

(1985) 11 BOM CK 0028

In the Bombay High Court

Case No : Originating Summons in Suit No. 2881 of 1984

Ignatius Louis Mascaranhas of Bombay

APPELLANT

Vs

Central Bank Executor and Trustees Co. Ltd. and Others

RESPONDENT

Date of Decision : 22-11-1985

Acts Referred:

Trusts Act, 1882 — Section 78

Citation : (1986) 1 BomCR 377

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Advocate : C.R. Menon, for the Appellant; K.P. Khambatta, V.V. Tulzapurkar and H.N. Vakil Advs., Mulla and instructed by Mulla for defendant No. 1., for the Respondent

Judgement

Sujata V. Manohar, J.—One Mrs. Hermione P. D'Mello executed a Deed of Trust dated 15th May, 1956 under which she appointed the 1st defendant-The Central Bank Executor and Trustee Company Limited as Trustees. The 2nd defendant Sydney J. D'Mello is a confirming party to the said Trust. Under the said Trust the settler bequeathed various properties mentioned in the schedule to the said Deed of Trust. The properties so settled upon trust include a property at Andheri which is described in Part 1 of Schedule A to the said Deed of Trust. The said property at Andheri, after the death of the settlor, is to be conveyed to defendants 2 and 3 who are the son and daughter of the settlor, as set out in Clause 2, sub-clause (d) of the said Deed of Trust. Under the said Deed of Trust no power to alter or revoke the trust is reserved in favour of the settlor.

2. It seems that defendants Nos. 2 and 3 are residing abroad for the last several years. According to the plaintiff he looked after the said settler Mrs. Hermione P. D'Mello in her old age. The settler died on 18th July, 1984. She has left a Will dated 7-4-1984 under which, she has, inter alia, bequeathed the said property at Andheri to the plaintiff. In these circumstances the following questions have been raised by the plaintiff in the Originating Summons :---

Q. 1) Whether the provisions of the Deed of Trust Exhibit "A" can be changed, altered or revoked by the Settlor during her life time under her Will ?

Q. 2) Whether the Trustees, the defendant No. 1 can object to the desire of the Settlor or flout the directions of the Settler as contained in her last Will and Testament ?

Q. 3) Whether the defendant No. 1, the Trustees are now entitled to question or object to the provisions of the last Will of the Settlor when the Trustees were informed of the Will by endorsing a copy thereof by the Settlor with a covering letter explaining the reasons for executing the Will and the Testators' desire and intention ?

Q. 4) Whether the Will, Exhibit "C" herein supersedes the provision of the Trust Deed and whether the plaintiff is entitled to the properties bequeathed to him by the deceased Settlor in the circumstances of the case ?

3. u/s 78 of the Indian Trusts Act, 1882 a trust which is created otherwise than by Will can be revoked in three circumstances, (a) where all the beneficiaries are competent to contract-by their consent; (b) where the trust has been declared by a non-testamentary instrument-in exercise of a power of revocation expressly reserved to the author of the trust; or (c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors- at the pleasure of the author of the trust.

4. In the present case no power of revocation is expressly reserved to the author of the Trust under the Deed of Trust. Defendants Nos. 2 and 3 have also not consented to the revocation of the Trust. In the case of Central Bank Executor and Trustee Co. Ltd. Vs. Hormusji Nusserwanji Madraswalla and Others, this Court has held that the provisions of section 78 of the Indian Trusts Act apply to all trusts, public or private and that a trust cannot be revoked except as provided u/s 78. Hence, having created a trust in respect of the said property, it was not possible for the settlor to bequeath the property which was the subject matter of the Trust to another party under any Will. The Will, therefore, in so far as it bequeaths the said property at Andheri to the plaintiff will not confer any benefit on the plaintiff since the Settlor had no power to bequeath the said property by Will. In view of this position in law it is not necessary for me to examine other contentions which have been raised by the first defendant relating to the said Will.

5. In the premises the questions are answered as follows :

Q. No. 1: Answered in the negative.

No. 2: Answer need not be given since the settlor did not have the power to revoke or alter the terms of the Deed of Trust or to give any direction in respect of the property which was the subject of a trust.

No. 3: Question does not arise in view of my answer to question No. 1.

No. 4: Answered in the negative.

The costs of the 1st defendant to come out of the Trust estate.