

(1956) 05 CAL CK 0021
In the Calcutta High Court
Case No : O.S. Suit No. 107 of 1955

Isaac Nissim Silas and Others

APPELLANT

Vs

Official Trustee of Bengal

RESPONDENT

Date of Decision : 09-05-1956

Acts Referred:

Succession Act, 1925 — Section 113
Transfer of Property Act, 1882 — Section 13
Trusts Act, 1882 — Section 78

Citation : AIR 1957 Cal 118

Hon'ble Judges : Mallick, J

Bench : Single Bench

Advocate : Meyer, for the Appellant; Gouri Mitter, for the Respondent

Judgement

Mallick, J.—This summons was taken out by the plaintiffs for the determination of this question, namely, whether the trust created by the first plaintiff Isaac Nissim Silas can be revoked by the settlor with the consent of his wife and two sons who along with the settlor are stated to be the only beneficiaries.

2. This trust was created by Issac Nissim Silas the settlor by an Indenture of Trust dated 1-4-1931. The Official Trustee of Bengal has been made a trustee and the property was conveyed to the trustee to be held by him upon trust set out in the said indenture.

3. The trust was a family trust created for the benefit of the settlor and his wife, his sons and their children to be born. At the date of the trust the settlor's family consisted of his wife, and his three sons, Elias, Jacob and Nissim. The trust deed provides that the trustee after making provision for meeting the necessary expenses, namely, the payment of the rates and taxes of the Corporation and the costs of repair will pay the balance of the income to the settlor during his life time, thereafter to his wife thereafter to his three sons in equal shares. Disposition was made of the remainder in favour of the sons children that may be born and remain alive at a certain period subject to certain contingencies. After

making provision for himself and his wife the settlor sets out the trust in favour of the sons and their children on the following terms :

"Upon Trust subject to the provisions hereinafter contained in respect of the shares of the said Elias Jacob and Nissim for the child or all the children of the said Isaac Nissim Silas and his wife Lily Silas who being sons shall attain majority or being daughters shall attain that age or marry and if more than one in equal shares absolutely but if there shall be only one such child then the whole in trust for such child subject nevertheless to the trusts hereinafter declared with respect to the shares therein of the said three children Elias Jacob and Nissim Silas that is to say Provided Always and it is hereby declared that the Trustee shall hold and stand possessed of the share of the said Elias Silas Upon Trust to pay the net income to arise therefrom to the said Elias Silas for and during the term of his natural life and subject thereto shall hold the said share Upon Trust for the child or children of the said Elias Silas who being sons shall attain their majority and being daughters shall attain majority or marry and if more than one in equal then the whole in trust for that one child And if there shall be no child of the said Elias Silas who shall attain a vested interest in the said share then my Trustee shall hold the said share ..."

On similar terms a trust has been created in favour of the children of the other two sons viz. Jacob and Nissim as well.

4. In plain language therefore the three sons of the settlor named in the deed, namely, Elias, Jacob and Nissim were to have, after the death of the settlor and his wife, interest in equal shares in the subject-matter of the trust absolutely. At the same time it was provided that the share of each one of the sons would be subject to the trust in favour of the children created in subsequent clauses. It is provided that during the life time of each one of the sons of the settlor, namely, Elias. Jacob and Nissim the trustee will pay them 1/3rd of the income, after meeting the necessary expenses in the manner set out above and thereafter the trustee would make over the property to the children of each one of the sons, namely, Elias Jacob and Nissim & if no son be born to son or the daughter as the case may be do not attain the age of majority or marriage the portion of the property allotted to each one of the sons would revert back to the settlor's estate so as to be divisible amongst the other beneficiaries.

5. It is to be noted that at the date of the trust none of the sons of the settlor was married and they had no sons. At present one of the sons, namely, Nissim is dead so that at the present time there are two sons of the settlor who are alive, namely, Elias and Jacob.

6. The legality of the gift in favour of the grand-sons has been questioned by Mr. Meyer appearing for the plaintiffs on two grounds. In the first place it is stated that the settlor purported to make a gift of the estate to his sons after the death of himself and his wife, that is, he purported to make a gift of the remainder to the sons absolutely. It was said that subsequent interest purported to be created

in favour of the grand-children would be inconsistent with the absolute interest given to the sons and as such the trust in favour of the grand-children must be held to be void and the sons must be held to get the remainder of the property under the deed absolutely. In the second place, it has been argued that the gifts in favour of the grand-children are bad inasmuch as the entire interest of the remainder has not been given to the grand-children. The gift in favour of the grand-children is a contingent gift and is to take effect subject to two contingencies, namely, that the legatees, that is, the grand-children must survive the named persons, and must also attain a particular age. Hence the gift of the corpus to the grand-children are subject to double contingencies and u/s 13 of the Transfer of Property Act such a gift in favour of unborn persons is bad in law. In support of the second argument Mr. Meyer has relied on a decision of the Judicial Committee in the case of AIR 1944 67 (Privy Council) . Viscount Maugham in delivering the Judgment of the Judicial Committee in that case made the following observation:

".... that if under a bequest in the circumstances mentioned in Section 113 there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it and that the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed."

It was therefore held that the bequest being not the whole of the interest of the testator the bequest must be held to be void in law. Mr. Meyer argued that the instant case is identical and inasmuch as the grand-sons do not get the whole interest of the settlor in the corpus, the observations of the Judicial committee apply with equal force to the facts of this case. He submitted therefore that the trusts in favour of the grand children in the Deed of Trust must be held to be void. I agree with this submission of Mr. Meyer and hold that the trust in favour of the grand-children is bad in law. In the view that I have taken it is not necessary for me to consider the other argument put forward by Mr. Meyer viz, that after making a gift of the remainder to his sons absolutely the subsequent trust in favour of grandchildren amount to curtailment of such absolute gift and as such is void.

7. In the trust deed if we leave out of account the grand-children then the only beneficiaries are the settlor, his wife and his three sons of whom one, namely, Nissim is dead. All these people -- the settlor, his wife and his two sons are the plaintiffs in the suit and are consenting to the revocation of the trust created by the settlor. u/s 78 of the Indian Trusts Act therefore the settlor is entitled to revoke the trust with the concurrence of the beneficiaries. I hold that the only beneficiaries under the trust is the settlor himself, his wife and his two sons and they having agreed to the revocation of the trust, there is no difficulty on the part of the settlor to revoke this trust.

8. It has been pointed out by Mr. Gouri Mitter learned counsel appearing for the Official Trustee that there is a provision in the trust deed whereby if the trustee wanted to sell the property he is directed to offer the same in the first instance to Manasseh Sion Linyado, The provision in the deed runs as follows :

"....if at any time the Settlor shall request the Trustee to sell the said Trust Estate or any part thereof the trustee shall have the same valued by a competent valuer and shall put the same up for sale by public auction after having first offered the same to the said Manasseh Sion Linyado if then alive at the price fixed by the valuer"..

It is pointed out that some sort of inchoate right has been created under this deed in favour of Manasseh Sion Linyado. I very much doubt whether any trust has been created in favour of this gentleman. Nevertheless, I asked Mr. Meyer whether his client is willing to give an undertaking to Court that in case his client wants to sell the property he would give the first offer to the said Manasseh Sion Linyado if he is alive. Mr. Meyer is willing to give such an undertaking. I accept such an undertaking. In that view of the matter it is not necessary for me to further consider whether anything should be done to protect the interest of Manasseh Sino Linyado.

9. In the result I hold that the settlor is entitled to revoke the trust on his giving an undertaking not to sell the property to anybody before offering the same to Manasseh Sino Linyado if he is alive. The answers, therefore, that I propose to give to the question raised in the summons are as follows:

(a) Whether or not the trusts created by an Indenture of Trust dated 1-4-1931 are revocable by consent of all the plaintiffs as aforesaid -- Yes.

(b) whether or not a declaration should be made that the said trust has been revoked? The answer is "yes". But this decree should be registered in order that the revocation may be effective.

(c) whether or not the defendant should be directed to make over the property in the said Indenture to the first named plaintiff or in the alternative to the plaintiffs jointly either unconditionally or on such terms as the Hon"ble Court might be pleased to impose? The Official Trustee is directed to make over the property to the settlor after decree herein is registered.

10. Costs of both the parties to come out of the estate as between attorney and client including fees actually paid to counsel.