
(2015) 05 CAL CK 0026

In the Calcutta High Court

Case No : A.P.D. No. 77 of 2015, C.S.O.S No. 6 of 2014 and OCO No. 1 of 2015

Pramila Saharia

APPELLANT

Vs

Maresh Kumar Saharia and Others

RESPONDENT

Date of Decision : 15-05-2015

Acts Referred:

Trusts Act, 1882 — Section 52

Citation : (2015) 5 CHN 493

Hon'ble Judges : Ashim Kumar Banerjee, J;Rajiv Sharma, J

Bench : Division Bench

Advocate : Amitesh Banerjee and Sunil Singhania, for the Appellant; Jayanta Kumar Mitra, Advocate General and Senior Advocate, Utpal Bose, Senior Advocate, Sakya Sen, Sudeshna Bagchi and Debasree Dutta, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Ashim Kumar Banerjee, J.

1. This appeal would relate to interpretation of a clause in the Deed of Trust.

2. Pramila Saharia is the daughter-in-law of Late Ram Gopal Saharia who executed a Deed of Trust in 1960. The relevant clauses that would come up for consideration are quoted below:

"20. The continuing Trustees may act notwithstanding any vacancy in their body provided, however, that if the number of the Trustees shall fall below the minimum fixed in clause 23 hereof the Trustees shall not except for the purpose of filling any vacancy act so long as the number in below the said minimum.

23. The number of Trustees shall not be more than 7(seven) and less than (three). Two Trustees present at a meeting shall form a quorum for any meeting of the Trustees.

31. A person shall cease to be a Trustee in any of the following events:-

(A) If he dies, or

(B) If he without leave of absence does not attend any meeting of the Trustees for one calendar year, or absents for three meetings consecutively whichever is later or

(C) If he becomes bankrupt; or

(D) If he becomes insane or otherwise becomes incapable to act, or

(E) If he resign his office, or.

Provided, however, the disqualification mentioned in clause (B) shall not apply to the said Sri Ramgopal Saharia and to the members of the family of the Settlor who for the time being shall be the Trustee under the presents.

32. In case of any vacancy in the Board of Trustees, the same shall be filled up by the remain trustees provided, however, that at least two of them shall be from among the members of the family of the Settlor as laid down in the next clause. On the death or retirement of the Settlor trustee, his eldest son if not objected to by three-fourth of the remaining Trustees shall become a Trustee and in such event, the new Trustee so coming in shall have the rights and privileges of the Settlor Trustee.

33. As amongst the members of the family of the Settlor to be chosen as Trustees the male shall have preference over the females, the senior in age will have preference over the junior in age and when a female is appointed as Trustee shall act as such only until there is no competent male member to act as a Trustee when she will automatically cease to be a Trustee and the Trustees will appoint such male member as Trustee in her place".

3. Initially, Ram Gopal Saharia was the founder trustee with his wife and son. In 1963 since Ramesh Saharia expired in his place Lokenath Khemani was appointed as trustee who was an outsider to the family. By a further resolution dated January 8, 1969 three trustees, namely, Ram Gopal Saharia, Choutmal and Lokenath held a meeting and asked Sarda Debi Saharia, the second wife of Ram Gopal Saharia, to vacate her post as a trustee to accommodate Krishna Kumar Saharia. Accordingly, Krishna was appointed. Since 2010 Pramila is claiming to be appointed as a trustee. Mahesh, the present trustee, would object to such inclusion, inter alia, on the following grounds:

"i) Although the Deed of Trust would limit the number of trustees, minimum three and maximum seven the appointment could only be done in case there is a vacancy. Since at present there is no vacancy, although the number of present trustees is three unless there would be any vacancy, she cannot be accommodated.

ii) As per the Deed of Trust, the female member of the family could only be accommodated once there is no eligible male member. At present, Mohan and Anant, two male members are already there in the Board of Trustees. As per the

Deed of Trust, out of three, there must be one outsider. So, two male members and one outsider would constitute the present Board of Trustees. The present Board would constitute two male members and one outsider and there is no vacancy. Hence, Pramila cannot be accommodated. Moreover, the existing male members are competent to be appointed as trustees."

4. With this grievance, Pramila initially approached Rajasthan Civil Court, inter alia, praying for injunction in respect of a property that, according to her, was being wrongfully occupied by the defendant in the said suit. In paragraph 9 of the plaint before the Rajasthan Court, Pramila would contend as follows:

"That as per the Trust Deed of R.G. Saharia Charity Trust after the death of the husband of the plaintiff, the plaintiff got the right to become a Trustee. Without the consent and approval of the plaintiff and the daughter of the plaintiff none has got the right to transfer the property of R.G. Saharia Charity Trust and Sardadevi Charity Trust in any way or encumber the name or create third party interest in the same. Under the aforesaid facts and circumstances it is extremely necessary to restrain the defendants by order of permanent injunction".

5. We are told, the civil suit is still awaiting disposal.

6. In 2014, Pramila approached the learned Single Judge by filing an application as Originating Summons suit asking for interpretation of the Deed of Trust particularly the clauses that would prevent her from being admitted in the Board of Trustees.

7. Mahesh contested the said proceeding. Mahesh raised three issues:

"i) She did not have locus standi as she was neither a trustee nor had any interest in the property being not a trustee.

ii) She was neither the legal heir nor the creditor or the legal representative or the beneficiary under the said instrument."

8. The learned Judge rejected the contention on locus. According to His Lordship, she was a member of the family. The Trust was created to be administered by the members of the family along with outsider. Rule 9 of the High Court Rules in Chapter XXXVIII any person claiming interest under the written instrument may apply by filing Originating Summons suit for determination of any question of any construction arising out of the said instrument. His Lordship rejected the contention on maintainability as to the locus of the applicant. Mahesh then took the next plea, so long male members were there, the female member could not be included. His Lordship rejected both the contentions, however, denied the ultimate relief in view of pendency of the Rajasthan suit. His Lordship observed, "in absence of any suit being filed by the petitioner, before the Jaipur Court, I would have inclined to consider all the questions that had fallen for determination in this Originating Summons. In the suit, the plaintiff has categorically asserted her right as a trustee whereas in this proceeding, the plaintiff is seeking for an opinion of the Court as to her status, the answer to which in either way would

affect the suit pending before the Jaipur Court. The male chauvinism of the Settlor is quite apparent from the various clauses of the Deed of Trust. That a female could be appointed as a trustee for a limited purpose is also indicated in Clause 33 of the Deed of Trust. The plaintiff is also a member of the family. In so far as answer to question Nos. (c) to (e) are concerned, the same is not answered in view of pendency of a suit in which the issue of the plaintiff as a trustee would be required to be adjudicated. In view of Clause 23 which is clear with regard to the number of trustees, no answer is called for. The questions are, accordingly, answered. The observations made herein shall not affect the pending suit. The originating summons is partly allowed".

9. His Lordship partly allowed the Originating Summons suit, however, did not grant the desired relief.

10. Being aggrieved, Pramila is before us.

CONTENTIONS:

11. Mr. Amitesh Banerjee, learned Counsel appearing for the appellant would support the decision on the issue of locus standi. According to him, rule 9 would give absolute right to Pramila to make the application and the learned Judge rightly held so that would deserve no interference. He would pray for rejection of the cross-objection that the respondents filed on the issue.

12. On the issue of male members, Mr. Banerjee would contend, the clause would hit the basic rights of the women guaranteed under the Constitution. The clause, even if held to be valid, would be against the laws of the land and would be available for judicial review being contrary to public policy.

13. The learned Judge rightly held, it was a product of male chauvinism that should be discarded.

14. He would lastly contend, the learned Judge, even after holding in favour of Pramila, should not have denied the ultimate relief on the ground of pendency of Rajasthan suit. Mr. Banerjee would contend, it was a suit for declaration and injunction in respect of a property that would have nothing to do with the application that was filed in this Court by way of Originating Summons on interpretation of the document. There was no question of accepting her as a trustee by the Rajasthan Court so long the issue was not resolved in this Originating Summons suit.

15. Per contra, learned Advocate General appearing for the respondent would strenuously contend, the learned Judge should not have held the application maintainable. If the clauses of the Deed of Trust can be taken into account in its true spirit, she would have no locus to approach this Court.

16. The learned Advocate General would further contend, vacancy would occur by reason of death or retirement or resignation. There was no such occasion. Hence, Pramila could not be taken in the Board of Trustees at all. Moreover, the

subject clauses would clearly provide, in the absence of any competent male member of the family, the family could not be taken in the Board of Trustees. Even if the clauses were held to be the product of male chauvinism, the Court would not be competent to re-write the instrument and would be obliged to honour the wishes of the settlor. He would pray for dismissal of the appeal allowing his cross-objection.

17. We concluded the hearing on April 30, 2015. When the appeal appeared for judgment on May 12, 2015 the learned Advocate General contended, he did not conclude his argument and he wanted to make further submission. This was not in our contemplation. We still believe, we understood it correctly, hearing was concluded. Yet, we directed the matter to appear for further hearing on May 14, 2015. We heard the learned Advocate General again on the date fixed.

18. Learned Advocate General, resuming his argument on the next day, reiterated what he had argued on the last occasion. He would draw our attention to Clauses 20, 23, 32 and 33 to get the true meaning out of them. He would contend, there was no impediment for a female member to be on the Board of Trustees however, she would have to make room for a competent male person once a male person was found to be competent to take up the job of Trustee. Referring to the minutes of the meeting of the Board of Trustees appearing at pages 94, 96, 98 and 99, he would contend, initially Smt. Sita Devi Saharia was on the Board. After the death of Rameshwar Lal, Lokenath Khemani, an outsider was taken in the Board. In the meeting held on January 8, 1969, Krishna Kumar was taken in, being found to be the competent male member and to accommodate Krishna Kumar, Sita Debi retired. On March 13, 1975 Ram Gopal died and Krishna Kumar was made the chairman and M.K. Saharia was taken in the Board being found to be the competent male member.

19. Krishna Kumar died on May 18, 2010. In the meeting held on June 8, 2010, in his place, Anant, being the senior most competent male member, was taken in. He would contend, since there was no vacancy the appellant could not be inducted. Even if there was a vacancy appellant could only be inducted in absence of any competent male member from the family.

20. Learned Advocate General would rely on two passages being paragraph 6-03 and 6-07 of "Lewin on Trust" to support his contention, the intention of the settlor must be honoured at any cost.

21. He would rely on an English decision of the House of Lords in the case of The Commissioners of Inland Revenue v. Raphael and Others (1934 House of Lords) Page-96. He would draw our attention to a passage appearing at page 134-135 where the House of Lords observed, "The operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention." He would also refer to another passage at page 142.

22. He would lastly rely on the dictionary meaning of "vacancy" from Black's Law

Dictionary and Oxford English Dictionary. The Black's Law Dictionary would define "vacancy", as the state or fact of a lack of occupancy in an office, post, or piece of property. The Oxford Dictionary would define "vacancy" as unoccupied position or job.

23. Taking the plea of maintainability, he would refer to Rule 1 Chapter XIII of the High Court Rules, Original Side that would inter-alia provide, a person claiming to be interested in the relief sought as creditor, legatee, heir or legal representative or as beneficiary, would be competent to take out an Originating Summons, for an answer to a question affecting the right or interest of the concerned person. Since the appellant was not in any way connected with the Trust or the Trustees, she was neither a creditor or a heir or legal representative, the Originating Summons suit was not maintainable.

24. Per contra, Mr. Amitesh Banerjee learned Counsel appearing for the appellant would submit, the vacancy would still arise so long the maximum member of the Trustees would not cross. Hence, the argument so advanced by the learned Advocate General was not tenable.

OUR VIEW:-

25. The parties to the lis would term the document as a Deed of Trust. If one would go through the purpose for which it was created everyone would agree with such proposition but while the instrument is put under the scanner for a close study, it would somewhat give a different impression. Before we deal with the present controversy, we need to closely examine the Deed of Trust appearing at page 35 to 49 of the paper book.

26. One Sri Ram Gopal Saharia executed the said Deed of Trust and made himself, his wife Smt. Sarda Debi and one Chouth Mal Saraf an outsider as trustee. The instrument would suggest, a sum of Rs. 10,000 in cash and 1,000 thousand equity shares in Numburnadi Tea Company Limited would form the corpus for a Trust to discharge public activities namely, setting up temples, educational institutions, imparting education amongst the children, setting up health care centers for the human as well as the animals, grant-in-aid for the cause of science, agriculture, literature, fine arts helping the poor in advancement of agricultural and other activities of public good.

27. If we read the moto for which the Trust was created as stipulated in paragraph 2 of the Deed, one would definitely say, it was for a public cause having no personal interest of the trustees. However, when we proceed to closely examine the Trust particularly the clauses dealing with the powers of the trustees, more particularly, the clause absolving them from being questioned of any act detrimental to the interest of the Trust, we find it otherwise. Let us now examine the clauses:

28. Clause 5 would suggest, the trustees may invest the Trust fund either in the purchase or mortgage of immovable properties and investment in securities. The

clause would also provide, such power would be exercised irrespective of the restrictions imposed by the Indian Trust Act, 1982. A total discretion was given to the trustees to deal with investments as well as the immovable properties. Significant to note, the original Deed of Trust did not bring any immovable property within the corpus of the Trust. The trustees were given unfettered right to sell, exchange of immovable properties.

29. As per clause 6, the trustees would operate Bank account jointly and severally and even one trustee can operate the Bank account. As per clause 7, the sale of immovable property would be totally at the discretion of the trustees. They would be entitled to resell and execute document to validate such sale and/or resale.

30. Clause 8 would clearly hit Section 52 of the Indian Trust Act, 1982. The clause would empower trustees to sell or purchase from the Trust on behalf of any third party, of course not on their account. Section 52, even if, not applicable, the underlying spirit would suggest, Trust should be free from any personal interest. Section 52 is quoted below:-"Trustee for sale or his agent may not buy- No trustee whose duty it is to sell trust property, and o agent employed by such trustee for the purpose of the sale, may, directly or indirectly, put the same or any interest therein, on his own account or as agent for a third person." As per clause 9, the trustees would at liberty to deal with the fund solely in their discretion. They would demise any immovable property.

31. As per clause 10, Trustees may demise immovable property belonging to the Trust on such terms as they would think fit and proper. They would also be empowered to receive donation and contribution.

32. As per clause 11, they could also borrow funds for the Trust.

33. As per clause 12, this was also in their sole discretion so that they would not be answerable to anyone as would be required in case of private Trust and public charitable Trust under the statute.

34. Clause 13 would empower them to compromise or compound any actionable claim and in case of any dispute, they would be at liberty to resolve same through arbitration and adjust and settle all accounts relating to Trust estate exercising full discretion as if they were absolutely entitled to do so, without being liable or answerable for any loss occasioned thereby.

35. Clause 16 would empower them to abolish or restart any of their choice.

36. As per clause 17, they would be dealing with the funds, stocks, shares securities investments in the manner as they like without being answerable to the loss or misapplication thereof.

37. Clause 18 would not make them answerable for any neglect or default in discharge of their function unless it was willful.

38. Clause 19 would empower them to reimburse, and discharge out of the Trust

fund. The limit is however, not prescribed.

39. The most important clause that would run totally contrary to the spirit of the Trust laws, was clause 25 that is quoted below:-

"All questions arising at the meeting of the Trustees shall be decided by a majority of votes and in case of equality of Vote, the Chairman shall have a second or casting vote provided, however, that no question touching the disposal of the corpus or part thereof or any of the immovable Trust properties will be decided and disposed off except in accordance with the votes of three-fourth of the Trustees for the time being under these presents."

40. The clause 25 would restrict someone to approach the Court of law complaining about irregularities and such complain would only be dealt with by an in-house procedure through 3/4th majority.

41. In this backdrop, let us now consider clause 20, 23, 32 and 33 that would be relevant here.

42. Clause 20 would limit the number of trustees and the process of filling up the vacancies.

43. Clause 23 would limit the number. The maximum would be seven and the minimum would be three. Two trustees would form a quorum.

44. As per clause 32, any vacancy could be filled up only as per the instrument that too, when the number goes below the minimum.

45. Clause 32 would deal with the process of filling up of vacancy out of the members, at least two of them must be member of the family.

46. As per clause 33, in appointment of trustees, they would prefer male than female from the family and in absence of any competent male member, the female would be appointed until a competent male person would be fit to take charge.

47. The issue involved herein would relate to right of a female member of the family. The parties also dealt with such issue in their own way, so was the learned Single judge. We, however, wish to go little deep into the matter and close scan of the document was thus necessary. Hence, we have made the venture as above only to know what the instrument actually is. Is it a Deed of Trust? Is it for public cause? Or in the guise of public cause, it was for the benefit of the family members and the family members are really the beneficiary of this instrument.

48. In the light of the above, we would support the learned Judge's view on the locus standi of the appellant but for a different cause. The learned Judge held, appellant was a beneficiary. Such observation was made without any discussion. If the document is considered per se the learned Judge's view cannot be supported. To that extent, we have to allow the cross-objection on such issue.

However, we feel and we hold, in the guise of the public cause, it was nothing but a family settlement by which a conduit pipe was installed for acquiring properties and deal with the same under the guise of this Trust. Such unfettered discretion given to the trustees would definitely be considered to be a benefit, even Section 52 of the said Act of 1982 was given a go by to permit trustee to acquire property in benami. Similarly, their actions were not strictly amenable to judicial review and the dispute could only be resolved by 3/4th majority or by arbitration. We wonder, how a majority decision could solve the issue of defalcation of fund or the same could be resolved through arbitration when there would be a breach of trust by any trustee. Considering the above, we support the ultimate decision on the plea of maintainability.

49. Let us now deal with the other issue raised the appellant. The learned Advocate General would interpret the relevant clauses to say, the settlor believed, the male members would be the fittest persons to carry out the activities of the Trust. The settlor would also provide for appointment of a female trustee only in absence of a competent male person. The learned Advocate General would submit, the pious wish of the settlor must not be disturbed. While we fully appreciate his argument to the extent, his pious wish should have a dominant role we are of the view, on the one hand pious wish of the settlor, in its clear unambiguous terms, would prevent female members to come and join the board of trustees, on the other hand, the laws of the land would totally deprecate such attempt. It would be contrary to the provisions of law that would hit the basic structure of the Constitution and would be contrary to the public policy. Any contract or instrument that would offend the laws of land and/or the basic structure of the Constitution, could not be permitted to operate in the field for which the same was executed. If we permit the so called pious wish of the settlor to be honoured, we would be denying a lady of her right to be admitted in the Trust being a member of the family only because, she was a lady and not a male person. Even if, she is engaged as a trustee, she would have to make room for the other male person of the family once he is found to be competent to take up the job of trustee. This cannot be supported. Learned Judge termed it as "male chauvinism". We, sitting in Court of Appeal, while discharging judicial duty would restrain ourselves to say so. We would hold, it was contrary to public policy so declared through our Constitution and as such could not be held to be valid. We strike down the clause 33.

50. The learned Advocate General would also take another plea. According to him, the vacancy could only arise on death or resignation or incapacity. In the present case, the document would itself limit the number of trustees to seven. The settlor appointed three trustees being the founder trustees. However, the document did not subsequently debar filling of the rest four posts. If we accept such contention, we would have to hold, the minimum number of trustees being three, it would always remain as it is and the other post would never be filled up. At present two male members would belong to one branch. They are father and son by relation. The other branches are not represented. The appellant was the

daughter-in-law of the other branch. Her husband was a trustee. After his death, she applied for her inclusion that the existing trustees denied. Considering the nature of activity that was permitted by the instrument, we have to accept, the trustees would have a role to play and such activity might be in their personal interest. Even if, it is found to be correct the same cannot be questioned in Court as discussed above.

51. The Decision in the case of The Commissioners of Inland Revenue (*supra*) would once again spell out the correct position of law. We are in *ad idem* with the learned Advocate General, the language of the instrument was unambiguous. He would concede to the first two questions that could be answered in favour of the appellant to the extent, a female member could be a member of the Board of Trustees and the appellant was a member of the family of the settlor. He would also concede, question "c" could be answered in her favour as the appellant being a member of the family was qualified to be the member of the Trust. He would join issue on question "d" and "e" where she would ask as to whether the minimum number of the Trustees could be maintained for the lawful functioning of the Trust and whether she could be appointed as the trustee in the present circumstance. He would contend, such issue is very much prevalent in the Jaipur suit as raised by the appellant in paragraph 9 of the plaint. We do not find any logic behind his argument. Once the appellant was a member of the family and was qualified to be a Trustee the moment there would be vacancy her candidature must be considered. The definition of "vacancy" so relied on by the Learned Advocate General from the dictionary would rather support the case of the appellant. "Vacancy" would mean an unoccupied position. The Deed of Trust would have seven posts whereas four posts are still vacant. He would contend, "vacancy" could only occur by way of retirement, resignation or death. We respectfully disagree. There would be a fourth situation in the case of the like nature where post are created by the instrument and are yet to be filled in. If we accept his logic, we would have to give a go by to the clear intention of the settlor that the Trust would be having maximum seven members. The Advocate General could not successfully answer our query as to how the four posts would be filled in. He would contend, Anant was the only male member found to be competent. Anant is already on the Board. There are still four vacancies if he would concede to the qualification of the appellant, we do not see any reason how she could be denied entry in the Trust. We reject his contention on the issue.

52. If we take the first two answers as positive, we see no reason why the Originating Summons would not be maintainable. If the appellant is a member of the family and qualified to be the trustee, we fail to reason how the Summons could be said to be not maintainable. Rule 1 Chapter XIII of the High Court Rules would rather support the case of the appellant.

53. The existing trustees would resist inclusion of others. We do not find any logic behind it that would have the support of law. The learned Judge could have extended the relief. He did not do so on a peculiar plea, Rajasthan Court suit was

awaiting disposal. However, the said suit was on a complete different premise. In paragraph 9, the appellant asserted her right as a trustee that might have played in the mind of the learned Single Judge. We make it clear, the civil suit in Rajasthan Court, would only decide the question raised in the said suit on a particular property. Such issue can be decided by Rajasthan Court in the way they would feel it best without touching upon the issue involved in the present lis. In short, the Rajasthan suit must not deal with the question as to whether on the date of filing of the suit, the appellant was entitled to file the said suit as a trustee or in individual capacity. If the appellant could successfully cross such hurdle with or without amendment she would obviously pray for a decree in that suit and the Court would deal with such prayer in accordance with law. The present lis is to answer a question and not to grant any relief. The questions were whether the Deed would permit a female heir to become a trustee of a Trust that we answer in the affirmative. Whether the plaintiff was a heir of the settlor, is a question of fact. In any event, the parties do not join issue on such score. She was the daughter-in-law of the settlor. The respondents did not dispute such fact hence, the question need not answered. Question as to whether the Deed would permit the present appellant to be qualified we would advise, answer should be derived from the answer that we give in response to question (a).

54. With regard to the other question as to the vacancy, we answer question (d) and (e) by observing, minimum number of three persons would definitely carry out lawful functioning. However, that would not preclude inclusion of other trustees so long it would not reach the maximum level of seven. In the present case, there are only three trustees, the appellant would thus be entitled to be inducted along with others so long the maximum number would not cross. The questions are answered accordingly.

55. The appeal is disposed of without any order as to costs. Cross-objection would fail and as such is dismissed without any order as to costs.

Rajiv Sharma, J.

I agree.