
(1970) 08 BOM CK 0016
In the Bombay High Court
Case No : Suit No. 468 of 1970

Bhalchandra Ramchandra Sule

APPELLANT

Vs

Uma Keshub

RESPONDENT

Date of Decision : 20-08-1970

Acts Referred:

Citation : (1972) 74 BOMLR 128 : (1972) MhLj 331

Hon'ble Judges : Vimadalal, J

Bench : Single Bench

Judgement

Vimadalal, J.—This is an Originating Summons taken out by one of the trustees under a Deed of Settlement dated January 11, 1961 executed by one Kailas Chandra Mahindra, the grandfather of defendants Nos. 1, 2 and 3. By the said Deed, the settlor appointed the plaintiff and defendant No. 4 as trustees and settled a large amount on certain trusts, the net annual income of which is hereafter expected to be about Rs. 40,000, after paying the municipal taxes in respect of two self-occupied flats. The Deed of Settlement, provides that the net income, after payment of taxes and outgoings, is to be utilised in the manner set out in Clause 1, the material portion of which is in the following terms:

(b) As to the balance for the time being of the trust income, if any, that may remain in the hands of the Trustees after paying or providing for all the disbursements mentioned in Sub-clause (a) above pay the same to the said Mrs. Sudha Keshub Mahindra (defendant No. 4) to be used by her for the maintenance of herself and her children (defendants Nos. 1, 2 and 3) by her husband the said Keshub Mahindra.

(c) On the death of the said Sudha Keshub Mahindra this trust will stand dissolved and the Trustees shall then make over the entire Trust Estate to the child or children of the said Sudha Keshub Mahindra by Keshub Mahindra who may be in existence at that time, if more than one in equal shares, whether male or female.

One of the trustees has now approached the Court on this Originating Summons for the determination of certain questions which are set out in para. 15 of the plaint. The first question that really arises is the subject-matter of sub-questions (iii) and (iv) of question (a), and briefly put that question is, whether the Deed of Settlement imposes a trust upon defendant No. 4 in regard to the use of the income during her life time. The second question that arises is the subject-matter of sub-questions (i) and (ii) of question (a), and that question briefly put is, whether, in the event of its being held by me that there is a trust, all the defendants are entitled to an equal share in the income of the trust during the life time of defendant No. 4. I have now been told that the parties hereto do not desire that I should answer sub-questions (i) and (ii) of Question (a) of the present Originating Summons and I, therefore, do not propose to answer the same.

2. The only question that survives for my consideration, therefore, is whether the income under the said Deed of Settlement is impressed with a trust in the hands of defendant No. 4 during her life time. In Lewin on Trusts (16th edn.) at p. 43, the test for determining such a question has been laid down with characteristic lucidity. The test is that if the words concerning maintenance merely show the motive of the gift, there is no trust. If, however, on the other hand, on a true construction of the terms of the document the Court comes to the conclusion that a trust was intended, it would, be enforced. I must, therefore, proceed to consider whether, when the settlor stated in Sub-clause (b) of Clause 1 of the Deed of Settlement that the income of the trust funds was given to defendant No. 4 for her life time "to be used by her for the maintenance of herself and her children", he was merely indicating the motive of the gift to defendant No. 4 in which case there would be no trust, or whether he intended to create an obligation in favour of her children which would be binding on defendant No. 4 in which case the income would be impressed with a trust. In the case of *In re Booth. Booth v. Booth* [1894] 2 Ch. 282, as well as in the case of *Longmore v. Elcum* (1843) 63 E.R. 160, the words used were very similar to the words which I am called upon to construe in the present case. In the case of *In re Booth. Booth v. Booth* the residue of the estate was given by a testator to his executor.

upon trust...to pay to his wife or permit her to receive the annual income thereof during her life, for her use and benefit, and for the maintenance and education of his children, and from and after her decease upon trust to divide his said residuary estate equally between and amongst all his children living at his decease,....

In the case of *Longmore v. Elcum*, the relevant clause was

upon trust to permit and suffer my said dear wife...to receive, take and retain the rents, issues, income, profits and proceeds thereof for her own use and benefit, and for the maintenance and education of my dear children,...

These clauses are, in my opinion, very similar to the clause in the present case,

in so far as they give the income to the wife for her own use as well as for the maintenance and education of her children, as in the present case. It was held in both those cases that the widow was a trustee for the children, and that the object or intention of trust upon which the testator made the gift to his wife was that she was to have it, not only for her use and benefit, but also for the maintenance and education of the testator's children. In the judgment in the case of *In re Booth*. *Booth v. Booth*, it was pointed out that the position could not, in law, be different if the gift had been made to a stranger instead of to the wife. In the case of *Longmore v. Elcum*, the Vice-Chancellor regarded it as clear that a trust was created for the children. It may be mentioned that, as in the present case, the trust, in both the said cases were not limited to the period of minority of the children, and were in fact not held to be so limited in the judgments delivered in those two cases. In the case of *Jubber v. Jubber* (1839) 59 E.R. 452 also, the testator had used similar words whereby he bequeathed the use of his property to his wife for the benefit for herself and her unmarried children so that they might be comfortably provided for as long as the testator's wife was alive. The Court took the view that the property in question was impressed with a trust in the hands of the wife, though in that case the Court based its decision on the difference in the language used in the clause in question as compared with an earlier clause in the same will. It is not necessary for me to refer to any other authority on the point for, in a matter of this kind, authorities are of limited use in so far as they indicate the principles of construction, but the ultimate decision must depend upon the intention of the settlor as gathered from the words used by him in the document in the light of the surrounding circumstances prevailing at the time when the document was executed. In my opinion, the language used by the settlor in the present case is stronger as indicating a trust than the language that was used in the three English decisions to which I have referred, in so far as the settlor has employed the words "to be used" in Sub-clause (b) of Clause 1 which, in my opinion, are clearly mandatory in tone. I am not prepared to construe those words as merely showing the motive of the gift. The conclusion at which I have arrived on a careful consideration of the Sub-Clause in question is that the testator intended to impose an obligation upon defendant No. 4 to use the income, not only for herself, but also for the maintenance and education of her children. I, therefore, answer sub-question (iii) of question (a) as follows:

3. The income of the trust property given to defendant No. 4 is impressed with a trust that it should be used by her for the benefit of herself and for the maintenance and education of her children.

4. I answer sub-question (iv) of question (a) in the negative. I order that the costs of all parties, as between attorney and client, do come out of the trust funds.