
(2014) 12 CAL CK 0079
In the Calcutta High Court
Case No : C.S.O.S. No. 6 of 2014

Pramila Saharia

APPELLANT

Vs

Maresh Kumar Saharia

RESPONDENT

Date of Decision : 09-12-2014

Acts Referred:

Citation : (2015) 3 CHN 57 : (2015) 3 WBLR 203

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Amitesh Banerjee, Sr. Advocate and S. Singhania, Advocate for the Appellant; Jayanta Kr. Mitra, Sr. Advocate for the Respondent

Judgement

Soumen Sen, J.—The originating summon has been taken out by the Sm. Pramila Saharia for determination of following questions and matters:--

"a) Whether in terms of the Deed of Settlement a female heir and/or member of the family of the Settlor is eligible and competent to become a trustee of the trust.

b) Whether the plaintiff is an heir of the Settlor and/or a member of his family.

c) Whether in terms of the provisions of the Deed of Settlement the plaintiff is qualified to be appointed as trustee of the trust.

d) Whether the Board of Trustees of the trust should consist of minimum three trustees for lawful functioning and administration of the said trust.

e) Whether the defendants would be directed by the Hon''ble Court to appoint the plaintiff as a trustee for proper constitution of the Board of Trustees with a minimum number of three trustees and if so, the defendants be directed to do so."

2. By and under a Deed of Settlement dated 28th May, 1960, one Ram Gopal Saharia as the Settlor had created a trust whereby he and his son Rameshwar

Lal Saharia and his wife Sm. Sarda Debi Saharia along with Chouthmal Saraf were appointed as the initial trustees. The trustees were changed from time to time either on the death of one of the trustees or of circumstances giving right to the existing trustees to fill up the vacancy and/or to appoint a new trustee.

3. The applicant is the daughter-in-law of Ram Gopal Saharia. She has filed this application by way of originating summons for determination of the aforesaid questions.

4. Mr. Jayanta Kr. Mitra, learned senior Counsel appearing on behalf of the defendants in the suit raised a preliminary objection with regard to the maintainability of the petition at the instance of the applicant on the ground that the said applicant does not come within the purview of persons who are eligible to take out the originating summons. According to the learned senior Counsel, Chapter XIII Rule 1 specifies the categories of persons who are entitled to take out originating summons.

5. The said Rule mentions the persons who can apply under the Chapter and includes (i) executors or administrators of a deceased person, or any one of them, and (ii) trustees under any instrument or any of them, and (iii) any person claiming to be interested in the relief sought as creditor, legatee, heir, or legal representative, or as beneficiary under the trusts of any instrument. These categories of persons may take out such originating summons for determination of questions specified in the said Rule. It is submitted that the petitioner is neither a trustee nor a legatee nor she is an heir or an executor or an administrator. Accordingly, she could not have taken out such an application.

6. On merits, the learned senior Counsel submitted that questions of difficulties and disputed questions of fact are not required to be addressed in an originating summon. Although, in determining the issues raised in the summons no disputed questions of fact are involved but it is submitted that allowing the application would mean interfering with the intention of the Settlor and the Court cannot re-write the deed of trust and/or give any direction contrary to what was intended by the Settlor.

7. Per contra, Mr. Amitesh Banerjee, learned senior Counsel appearing on behalf of the plaintiff submits that the applicant being a legal heir of one of the sons of Ram Gopal Saharia is very much interested in the proper administration of the trust property and as such legally entitled to maintain the present action.

8. There is no disputed question of fact as rightly pointed out by Mr. Mitra involved in this proceeding. The questions that arise for determination are two fold: firstly is the locus of the applicant and secondly allowing the application if would result in interfering with the intention of the Settlor. The other impediment is the suit filed by the petitioner before the District Court at Jaipur in which at paragraph 9 of the plaint, the petitioner has asserted her right as a trustee. The said suit was filed in August, 2013 whereas the originating summon has been taken out on March, 2014. One question obviously would arise if the petitioner-

plaintiff is considering herself as a trustee then would there be any requirement as such of taking out the summons for determination of the issue relating to the status of the petitioner vis-?-vis the said trust.

9. Before I enter into the merits of the matter, let me first decide the locus of the petitioner.

10. Chapter XIII Rule 1 read with Rule 9 gives rights to large number of parties to take out originating summons for determination of the questions as enumerated in Rule 1 of Chapter XIII. Any question affecting the rights or interests of the person claiming to be creditor, legatee, heir or legal representative or beneficiary can be determined by the Court under the said Chapter. Similarly, the Court can determine any question arise in the administration of the estate or trust. The petitioner is the legal heir of the eldest son of Ram Gopal Saharia who was appointed as one of the trustees by his father under the Deed of Settlement of 1960. I am unable to accept the argument of Mr. Jayanta Kr. Mitra, the learned senior Counsel that the heir or legal representative would be confined to that of executors or administrators of a deceased person and would not include a legal heir who is a beneficiary under the trust. Rule 9 makes it quite clear that any person claiming to be interested under a Will, or other written instrument, may apply in Chambers by originating summons, for the determination of any question of any construction arising under the instrument, and for a declaration of the rights of the person interested. Accordingly, the petitioner as heir of the eldest son of one of the trustees is competent to take out the originating summons for determination of the questions as under Chapter XIII Rule 1 of the Original Side Rules.

11. Both the Counsels have referred to various provisions of the Deed of Trust in support of their respective submission. While Mr. Mitra has argued that in absence of any vacancy and having regard to the clear intention of the Settlor that the male shall have preference over the female and when a female is appointed as trustee, she would act as such only until there is no competent male member to act as a trustee, the appointment of the appellant as trustee is completely ruled out. Mr. Banerjee would submit that having regard to the fact that the intention of the Settlor that the female members are adequately represented in the administration of the trust which are manifest from the Deed of Settlement inasmuch as the number of trustees are only three although, the outer limit is seven, there could be no justification for the defendants in resisting the claim of the plaintiff to function and/or seek an appointment as a trustee.

12. The clauses of the Deed of Settlement on which both the parties have relied are stated hereinbelow:--

"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 is below the said minimum.

23. The number of Trustees shall not be more than 7 (seven) and less than 3 (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 events, 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 will act as such only until there is no compete 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."

13. The Deed of Settlement does not prohibit the appointment a female member of the family of the Settlor to be appointed as a trustee. There cannot be any doubt that the applicant is a female member of the family of the Settlor. There is also no embargo in the deed of trust for appointment of a new trustee so long it does not exceed seven. Under Clause 23, there has to be a minimum of three trustees and the maximum would be seven. The existing trustees can always appoint a trustee either from the family of the Settlor or from outside as present composition would indicate that one of the octogenarian trustees is from outside. The present trustees are not incompetent to appoint the applicant as a trustee since she is otherwise qualified. The argument of the defendants appear to be that in the event the applicant is appointed as a trustee, the intention of the Settlor as one could gather from Clause 33 of the Deed of Settlement would get affected and the same would result in modification of the trust. It is submitted

that since there is no male line and/or possibility of any male person to become eligible as a trustee, the appointment of the plaintiff as a trustee would be in derogation to the said terms. The Settlor never wanted a female member of the family to continue as a trustee in perpetuity.

14. 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.

15. The urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.