

(1997) 12 CAL CK 0009

In the Calcutta High Court

Case No : G.A. No. 603 of 1997 and A.P.O.T. No. 76 of 1997

Dorabji Rustomji Bhesania

APPELLANT

Vs

Rustom Dhunjishan Anklesaria

RESPONDENT

Date of Decision : 22-12-1997

Acts Referred:

Citation : (1999) 1 ILR (Cal) 105

Hon'ble Judges : Ruma Pal, J;Devendra Kumar Jain, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ruma Pal, J.—This appeal has been preferred from a decree passed on an originating summons suit filed by the respondents. The questions referred to the Court by way of originating summons relate to the deed of settlement dated September 13, 1930 executed by Rustomji Dhunjibhoy Mehta (referred to as the Settlor). The Settlor was a propertied Parsee gentleman. He created a trust under the said deed of settlement which covers 55, Canning Street and 9, Rainey Park (now known as 23, Gurusaday Road) and provides for dispositions in favour of the settlor's children and the Late Ervad Dhunjibhoy Byramji Mehta's Zoroastrian Anjuman Atash Adaran, a public religious trust (hereafter referred to as Atash Adaran). The appellants and the respondents are the four trustees of the trust.

2. The settlor had seven children, namely his sons Maneck, Byramji, Nusserwanji, Dossabhoy, Kaikhusru, Jahangir and his daughter Nawajbai. All the settlors children are now dead, Maneck is survived by his son, Dhun Maneck. Byramji had a son and a daughter namely Dhun Byramji and Dina. Dhun Byramji is alive but Dina and her husband are both dead. However, Dina left behind her son and a daughter namely Shapoor and Riya. Jahangir died in 1987 leaving behind him a daughter Shireen. Nawajbai married Sohrab Vimadalal. They had a son Homi and a daughter Shireen (Silloo). Both predeceased Nawajbai. The daughter and son of Silloo, Gulrukh & Dinshah are alive. At present the surviving

heirs of the settlor whose interests would be affected by the decision in this appeal are : Dhun Byramji, Shapoor and Riya representing Byramji's estate. Shirin representing the estate of Jahangir and the heirs of Sohrab Vimadalal representing the estate of Nawajbai.

3. Disputes have arisen between the trustees with regard to (1) the exercise of power by the trustees to sell 9, Rainey Park and (2) the nature of the interest, if any, in the trust property of the heirs of Nawajbai.

4. The respondents have urged that the property at Rainey Park should be sold on the ground that the heirs of the settlor who had a subsisting interest in the property would be benefitted thereby as apart from yielding no income the property was a source of expenditure by reason of maintenance cost, taxes, electricity bills, etc. They have also contended that Sohrab Vimadalal had an absolute interest to the extent of Nawajbai's share in the property.

5. According to the appellants, the major beneficiary under the deed of settlement is the Atash Adaran. The sale of Rainey Park, according to the appellants, would be contrary to the interest of Atash Adaran which they contend is the ultimate sole beneficiary of the property at Rainey Park. According to the appellants Sohrab Vimadalal did not inherit any part of the trust property and had no interest therein.

6. The respondents referred the following questions to the Court for determination :

1. Whether the rights of Dhun Maneck Mehta, Dhun Byramji Mehta, Shapoor Kharegat, Rai Mayer, Shereen Khanna, Sohrab Vimadalal and the trustees of the Seth Dhunjibhoy Byramji Mehta's Parsee Zoroastrian Atash Adaran are as set out in the paragraph 21 of the affidavit of the second plaintiff, Peston Padamji Ginwale affirmed in support of this originating summons and if not what the rights of all or any of the said persons or other persons are in the trust property.

2. Whether the Trustees of the settlement are now bound to sell or whether it is proper for them to sell the property known as Mehta Building at No. 55, Canning Street, Calcutta at the best price available.

3. Whether the said trustees are now bound to sell or whether it is proper for them to sell the property at No. 9, Rainey Park, 23, Gurusaday Road, at the best price available.

4. Approval of the sale of no. 9, Rainey Park to KND Engineering Technologies Limited upon the terms contained in Exhibit I to the said affidavit of the second plaintiff, unless better terms can be obtained from some other purchaser.

5. Administration of the trust by directing the trustees to enter into and sign an agreement for sale to the said KND Engineering Technologies Limited on the said terms or to any other purchaser who agrees to better terms and upon completion of the requisite formalities to execute a conveyance thereof accordingly and

further directing that if the defendants or either of them refuse or fail or neglect to sign such agreement for sale or conveyance the Registrar of this Hon''ble Court shall sign such agreement and conveyance on behalf of the respective defendants and that such signature by the Registrar, High Court shall have effect in all respects as if such agreement and conveyance had been duly signed by the respective defendants and each of them.

6. Further administration of the trust by directing the trustees and each one of them to dispose of the sale proceeds of the said property when received after payment of capital gains tax and other charges in accordance with the rights of the persons concerned as determined by this Hon''ble Court.

7. An order that the costs of the plaintiffs of and incidental to this suit as between Attorney(s) and client including actual fees paid to counsel be paid out of the trust estate.

8. An order that the cost of the defendants be paid in such manner as this Hon''ble Court may seem fit.

9. Such further or other order as may be made as to this Hon''ble Court may seem fit and proper.

10. Liberty be given to mention and/or apply.

7. The Learned Single Judge by a judgment and decree dated December 24, 1996 determined the question as follows :

(a) It is declared that the shares of the beneficiaries are as set out in paragraph 21 of the affidavit in support of the originating summons;

(b) It is proper for the trustees to sell the premises no. 9, Rainey Park (23 Gurusaday Road), Calcutta at the best available price. However, if no offer is received by the trustees which is higher than that of KND Engineering Technologies Ltd. and if the trustees of the said "Atash Adaran" are unable to match its offer than in that case the offer of the said KND Engineering Technologies Ltd. may be accepted and the conveyance may be executed in its favour.

(c) If necessary consequential directions may be obtained by the plaintiffs for execution of the conveyance by the Registrar, Original Side of this Court at the appropriate time;

(d) The trustees shall upon receipt of the sale proceeds distribute the same to the beneficiaries in accordance with their shares as determined in (a) above after payment of capital gain tax and other statutory charges;

(e) The plaintiffs and the defendants shall be entitled to costs of this suit to be taxed on the same scale as in the defended suit and which shall come out of the trust funds;

Liberty to mention.

8. Being aggrieved the appellant preferred this appeal. They have raised a preliminary objection on the point of jurisdiction. According to the appellants the suit was a suit for land and a portion of the subject matter of the suit being outside the jurisdiction of this Court leave under Cl. 12 of the Letters Patent should have been obtained. No such leave having been obtained this Court did not have the jurisdiction to entertain the suit. Reliance has been placed on the provisions of Chapter XIII of the Original Side Rules of this Court to contend that a suit by way of originating summons was governed by the same considerations as to jurisdiction as an ordinary suit. The decision of a Division Bench of this Court in *Tobo Enterprises Pvt. Ltd. v. Campco Industries Limited* AIR 1984 Cal. 24 and *Probirendra Mohan v. State of Bihar* AIR 1959 Cal. 767 have also been relied upon.

9. The respondents have argued that the suit was not a suit for land at all as no question of title or possession was being determined/What was being determined was a difference between the trustees as to the construction of the deed of settlement. This was the entire cause of action. The disputes had arisen within the jurisdiction of the Court and as such no leave under Cl. 12 of the Letters Patent was required. The respondents have relied upon the decision in *Shib Kumar v. Rasul Bux* AIR 1959 Cal. 302 in support of this submission.

10. Before the merits of the respective contentions are considered, the issue of jurisdiction is taken up. Clause 12 of the Letters Patent reads inter alia, as follows :

that the said High Court..... in the exercise of its Ordinary Original Civil Jurisdiction, shall be empowered to receive, try and determine suits of every description, if in the case of suits for land or other immovable property, such land or immovable property shall be situated, or in all other case if the cause of action shall have arisen, either wholly, or in case leave of the Court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction of the said High Court.

(Emphasis supplies)

11. The parties have not disputed and in our opinion cannot object that for the purpose of Cl. 12, an originating summons is a suit. Reference *Sewdya Ramjee Das v. Official Trustee of Bengal* AIR 1931 Cal. 651. The only question is, is it a suit for land. In our view, it is.

12. There is a dispute relating to the title to the Rainey Park property. The respondents seek to establish the absolute title of *Sohrab Vimadalal* to the extent of *Nawazbai's* share in the property. This is disputed by the appellants. The Court will have to adjudicate on this. The suit is therefore substantially one for adjudication upon title to immovable property or at least for a determination of the right or interest of the beneficiaries therein. Consequently it is a suit for land within the meaning of Cl. 12 of the Letters Patent (See *Prabirendra Mohan v. State of Bihar*(2). The decision in *Shib Kumar Banerjee v. Rasul Bux*(3) relied

upon by the respondents does not assist them. That was a suit for specific performance of an agreement. The title was not in dispute.

13. As Rainey Park is outside the jurisdiction of this Court and no leave having been obtained under Cl. 12, this Court does not have the jurisdiction to entertain the action.

14. We accordingly allow the appeal and set aside the judgment appealed from without any decision on the merits. There will be no order as to costs.

Devendra Kumar Jain, J.

15. I agree.