
(2001) 12 CAL CK 0014
In the Calcutta High Court
Case No : Suit No. 5 of 2000

Mahesh Tulshan

APPELLANT

Vs

Rajendra Kumar Banka and Others

RESPONDENT

Date of Decision : 18-12-2001

Acts Referred:

Charitable and Religious Trusts Act, 1920 — Section 7
Trusts Act, 1882 — Section 34, 72, 74

Citation : (2002) 1 CALLT 546

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : P.K. Mallick and Sabyasachi Sen, for the Appellant; P.K. Das, P.S. Bose, Abhrajit Mitra and Sakya Sen, for the Respondent

Final Decision : Dismissed

Judgement

A. Lala, J.—This is an application under Sections 73 and 74 of the Indian Trust Act, 1882. By making this application the petitioner wanted to be appointed as principal trustee of the trust created by Rai Bahadur Seth Soorajmull Jhunjhunwalla (Tulshan) by an Indenture of Settlement and Trust dated 25th August, 1887 along with other Incidental prayers.

2. Three persons were made party respondents in the application. Fourth one wanted to be added as party respondent therein. First three respondents are male decedents wherein fourth one is female decedent. Apparently trust will be followed by the line of male decedents. Both Rajendra Kumar and Ram Awtar are the grand sons of one Sarswati Devi Danka (deceased) daughter of one Raj Bahadur Sheo Prosad Tulshan (Jhunjhunwalla) (deceased), son of the founder of the Trust. Kailash is not the family member at all. The added respondent Saroj is the sister of Jagadish Prasad Tulshan (deceased), son of second wife of one Badridas Tulshan (deceased), grandson of the founder. Therefore neither of the respondents are appointed or to be appointed by following line of male decedents. On the other hand, Mahesh Tulshan, the petitioner herein is

grandson of Ganga Prasad Tulshan (deceased) son of the founder. Therefore, according to Mahesh he is the sole surviving male descendant to be appointed as principal Trustee as per the Trust Deed created by the founder. Genealogical Table being Annexure "I" to the writ petition is as follows:-

GENEOLOGICAL TABLE Rai Bahadur Seth Soorajmull Jhujhunwalla Tulshan (D)
 | _____ | _____ | | Rai Bahadur
 Sheoprasad Ganga Prasad Tulsan (D) Tulshan Jhunjhunwalla | |
 _____ | _____ | | Saraswati Debi Banka (D) Badrida Tulshan
 (D) Keshar Deo Tulshan (Daughter) _____ | _____ | | | Keshardeo
 Banka (D) Arun Kumar Bimal Kumar Mahesh Tulshan | Tulshan (D) Tulshan
 Ramesh Tulshan _____ | _____ (From 2nd wife) Rajesh Tulshan | | |
 Umesh Tulshan Rahendra Kumar Ram Awtar Jagadish Prasad Banka Banka
 Tulshan (From 2nd wife)

3. This is a public Charitable Trust. Section 1 of the Indian Trust Act, 1882 prohibits applicability of such Act into the area where Religious or Charitable endowment applies. Till the time of application being made by a female descendant, respondent No. 4 herein for the purpose of addition of the parties, this Court proceeded with the merit of the application. But as and when the other respondents took a point of maintainability of the application and to overcome the situation when the petitioner took out an application for amendment of the cause title by making an incorporation that the application is made u/s 7 of the Charitable and Religious Trust Act, 1920, the dispute cropped up. All the respondents in a chorus opposed the application from making such amendment by saying that either an application is to be made under Indian Trust Act, 1882 or the same has to be made under Charitable and Religious Trust Act, 1920. Both cannot be made at a time. Moreover, the amendment by incorporation of Charitable and Religious Trust Act, 1920 will demolish the valid point of non maintainability which they have already taken. Such point of maintain-ability, as I respect, is to say that since this is a Charitable and Religious Trust the application ought to be made under Act of 1920 unlike Act, 1882. Therefore, the very foundation of the application is bad.

4. The objections of Mr. P.K. Das, learned senior counsel, appearing on behalf of the respondents other than the added respondent are as follows : (a) Indian Trust Act, does not apply to Charitable and Religious Trust; (b) Section 7 of the Religious and Charitable Trust Act does not apply as the petitioner is not a Trustee; (c) No leave has been obtained under Clause 12 of the Letters Patent before making this application; (d) where specific provision of law is provided for the purpose such provision will be followed; (e) Trust Deed itself provides for appointment by way of Instituting the suit;

5. Out of the aforesaid points the numbers (a), (b) and (d) can be discussed at a time as already started with. It appears to that Section 7 of the Charitable and Religious Trust Act, 1920 gives power to the Trustee to apply to the Court for the purpose of obtaining certain directions. Such Section is very much comparable

with Section 34 of the Indian Trust Act. In both the Sections, any Trustee without instituting the suit can be able to apply to the Court having appropriate Jurisdiction mentioned therein for getting any directions in respect of the management or administration of the Trust property. Therefore, these are the summary procedures. Sections 73 and 74 are neither similar with Section 34 of the Indian Trust Act, 1882 nor similar with Section 7 of the Charitable and Religious Trust Act, 1920. Section 73 is a provision for the purpose of appointment of new Trustee on the basis of death etc. wherein Section 74 making a provision for appointment of new Trustee by the Court. There are various parameters of considerations. The sections appear to be subjective sections wherein object is to obtain of the order from the Court. Therefore, such object might have been in summary manner or by way of instituting regular suit depending upon the circumstances. But one aspect is very clear that the Court can proceed in a summary manner either u/s 34 of the Act of 1882 or u/s 7 of the Act of 1920 provided such application is made by a Trustee. In the Instant case the application is made for appointment of Principal Trustee by a party who is not a Trustee. One might have a very good case of being appointed Principal Trustee that does not necessarily mean he automatically become trustee can not be allowed to proceed. Hence, the application cannot qualify even if the amendment allowed by the Court by incorporating of Section 7 of Charitable and Religious Trust Act, 1920. Moreover, the embargo u/s 1 of Indian Trust Act, 1882 prohibits the petitioner under such Act as already I have discussed. Hence, the attempt either for the relief of the main application or in the amended application should fall through. u/s 92 of the CPC one can get benefit in case of any alleged breach of any express or constructive Trust created for public purposes of a charitable and religious nature or where the direction of the Court is deemed necessary for the administration of any such Trust either to the extent of removing any Trustee or appointing a new Trustee vesting of any property in a Trust, accounts, scheme, further relief all are available therein. Such relief can be granted by way of instituting the suit. Therefore, when the dispute is raised by a person not yet become a Trustee cannot seek for the same by making an application even after amendment is carried out by Incorporating Section 7 of the Act of 1920. An amendment can be made where original application, under which the present one is made, appears to be sustainable. Secondly, such amendment will not change any cause of action. Here, since the application is made by a party not being Trustee the Jurisdiction of the Court cannot be invoked for making such application. Court cannot assume Jurisdiction by amendment when the Court lacks it. The amendment will put the cause of action to the Act of 1920 wherein the initial application is bad and prohibited even u/s 1 of the Act, 1882. The application for amendment cannot have any leg to stand. The very locus standi of the petitioner is in dispute. Hence, on both the accounts either from merit to the technicality or from technicality to merit the application cannot be survived. By my above discussion I have already dealt with point (e) along with point Nos. (a),(b) and (d).

6. Mr. P.K. Mallick, learned senior counsel, appearing in support of the petitioner cited a Judgment reported in Sukhlal Chandanmull Karnani Trust and Another Vs. Shew Kumar Karnani and Others, to establish that Court has inherent power in respect of administration and management of the Trust estate. Therefore, it is immaterial in what form the matter has been placed before the Court. The mistake, if any. Is curable mistake and can be cured if the Court come to know that the inherent power exists to do the justice.

7. According to me, there is a gulf difference between principles of hearing a suit and hearing an application in summary manner unless both are at par with each other. In hearing suit the parties normally asking relief in the nature of the cause of action verified by the party or parties for establishing the same on the basis of the oral and documentary evidences and/or by arguments. But in an application, one has to make such application under particular section of the Act and if it appears that such section under the Act is not applicable there then the application as a whole is not be sustained. No further question can be available in the application, unlike the suit to come to an ultimate conclusion. Therefore the ratio of such Judgment made applicable in the course of hearing of the suit can not be applicable herein.

8. Mr. Mallick, further submitted that in In Re: Dhanalal Karnawat and Another, a Bench of this Court held that provisions of Section 34 of the Indian Trust Act, 1882 is similar with Section 7 of Charitable and Religious Trust Act, 1920 on the plea that the subject matter covered by Religious and Charitable Trust is technical and overruled. There, I find that the application was made by or against the Trustee. The incorporation of Section 34 of Section 7 did not change any characteristic of the application. Therefore, there was no embargo for the Court in holding the same as technical. However, in coming to such conclusion Court relied upon a Judgment reported in Mahant Som Giri Vs. Mahant Ram Ratan Giri and Others, where it has been held that the Indian Trust Act, 1882, no doubt, does not apply to public or private Religious and Charitable endowment but nevertheless the principles underlying the Sections served as useful guide.

9. He further cited a Judgment reported in Phulchand Lakhmichand Jain and Another Vs. Hukumchand Gulabchand Jain and Another, where it has been held that though the provisions of the Trust Act are not applicable to public Trust in view of Section 1 of the Act the principles underlying them being based on general principles and Rules of English Law can be applied to them. In matters which are not provided for, the Courts in India apply the principles and Rules of English Law on the subject unless they are Inconsistent with the Rules and Practice of this Court.

10. According to me, the application is under the specific Section of the Act. Particularly when such application is made in the place and instead of a suit it is a replacement of the suit by way of summary manner. Therefore, the restriction of Section 1 under the Indian Trust Act, 1882 cannot be Ignored. To that extent, certain Judgments are very particular. In 88 CWN 428 (Gour Lal Mitra and Anr. v.

Tripura Prosanna Basu and Ors.) a Bench of this Court held that both under Indian Trust Act, 1882 and Charitable and Religious Trust Act, 1920 questions involving details or difficult and of importance should not be answered by the Court in a summary manner in an application made by the said statutes. In any event, no application can be made under the Charitable and Religious Trust Act, 1920 where a scheme has already been framed by the Court. The Indian Trust Act, ex facie, does not apply in respect of a debutter estate in favour of the Deities governed by the Hindu Law of Religious Endowment.

11. A Division Bench of Delhi High Court reported in Shanti Devi Vs. State and Others, is specific in this respect. There, under the judgment two principle have been laid down. One is that in view of Section 1 of the Indian Trust Act, 1882 Religious and Charitable Trust Act for consideration is custod. Secondly, the scope u/s 73 of the Indian Trust Act, 1882 applies to private Trust and does not extend to Charitable Trust.

12.1 am of the view that the applicability of both the Trusts are distinct and different like the applicability of the Indian Succession Act and Hindu Succession Act. As and when the Hindu Succession Act is applicable in respect of intestate succession the Indian Succession Act is not "" applicable. But when there is a Intestate succession the Indian Succession Act is applicable. Similarly, when a charitable and religious format of the Trust is applicable the Charitable and Religious Trust Act, 1920 will govern the field. But when the Trust is of private nature, the Indian Trust Act, 1882 will be applicable specially by the ouster Clause of Section 1, So far as the judgment cited by the petitioner herein, that can only be made in a suit wherein the Court has to go into the merit to understand the scope and the applicability of the Act. It is yet to be determined unlike the applications made in the place and instead of suit by availing of a summary process knowing fully well under which Section of the Act it is applicable. Therefore, there is no such scope of conversion by amendment because by way of conversion the cause of action fitting to the particular provision of the Act will automatically evaporate by replacement of another provision of the Act which is not permissible in law. I cannot proceed de hors the law.

13. So far as the question of applicability of Clause 12 is concerned the same is hypertechnical at this stage unlike the point above. Since I am Inclined to refuse the petitioner on much better point I am not Inclined to proceed with the same. However a short discussion is required. A leave can be obtained even at the time of disposal of the suit or application if it is not obtained at the initial stage which is well settled principles of law. That apart, it is contended that Trust was created within the Jurisdiction and properties situate within the Jurisdiction. Therefore, without adjudging the merit very well, the Court cannot come to a definite conclusion that without obtaining leave the petitioner committed a gross mistake. Therefore, I do not think that there is any scope of further discussion.

14. Last but not the least, I hold that the filing of the suit u/s 92 of the CPC is

not the only the remedy available to the petitioner. Petitioner can institute an application in the form of originating summons under Chapter XIII of the Original Side Rules which is as good as suit. It is only available in the Chartered High Courts. Such Rule is applicable not only to the Trustees but also the persons claiming to be interested in the relief sought as creditor, legatee, heir or legal representative or as beneficiary under the Trusts of any Instrument or as claiming by Trustee or otherwise, etc. If right of any of such category under which any party is falling he can apply for originating summons in the Chartered High Court which is not only suit for the sake of administration but also for the sake of judiciary and if Court opines under such originating summons the same is a decree which can be put for execution.

15. Thus, I hold that the application is liable to be dismissed and accordingly dismissed. As a consequential effect, the finality of the application for amendment, if any, rendered infructuous in view of such reasoning. The interim order stands vacated. However, no order is passed as to costs. The petitioner is not prevented from taking the self same cause either by way of originating summons or by instituting suit as prescribed above.

Prayer for stay of operation of this judgment and order is made, considered and refused.

Xeroxed certified copies of this Judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the order and certified copy of this judgment.

All parties are to act on a signed copy minute of the operative part of this Judgment on the usual undertaking and subject to satisfaction of the Officer of the Court in respect as above.