir Benjamin should settle the appropriate settlement upon the footing that Marietta had the power to make it but that before the executors of the will handed over any money to be held on the trusts of such settlement the protection of an order of the court at Alexandria should be obtained. It was also arranged that the settlement should deal only with £12,000, the other £3,000 being with Marietta's consent paid to the trustees of the Alexandroff marriage settlement.

Upon this footing Sir Benjamin drafted the settlement which is impeached in these proceedings. It must be said at the outset that the beneficial trusts of the settlement as executed remained exactly as Sir Benjamin originally drafted them and it cannot be suggested that they were any other than the trusts which he thought it was competent for Marietta to declare in exercise of the power reserved to her by the deed of arrangement. The parties to the settlement were (1) Marietta, (2) the appellant, (3) André Alexandroff, George C. Scaramanga and E. L. Ralli as trustees. There were full and accurate recitals of all the material facts. Then Marietta in exercise of the power reserved to her and with the privity of the appellant declared the trusts of the £12,000. They were (1) to provide a certain indemnity, (2) the usual trusts for the appellant and her children with provisions for hotchpot and advancement, and (3) in default of children of the appellant an ultimate trust in favour of the trustees of the Alexandroff marriage settlement. The appellant was further given the usual power of appointing a life interest in favour of any husband she might marry.

It must be emphasised that this settlement was Marietta's act and that it was not contemplated by anyone that any beneficial interest was derived from the appellant's bounty, though she was a proper party to the deed for the purpose of the indemnity trust if for no other reason.

The draft settlement was sent to Egypt where it was scrutinised by or on behalf of the parties interested with a view to submission to the court. The appellant had by this time returned to Egypt and it had been arranged at the instance of Mr. Leveaux that Mr. Preston, a well-known lawyer practising in Egypt, who had acted for members of the Ralli family, should advise her. A summons, which had been previously submitted to and approved by Mr. Preston, was on the 11th May, 1913, issued by Mr. Leveaux on behalf of the executors in His Britannic Majesty's Supreme Court for the Dominions of the Sublime Ottoman Porte sitting at Alexandria, the respondents being Marietta, the appellant and Catherine. It asked for first a declaration that the executors might be at liberty to hand over the sum of £12,000 referred to in the will of the testator and "destined for the respondent Dora Ralli" to Marietta in accordance with the terms of the deed of arrangement notwithstanding anything in the will purporting to create a trust to the contrary, and secondly a declaration that the sum of £12,000 so paid over to Marietta might be handed over to the intended trustees of the proposed settlement "upon trusts in favour of the said Dora Ralli and her issue, draft of which will be submitted to the court," and that the executors and Marietta might be authorised to apply the said sum accordingly, and, thirdly, that the executors might be at liberty to pay over the sum of £3,000 referred to in the will and destined for Catherine with the consent of Marietta to the trustees of the Alexandroff marriage settlement. This summons, which was entitled in the matter of the trusts of the testator's will and in the matter of the deed of arrangement, was supported by an affidavit of the executor Antonio Theodore Ralli, which cannot fairly be attacked as inaccurate or uncandid, and was duly heard by His Britannic Majesty's Supreme Court on the 14th May, 1913, when an order was made not in the form of declarations as asked by the summons but expressly directing the executors and Marietta to do that which the summons asked that they might be declared to be at

liberty to do. The order on the face of it stated that the draft of the settlement had been submitted to and approved by the court.

The executors duly carried out the terms of the order, the sums of £12,000 and £3,000 were handed over as thereby directed, the settlement was duly executed and no question was raised until, a quarter of a century later, the proceedings were instituted out of which this appeal arises. Marietta died in the year 1938.

On the 4th April, 1940, the appellant, who had married in 1915, but had no children, commenced proceedings by writ issued out of His Britannic Majesty's Consular Court at Alexandria against André Alexandroff, Sir Strati Ralli, Augustus Vlasto and Antonio Theodore Ralli, of whom the first, second and third are the present trustees of the settlement, and the first and fourth the executors of the testator's will. André Alexandroff was also sued as a trustee of and beneficiary under the Alexandroff marriage settlement. She claimed to have the settlement set aside or (alternatively) to have it rectified by the deletion of the ultimate trust in favour of the trustees of the Alexandroff marriage settlement with or without the substitution in lieu thereof of a general power of appointment exercisable by the appellant by deed or will. The latter claim is wholly misconceived. If the deed is to be regarded as a bilateral act it can only be rectified on clear proof that as executed it did not carry out the agreement of the parties which must itself be clearly proved; or if it is the unilateral act of the settler it must be shown that it does not conform to her real and continuing intention. No attempt was or could be made to satisfy those conditions. It is therefore not on rectification but on rescission, which may indeed be of part only of a deed, that the appellant must rely.

To obtain rescission of the settlement, or of that part of it, namely the ultimate trust, which was to her an offence, it was necessary for the appellant to establish, first, that it was not competent for Marietta by herself to make such a settlement, second, that the ultimate trust derived from the act and bounty of the appellant and thirdly that, she was entitled to have it set aside, not indeed because, positively, any undue influence had been exercised upon her, but because, negatively, she had not been independently advised of her rights under the Deed of Arrangement and the Testator's will and it happened that Andre Alexandroff was at once a Trustee of the Settlement, an executor of the will and a Trustee of and beneficiary under the Alexandroff marriage settlement. It appears to their Lordships that there would be very grave difficulties in the way of the appellant even if she succeeded in her first step, particularly in view of the proceedings before the Court in Egypt in 1913. But their Lordships, if they may do so without disrespect to the very careful judgments in the Courts below, which have helped greatly to elucidate the case, think it unnecessary further to consider these matters. For in their view the appellant's case fails *in limine*. If the ultimate trust of the settlement can take effect as a valid exercise by Marietta of her power, there need be no discussion of what the result might be if it depended for its validity upon a disposition by the appellant. Their Lordships are of opinion that it can so take effect. The question is purely one of construction of the Deed of Arrangement. It is clear that the view taken by Sir Benjamin Cherry, which was acquiesced in by all the other lawyers concerned and accepted by the Court in Egypt, was that upon the true construction of that deed it was competent for Marietta to declare an ultimate trust of the £12,000 in favour of Catherine or her children upon failure of issue of the appellant and equally, no doubt, if she had thought fit, of the £3,000 in favour of the appellant or her children upon failure of issue of Catherine. Their Lordships would in any case hesitate long before reversing such a consensus of opinion so long acted upon, but it appears to them upon a careful consideration of the whole deed that this is the right view. Marietta was the absolute owner of the £15,000, though the payment of it was by her bounty deferred. It was for her to

determine whether the testator's daughters should receive it and in what shares, though she might well consult the testator about it. But the fact that the whole deed moved from her bounty favours the construction of an executory trust, such as this is, which gives her a wide power in favour of the beneficiaries rather than a narrower one. It is possible, and it has been strenuously argued, that the words in question admit a construction which would confine the trusts of £12,000 to the appellant and her issue and those of £3,000 to Catherine and her issue. But grammatically, as it appears to their Lordships, the words are well capable of another meaning, namely that which was adopted by learned conveyancing counsel, and this is the meaning which their Lordships prefer. It follows that the appellant's suit was wholly misconceived and was rightly dismissed in both Courts below. Counsel for the parties expressed their agreement that the costs of all parties to this appeal as between solicitor and client should be paid out of the settlement fund. In the special circumstances of this case effect can properly be given to this agreement.

Accordingly their Lordships are of opinion for the reasons above stated that this appeal should be dismissed but that the costs of this appeal of all parties as between solicitor and client should be paid out of the settlement fund and they will humbly so advise His Majesty.

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At 600 p.m. 11/11/1914

11/11/1914

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In the Privy Council

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DORA CONSTANTINO

v.

ANDRE ALEXANDROFF AND OTHERS

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