

(2006) 02 CAL CK 0033

In the Calcutta High Court

Case No : APO No. 508 of 2005, G.A. No. 2913 of 2005, APOT No. 584 of 2005
and ATA No. 50 of 2001

Ashok Kumar Kapur and Others

APPELLANT

Vs

Ashok Khanna and Others

RESPONDENT

Date of Decision : 06-02-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 41 Rule 22, Order 41 Rule 22(1), Order 41 Rule 33, Order 43 Rule 1
Pagoda Act, 1877 — Section 10, 540
Specific Relief Act, 1963 — Section 6(3)
Trusts Act, 1882 — Section 11, 34, 56, 77, 78

Citation : (2008) 1 CHN 807 : (2007) 1 ILR (Cal) 1

Hon'ble Judges : Tapan Kumar Dutt, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against an order dated 23rd December, 2004 passed by the Hon'ble First Court whereby His Lordship while disposing of the application u/s 34 of the Trusts Act, 1882 (hereinafter referred to as the said Act) was pleased to hold that the application u/s 34 of the said Act is maintainable. His Lordship further held that the Trust has to remain for payment of pension not only to the members on their retirement but also to their widows, minor children not exceeding 21 years of age before or after the retirement. It is also held by His Lordship that the Trust fund cannot be held to be a resultant one as the purpose and object of the said Trust is yet to be fulfilled so far the existing staff who are on the pay roll of the company and their dependants are concerned. According to His Lordship, the purchase of annuities cannot absolve the trustees to discharge their duties and the Trust has not come to an end.

2. The appellants are the present trustees of the trust fund known as Dunlop Executive Staff Pension Fund. The erstwhile trustees of the fund had applied to

the Hon''ble Court u/s 34 of the said Act stating that the trust is held by way of resultant trust in favour of the original settlor of the trust, Dunlop India Limited (hereinafter referred to as the said company).

3. Learned Counsel appearing on behalf of the respondent took a point that appeal is not maintainable from the said order and/or judgment dated 23th December, 2004 passed by the Honb''le First Court in application filed by the trustees u/s 34 of the said Act, since no appeal lies from an order passed in an application u/s 34 of the said Act. He relied upon the decisions reported in AIR 1935 Oudh 72 (73) (DB) (Mizra Mohammad Sadiq Ali Khan v. Kazim Ali Khan and Ors.) and 1909 Bombay 429 (432) (Trimbak Mahadev v. Narayan Hari). According to him, order under appeal dated 23rd December, 2004 does not adjudicate the right of any party. The said order is only an opinion of the Hon''ble Court. The same does not have any binding character upon the parties, nor the same decides anything conclusively. In support of such contention he relied upon a decision reported in AIR 1945 Sind 61 (In re: Mohammed Hashim Gazdar and Ors.).

4. The appeal is also not maintainable under the provisions the Civil Procedure Code. The said order neither falls within the category mentioned in Order 41 of the CPC nor the same can be considered as a decree and as such does not fall under Order 43 of the Civil Procedure Code.

5. The said order does not adjudicate right of any party nor determines any issue, therefore, cannot be termed as "judgment" within the meaning of Clause 15 of the Letters Patent. He relied upon a decision reported in Shah Babulal Khimji Vs. Jayaben D. Kania and Another,

6. Since the point of appealability was taken on behalf of the respondent, the learned Senior Advocate appearing on behalf of the appellants submitted that the Hon''ble First Court has come to a finding on the basis of construction of various terms in the trust deed. Therefore, His Lordship has passed a judgment which will be binding on the trustees in dealing with the trust. Rights of the trustees in so far as their contention that the purpose of the trust has come to an end and the fund is held on resultant trust has been negated. Therefore, by virtue of Clause 15 of the Letters Patent, an appeal is maintainable. There is no restriction in the Trusts Act to take away the right of appeal as provided under Clause 15 of the Letters Patent. He further contended that it has been held by the Hon''ble Supreme Court that unless the right of appeal under Clause 15 of the Letters Patent is specifically taken away, a right of appeal exists and he relied upon a decision reported in AIR 1998 SC 424 (Vanita M. Khanolkar v. Pragna M. Pai and Ors.) and contended that the Hon''ble Supreme Court in the said decision has held that the statutory provision barring an appeal and revision cannot cut across the Constitutional power of the High Court under Clause 15 of the Letters Patent. It was held that no bar to appeal was discernible from Section 6(3) of the Specific Relief Act. He also relied upon a decision reported in Sharda Devi Vs. State of Bihar, and contended that in the said decision the Hon''ble Supreme

Court held that the power of appeal to the Hon"ble Division Bench of the High Court under Clause 15 from an order of a Single Judge of that High Court would not get excluded in absence of any exclusionary provision in the concerned statute. He also relied upon a decision reported in 2004(9) SCC 519 (Case of MV Sea Success) and submitted that the Hon"ble Supreme Court held that in the absence of any prohibition regarding the maintainability of an appeal and if the order in question amounts to an order or judgment, appeal under Clause 15 would be maintainable.

7. He further contended that the decision reported in AIR 1935 Oudh 72 (supra) considered a question as to whether an order on an petition u/s 34 of the said Act was a decree or not and whether any appeal lay to the Hon"ble High Court the consideration of an appeal under Clause 15 of the Letters Patent was not in issue in the case. Therefore, according to him, that decision has no application in the facts and circumstances of this case. In ILR 33 Bom 429 (Trimbak Mahadev v. Narayan Hari) the question of consideration before the Court was whether Section 34 of the said Act applies to trustees and not to executors of a Will. It was held that the case presented to the District Judge was not a case falling u/s 34 of the said Act. According to Mr. Sarkar, here also the appealability under Clause 15 of the Letters Patent was not under consideration. Hence, the same cannot be a help to the respondent. The case reported in AIR 1945 Sind 81 (supra) discusses the meaning of the words "opinion, advice or direction" u/s 34 of the said Act. The Court held in that case that the jurisdiction u/s 34 of the said Act is a consultative jurisdiction giving guidance to a trustee. It has also been held that the advice, opinion or direction given u/s 34 is not an order binding on parties and disobedience to it does not involve committal for contempt.

8. It is submitted that if the submission made by the respondents have to be taken to its logical conclusion, then it should be held by the Hon"ble Division Bench that the findings in the judgment of the learned Single Judge is not binding upon the trustees or beneficiaries.

9. Mr. Sarkar further contended that the learned Single Judge has held that the application u/s 34 is maintainable. There is no cross-objection or cross-appeal filed from the said order by the respondent. The respondent cannot challenge the finding on maintainability of Section 34 application without filing a cross-objection or cross-appeal relying on the case reported in Shri Ravinder Kumar Sharma Vs. The State of Assam and Others, . In that case, respondent in the appeal was sustaining the impugned part of the decree. The scope of cross-objection under Order 41 Rule 33 has been explained in the case reported in Banarsi and Others Vs. Ram Phal, and he drew our attention to the said decision.

10. On merits, Mr. Sarkar submitted that the sole object of the fund is to provide pension or annuities to members upon retirement from the company. It is admitted that the fund was established in 1962 for the purpose of providing pension and annuities for the members of the executive management staff. Members mean and include existing employees of the company who have been

admitted as a member but does not include an employee who has retired or ceased to be in services. According to him, none of the objectors in the instant case are members of the fund since admittedly they have all retired. A substantial number of the existing employees have already given letters of consent to creation of new trust and payment of annuities from such Trust. The letters of consent are annexed to this petition (appearing at pages 264 to 522 of the stay petition). The company has given a letter of discontinuity for further contributions to the fund. So therefore, there is no question of any further contributions to the trust fund.

11. He further contended that the company is facing severe financial crisis. The company is a sick company and is before the BIFR and AAIFR. Funds stated to be held on resultant trust will be utilized by the company for the purpose of its revival. The objectors who have come before the Court are all ex-management staff. They have all receiving pensionary benefits from out of the annuities purchased by the trustees of the fund. They have accepted such annuity and only after directions were sought by the trustees on the question of the resultant trust that such ex-management employees have come to stake a claim in the funds which is a substantial amount. He submitted that under the trust in the event of a member and/or dependant granted the pension by purchase of assurance or annuity policy or policies of contract on the Life Insurance Corporation of India. Families of members are only entitled to pension in the event of a member dying before retirement. Accordingly, once pension is provided by purchase of annuity from the fund to a pensioner, he will neither be a member because of retirement nor is he a beneficiary of the fund since his benefit is paid out from the annuity which is also in the case of a family of a deceased member.

12. Objections have been filed by two categories before this Court. First category is employees who are admittedly enjoying benefits under the annuities, i.e. the respondent No. 1. The other category is the respondent No. 3 Mr. M.D. Shukla, who was the Managing Director of the company for a period of 38 months but claims pensionary benefit of over Rs. 45 lakhs after having changed the Trust Rules just before his retirement. His claim is disputed by the company.

13. It is submitted that so far the first is concerned, they cannot have any further right in relation to the fund as they have retired and are receiving benefits under the annuities, purchased from the Life Insurance Corporation of India. They have accepted such annuities. So far as Mr. M.D. Shukla is concerned, an order has been passed in his suit for furnishing of security which, however, is stayed by the Division Bench.

14. Mr. Sarkar submitted that if this Court thinks fit some amounts can be kept aside either by way of deposit in Court or otherwise for the benefit of the first group of objectors and Mr. M.D. Shukla until their claims are decided in the suits filed by them. However, it is humbly submitted that in so far as the reliefs asked for by the trustees under the application u/s 34, that should be granted. Trustees have asked for opinion, advice or direction in the matter or administration of the

resultant trust which is submitted is a question that can be decided u/s 34 of the said Act. The advice and/or direction sought are in relation to the management and administration of the trust property. While giving an opinion regarding management and administration of the trust property, the Court may find that the object of the trust has been achieved full and resulting trust has been created. It is submitted that such matter is within the Court's jurisdiction u/s 34 of the said Act. According to him, there is no disputed question of fact here which is also the finding of the Hon'ble First Court and the said finding has not been challenged in this appeal. In these circumstances, he further contended that the purpose of the trust has been fulfilled and a resulting trust has arise in favour of the settlor and no valid objection has been or can be raised. In this regard, he relied upon the decisions reported in 1958 Chancery 300 (In re: Gillingham Bus Disaster Fund, Bowman and Ors. v. Official Solicitor and Ors.), AIR 1938 Mad 641 (Indian Molasses Co. Ltd. Vs. Commissioner of Income Tax, West Bengal, (Indian Molasses Co. (Private) Ltd. Vs. Commissioner of Income Tax, West Bengal, (Indian Molasses Co. (Private) Ltd. v. Commissioner of Income Tax, West Bengal) and submitted that the principle of resulting trust will appear from the said decisions.

15. It is submitted on merits by the respondents that employees and/or retiring employees of the executive cadres of the company are the beneficiaries of the subject trust created on September 22, 1962. The said trust cannot come to an end at any stretch of imagination and as such cannot be termed as a resulting trust. The sole object of the fund being held by the trust is to provide pensions and annuities to the member of the trusts and/or their dependants including widows and children (upto 21 years) in accordance with the rules of the trust. The subject trust is irrevocable and no money belonging to the fund in the hands of the trustees of the subject trust shall be recoverable by the company, nor shall the company have any lien or charge of any description of the same. In the event, the trust being wound up under the provisions of Rule 31 of the Trust Rules.

16. Learned Counsel appearing on behalf of the respondents also drew our attention to certain Clauses of the said Trust Deed and submitted that after construction of the said Clause it would be evident that the purpose of the trust exists and remains valid until the last surviving employees receive its benefit out of the trust fund. He further contended that u/s 56 of the Trusts Act beneficiaries are entitled to have the benefit in accordance with the intention of the author of the trust since the trust has been executed for the purpose of the interest of the beneficiaries. On the true construction of the Trust Deed it reveals that the provisions have also been made in the case of death of the beneficiary of the trust. Therefore, in any event for all practical purpose and/or purposes thereof the said trust can never come to an end or extinguish. Learned Counsel also drew our attention to illustration (b) of Section 56 of the Trusts Act and submitted that the facts of the case are squarely covered under the said illustration. He further contended that Section 11 of the said Act states that

trustees are bound to fulfill the purpose of the trust and to obey the directions of the author of the trust, except as modified by consent of all the beneficiaries being competent to contract. It is submitted that in the instant case no such consent has been obtained from all the beneficiaries of the subject trust which is also practically not possible. Therefore, attempt of the petitioner is thoroughly misconceived, frivolous, illegal and is not permissible in law.

17. He further drew our attention to Sections 77, 78 and 83 of the Trusts Act and contended that the said trust has not been revoked by the Testator or otherwise. Therefore, Section 78 has no manner of application in the facts and circumstances of this case.

18. He further submitted that the acts of the appellants are mala fide for the following reasons:

(a) The retiring employees from time to time demanded their pensions and/or rate of pensions, which they are entitled to. No reply given by the Trustees and/or Company. On 24th April, 2001 the trust alleged to have been splitted up.

(b) Previously the company sought to remove the fund worth of more than 20 crores lying in the special account with the Reserve Bank of India to which Reserve Bank declined to allow the company for such illegal removal of fund. The company filed a writ petition against Reserve Bank of India before this Hon'ble Court being W.P. No. 603 of 2001 and the same has been dismissed.

(c) In view of the above facts and circumstances, the present appeal filed by the appellants is frivolous, mala fide and harassive. The impugned order dated 23rd December, 2004 passed by the Hon'ble First Court below is just and proper and the opinion given by the learned Judge u/s 34 of the Trusts Act is just and proper and as such the present appeal should be dismissed with costs.

19. It has been submitted that in these circumstances the appeal should be dismissed.

20. On behalf of Dr. M.D. Shukla it is submitted that the said trust is irrevocable, vide Clause 3 of the Trust Deed and no money belonging to the fund in the hand of the trustees shall be recoverable by the company. It is also contended that all the members of the executive staff are "members" of the Pension Fund, vide Clause 2(k) of the said Trust Deed. It is submitted that the said Trust Deed was created by the company with an object of providing pension to all the retired members of the managing staff, his widow and children below the age of 21 years. The said Trust is irrevocable. The company shall have no control over the trust fund. Certain trustees have made application before the Trial Court praying for direction, advice and opinion of this Hon'ble Court with regard to Rs. 20,83,95,690/-.

21. After hearing the said application the Hon'ble First Court came to the conclusion that no opinion can be given that the said trust has come to an end. The Hon'ble Judge was passed to express an opinion on the facts placed before

His Lordship. It is submitted that the opinion expressed u/s 34 of the said Act is not appealable and he relied upon a submission made by the learned Counsel appearing on behalf of the other respondent.

22. After hearing the learned Counsel for the parties and after perusing the Clauses mentioned in the said Trust Deed we find that the Trust Deed was created for the benefit of not only the members on their retirement, but also to their widows, children (not exceeding 21 years of age) before or after retirement. We have scrutinized the Clauses of the Trust Deed in question.

23. It appears that the appellant applied before this Court in the guise of having an opinion from the Court tried to have a declaration to the effect that the Trust has become inoperative and/or objects of the trust have been fulfilled and by which amount so lying in the said trust fund can be utilized by the company.

24. The question arose before us whether the appeal is maintainable or the trust has already been extinguished.

25. It would be proper for us at this stage to take note of the decisions which are placed before us by the learned Counsel for the parties for our consideration and it appears that.

26. In *Mirza Mohammad Sadiq Ali Khan v. Kazim Ali Khan and Ors.* (supra) the Hon^{ble} Court held that an order dismissing the petition u/s 34 is not appealable since the Court held that an order on a petition u/s 34 is not a decree and no appeal lies therefrom. Their Lordships relied upon a decision of the Privy Council reported in 14 I.A. 160 (*Meenakshi Naidoo v. Subramaniya Sastri*) and came to the conclusion which is reproduced hereunder:

In approaching the consideration of this question Their Lordships cannot assume that there is a right of appeal in every matter which comes under the consideration of a Judge: such right must be given by statute, or by some authority equivalent to a statute. The first question which arises in the present case is whether any right of appeal is given by the Pagoda Act, 1877 itself. There is nothing in the Act which would suggest it, unless it is to be found in Section 10, to the terms of which Their Lordships have already referred.... It has however been suggested that, though there may be no right of appeal under the Pagoda Act itself, yet a right of appeal must be found in the general law, and Their Lordships' attention has been particularly directed to the Section 540 of Act 10 of 1877, which gives a general right of appeal from decrees of Courts exercising original jurisdiction; the jurisdiction conferred by the Code (Section 10) is to try suits of a civil nature. The Act of 1877 contained in its interpretation clause, a declaration of the meaning of the word "decree", as used in that Act, but this interpretation was modified by Act 12 of 1879, and, as modified, the interpretation is as follows:

"Decree" means a formal expression of an adjudication upon any right, claim, or defence, set up in a Civil Court where such adjudication decides the suit or the

appeal. In the opinion of Their Lordships there was no civil suit respecting the appointment, and it would be impossible to bring an order made by the District Judge pursuant to Section 10, Pagoda Act, within the definition of a decree as contained in the Code, and no other general law has been suggested.

27. Their Lordships also held that no right of appeal has been conferred by the Trusts Act, and the order of the learned Single Judge is not such an order as is made appealable under Order 43, Rule 1 of the Code of Civil Procedure. Their Lordships also came to the conclusion that the Trial Court did not decide any matters in controversy arising out of a suit and Their Lordships also relied upon a decision reported in ILR 33 Bombay 429 (Trimbak Mahadev v. Narayan Hari).

28. In Muhammad Hashim Gazdar and Ors. (supra) the Hon''ble Court held that advice, opinion or direction given u/s 34 of the Trusts Act is not an order binding on parties and disobedience to it does not involve committal for contempt. But the Court u/s 34 of the Act exercises what may be called its consultative jurisdiction, giving guidance to a trustee who presumably asks for it, because he wants it and intends to follow it. But it is always open to a Court, if a trustee having once applied for advice, opinion, or direction, and having ignored the guidance thus given, applies again for opinion, advice or direction to tell the petitioner that he must go elsewhere. The said observation was made by the Full Bench in a contempt proceedings and the Hon''ble Court held that the object of Section 34 is to enable a trustee to obtain the Court's guidance in suitable matters for his protection and that a direction given under the Section is not an imperative order. A trustee who fails to follow a direction does not acquire protection, but he is not liable to contempt proceedings for the failure.

29. In Shah Babulal Khimji v. Jayaben D. Kania and Ors. (supra) the Hon''ble Supreme Court held that some of the principles were laid down which might guide a Division Bench in deciding whether an order passed by the Trial Judge amounts to a judgment within the meaning of the Letters Patent. Such illustrations are as follows:

- (1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant.
- (2) An order rejecting the plaint.
- (3) An order refusing leave to defend the suit in an action under Order 37, Code of Civil Procedure.
- (4) An order rescinding leave of the Trial Judge granted by him under Clause 12 of the Letters Patent.
- (5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice u/s 80, bar against competency of the suit against the defendant even though the suit is kept alive.

- (6) An order rejecting an application for a judgment on admission under Order 12 Rule 6.
- (7) An order refusing to add necessary parties in a suit u/s 92 of the Code of Civil Procedure.
- (8) An order varying or amending a decree.
- (9) An order refusing leave to sue in forma pauperis.
- (10) An order granting review.
- (11) An order allowing withdrawal of the suit with liberty to file a fresh one.
- (12) An order holding that the defendants are not agriculturists within the meaning of the special law.
- (13) An order staying or refusing to stay a suit u/s 10 of the Code of Civil Procedure.
- (14) An order granting or refusing to stay execution of the decree.
- (15) An order deciding payment of Court-fees against the plaintiff.

30. In our opinion, all those guidelines cannot be a help to Mr. Sarkar's client in the facts and circumstances of this case. After perusing the decisions cited by the parties before us and after taking into account the decisions of the Hon'ble Supreme Court held in *Shah Babulal Khimji v. Jayaben D. Kania and Anr.* (supra), we can only express ourselves that the order so passed by the Hon'ble First Court u/s 34 of the Trusts Act in the instant case, in our opinion cannot be said that it decided the rights of the parties finally and thereby we have to come to the conclusion that the said order is merely an opinion and/or advice by the Hon'ble First Court on an application being filed by the appellant/petitioner. We, therefore, hold that the order so passed by the Hon'ble First Court in the instant case, cannot come within the purview of Clause 15 of the Letters Patent and we have to hold that the said order cannot attract the provisions of Clause 15 of the Letters Patent and thereby we have to hold that the appeal is not maintainable.

31. In *Vanita M. Khanolkar v. Pragna M. Pal and Ors.* (supra) where the Hon'ble Supreme Court held that any statutory provision barring an appeal or revision cannot cut across the Constitutional power of a High Court. Even the power flowing from the paramount charter under which the High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under Letters Patent and the Court held that on the clear language of Clause 15 of the Letters Patent there cannot be a bar to invoke Clause 15 of the Letters Patent and thereby an appeal is maintainable.

32. In *Sharda Devi v. State of Bihar* (supra) the Hon'ble Supreme Court held that a Letters Patent is in the charter under which the High Court is established. The powers given to a High Court under the Letters Patent are akin to the

Constitutional powers of a High Court. Thus when a Letters Patent grants to the High Court a power of appeal, against a judgment of a Single Judge, the right to entertain the appeal would not get excluded unless the statutory enactment concerned excludes an appeal under the Letters Patent.

33. In *Ravinder Kumar Sharma v. State of Assam and Ors.* (supra) the Hon^{ble} Supreme Court held that under Order 41 Rule 22(1) of the Code of Civil Procedure, before the 1976 Amendment, it was open to the respondent-defendant who had not taken any cross-objection to the partial decree passed against him, to urge, in opposition to the appeal of the plaintiff, a contention which if accepted by the Trial Court would have resulted in the total dismissal of the suit.

34. The recommendations of the Law Commission to amend Rule 22 of Order 41 are reflected in the Statement of Objects and Reasons of the Amending Act 104 of 1976.

35. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory and further held that the filing of cross-objections against the adverse finding was not obligatory.

36. In *Banarsi and Ors. v. Ram Phal* (supra) the Hon^{ble} Apex Court held that the CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22(1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection to the extent to which decree in his favour. However, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analyzing the provision. There may be three situations:

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

37. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended Code of Civil Procedure, read in the light of the explanation, it is still not necessary for the respondent to

take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection.

38. In *Gillingham Bus Disaster Fund, Bowman and Ors. v. Official Solicitor and Ors.* (supra) the Hon^{ble} Court came to the conclusion that merely money held upon a trust for which no beneficiary can be found. Such cases are common and where it is known that there are beneficiaries the fact they cannot be ascertained does not entitle the Crown to come in and claim.

39. In *N.N.R.M. Lakshmanan Chettiar and Ors. v. N.N.L. Ramasamy Chettiar and Ors.* (supra) it has been held that where funds are held in trust for a particular purpose, which falls or comes to an end, there arises a resulting trust of such funds as remain in favour of the contributors or, if they are dead, their personal representatives. As it appears to us in the instant case that it cannot be said that the funds which are held in trust for a particular purpose, comes to an end, or it can be declared as a resulting trust of the funds as suggested by Mr. Sarkar in the given facts.

40. In our opinion, the decisions reported in AIR1956 Calcutta 281 (supra) and AIR 1959 SC 1049 (supra) cannot be a help to Mr. Sarkar in the facts and circumstances of this case.

41. After considering the submissions made before us and the submissions made on behalf of the parties and after construing the Trust Deed and its Clauses as placed before us, we find that the sole object of the fund is to provide pension and annuities to the members of the trust and/or their dependents including their widows and children (upto 21 years) in accordance with the Rules of the said Trust. It is evident from the Clauses that the said trust is irrevocable and further the company shall not have any lien or charge of any description over the said trust fund. We have also considered the Clause 2 of the said trust deed which set out hereunder:

Clause 2. The sole object of the Fund is to provide on behalf of the employers (as defined in the Rules of the Fund) pensions or annuities to the members (as defined in the Rules of the Fund) upon their retirement from the service of the employers and/or the dependants (as defined in the Rules of the Fund) of the members in accordance with the Rules of the Fund for the time being in force (hereinafter referred to as "the Rules").

42. We have considered Clause 3 of the said trust deed which is reproduced hereunder:

Clause 3. These presents shall constitute a trust upon and subject to the Rules and to the law for the time being in force in India relating to Pensions Funds which trust shall be irrevocable and no money is belonging to the Fund in the hands of the Trustees shall be recoverable by the Company nor shall the Company have any lien or charge of any description on the same.

43. We also considered Clauses 2(c), 2(f), 2(j), 2(k), 2(o) which are reproduced as hereunder:

Rules of Dunlop Executive Staff Fund Part 1: Preliminary

Clause 2(c). "Beneficiary" shall mean an individual presently or prospectively eligible for a benefit payable under the Rules and include a member as hereinafter defined.

Clause 2(f). "Dependant" shall mean the widow of a member or of a retired member and shall include children below the age of 21.

Clause 2(j). "Fund" shall mean the Dunlop Executive Staff Pension Fund.

Clause 2(k). "Member" shall mean a member of the executive staff or of the management staff of the employers who has been admitted as a member of the Fund in accordance with the Rules but shall not include an employee who having been admitted as a member has subsequently retired or whose service has otherwise been terminated by reason of dismissal, resignation, retrenchment or otherwise.

Clause 2(o). "Retirement" shall mean termination of a member's service with the employers (otherwise than by dismissal) not on account of total incapacity on or after the normal retirement date or before the normal retirement date, but after he has attained the age of 40 years, and has rendered 10 years of pensionable service before the termination of service (otherwise than by dismissal). Retirement shall also include termination of member's service at any time on account of total incapacity.

44. After analyzing those Clauses in our opinion, the trust shall be irrevocable one and no moneys belonging to the funds in the hands of the trustees shall be recoverable by the company nor shall the company have any lien or charge of any description to the same. Therefore, we are sure that the purpose of the trust exists and/or remains valid until the last surviving employees received its benefit out of the trust fund and furthermore, under Clause 3 of the said Trust Deed funds lying in the hands of the said trustees are not recoverable by the company nor the company shall have any lien or charge of any description on the said trust fund. Therefore, we do not have any hesitation to hold that no opinion can be expressed by the Court that the amount so lying in the hands of the trustees can be recoverable by the company or may be transferred in any manner to the company. Therefore, we are not in a position to accept the contention of Mr. Sarkar that during the financial stringency they shall have the right to utilize the said fund and the amount lying in the said trust fund can be transferred to the company for meeting its liabilities. After scrutinizing the Clauses of the said Trust Deed we have come to the conclusion that the purpose of the trust exists and remains valid until the last surviving employees receive its benefits out of the said trust fund. We do not have any hesitation also to express our opinion as His Lordship expressed in His Lordship's decision that the trust exists and we also

have to accept the contention of learned Counsel appearing on behalf of the respondent in the instant case that the instant case is squarely covered under the illustration (b) of Section 56 of the Trusts act and the trustees are bound to fulfill the purpose of the trust and to obey the directions of the author of the trust, except if any modification is made by consent of all the beneficiaries, being competent to contract. It appears to us that in the guise of getting an opinion from the Court, the company thought it fit to extinguish the trust in question and the amount lying in the hands of the trustees in respect of the said fund to have a lien over the same or to utilize the same which is totally barred under Clause 3 of the said Trust Deed. Therefore, we do not have any hesitation to hold that the attempt on the part of the appellant is frivolous and is illegal and is not permissible in law. We do not find any reason to interfere with the order so passed by the Hon''ble First Court and we do not find that any grounds have been made out in this application to interfere with the said order.

45. For the reasons stated hereinabove, we uphold the decision of the Hon''ble First Court.

The application is dismissed. Undertakings are discharged.

By consent of the parties the appeal is treated as on day''s list and is dismissed.

Tapan Kumar Dutt, J.

46. I agree.