(1967) 10 BOM CK 0018

In the Bombay High Court

Case No : O.C.J. Suit No. 468 of 1967

The Central Bank Executor and Trustee Company Ltd. APPELLANT

Vs

Hormusji Nusserwanji Madraswala and others RESPONDENT

Date of Decision : 25-10-1967

Acts Referred:
Trusts Act, 1882 — Section 78

Citation : (1968) MhLj 750

Hon'ble Judges : J.R. Vimadalal, J

Bench : Single Bench

Advocate : M.P. Laud, for the Appellant; F.S. Nariman for Defendants Nos. 1, 2 and J.B. Dubash for Defendant No. 3, for the Respondent

Judgement

J.R. Vimadalal, J.—This is an Originating Summons taken out by the plaintiff-company which is the present trustee of the deed of settlement executed by one Maneokji Ratanji Bharucha on April 22, 1942, for the determination of certain questions that have been framed in it.

2. By clause 2 of the said deed of settlement dated April 22, 1942, the settlor provided that the net income of the trust estate was to be paid by the trustees to himself for life. By clause 4 thereof, it was provided that, from and after the death of the settlor, the trustees were to pay the net income to the settler''s sister Banubai, if she be then living, for the term of her natural life. Clause 5 of the said deed provided that, from and after the death of the said Banubai, or in ease she predeceased the settlor, then on the death of the settlor, the trustees were to divide the trust premises into two equal parts and hold them upon certain trusts thereafter specified. Clause 6 provided that one of those parts was to be held in trust for the issue of the said Banubai, but if the said Banubai died without leaving any issue, the trustees were to hold the same upon trust to pay the net income thereof to her husband for life, and, in default of such husband, to apply the net income for the benefit of the settler''s brother Ardeshir, if he be then alive, for his life, and, in default of the said Ardeuhir, to transfer the said

part of the trust premises to the Parsi Panchayat Board at Surat for the benefit of a certain infirmary situated there. Clause 7 of the said deed provided that the net income of the other part of the trust premi-S6B was to be paid to the settler''s brother Ardeshir, if he be then alive, and thereafter for the benefit of the wife and children of the said Ardeshir. Clause 8 of the said deed provided that, from and after the death of the said Ardeshir and the said Banubai, the trustees were to hold the said equal part of the trust premises upon certain other trusts in favour of the issue of the said Ardeshir, but if the said Ardeshir were to die leaving no issue and no widow, the said part of the trust premises was to be transferred to the Parsi Panchayat at Surat for the benefit of a certain technical institute situated in that town. Clause 18 of the said deed is in the following terms:

18. The said Manekji Ratanji Bharucha (alias Gadiwala) may from time to time at any time or times by a Deed or Deeds revocable or irrevocable or by Will or Codicil wholly or partially revoke and make void or vary all or any of the trust use powers and provisions hereinbefore created, declared and contained and by the same Deed or any other Deed or Deeds whether revocable or irrevocable or by Will or Codicil declare any new or other trusts uses powers or provisions concerning the premises the trusts uses powers and provisions whereof shall have been so varied or revoked as aforesaid.

3. It may be mentioned that the settler''s brother Ardeshir died unmarried on May 10, 1956, and the settler''s sister Banubai also died unmarried on October 22, 1957.

4. In exercise of the power conferred by the said clause 18 of the deed of settlement dated April 22, 1942, the settlor, by a deed of revocation dated October 15, 1958, revoked clauses 4, 5, 6, 7, 8 and 9 of the said deed, and declared and directed that, after his demise, the trustees were to convert the investments representing the trust fund into money and divide the net amount into six equal parts which were to be dealt with in the manner laid down therein. Five of those six equal parts were directed by the said deed of revocation to be applied to various charitable institutions, and it is unnecessary for me to refer to the same. The sixth part of the income was directed, by clause 2 (f) of the said deed of revocation, to be invested, and the net income thereof to be paid to the settler''s friends, who are defendants Nos. 1 and 2 to this Originating Summons, for the term of their natural lives, and, from and after the death of both of them, half of the investments representing the said one-sixth shave were to be handed over to the trustees of the Bandra Parsi Convalescent Home for Women and Children, and the other half to the trustees of the Shirinbai Cama Convalescent Home for Men and Boys, to be held upon trust to apply the net income thereof for the maintenance of the said institutions. Clause 3 of the said deed of revocation was in the following terms:

3. Save as hereinbefore modified the said Indenture of Settlement is hereby confirmed and shall remain in force and effect in every report.

5. By another deed of revocation dated August 11, 1962, the settlor, in purported exercise of the power of revocation reserved to him by the said deed of settlement dated April 22, 1942, varied and altered the uses in the said deed of revocation and new appointment dated October 15, 1958, in the manner stated therein, namely, that clause 2 (f) of the said deed of revocation dated October 15, 1958, was to be deleted, as if it had not appeared at all in the said deed, and a new clause 2 (f) substituted in its place, which provided that take said one-sixth part of the trust fund was to be applied to certain charities specified in the said deed of revocation dated August 11, 1962. It is unnecessary for me to refer to the directions given by the said deed of revocation, beyond pointing out that the effect of those directions was that the provision in clause 2 (f) of the deed of revocation dated October 15, 1958, under which the income of the said one-eight part was to be paid to defendants Nos. 1 and 2, did not find place. It is the contention of Mr. Nariman on behalf of defendants Nos. 1 and 2 that the settlor had no power to revoke the deed of revocation dated October 15, 1958, as he purported to do under the power of revocation originally contained in the deed of settlement dated April 22, 1942. It :\\B, on the other hand, submitted by Mr. Laud on behalf of the plaintiffs, and by Mr. Dubash on behalf of the Charity Commissioner (defendant No. 3), that the settlor did have the power to revoke the said deed of revocation dated October 15, 1958.

6. The whole argument of Mr. Laud in support of the above submission comes to this, that what was sought to be done by the said deed of revocation dated October 15, 1958, was to revoke clauses 4 to 9 of the original deed of settlement dated April 22, 1942, and to incorporate in that very deed of settlement certain new trusts and provisions contained in the said deed of revocation dated October 15, 1958. It was argued by Mr. Laud that, if his contention to that effect was accepted, the effect would be that the new trusts and provisions BO incorporated would continue to be subject to the power of revocation contained in clause 18 of the deed of settlement dated April 22, 1942. In support of that argument Mr. Laud relied on the fact that clause 18 of the said deed of settlement itself provided, in terms, for the revocation being effected "from time to time" by a "Deed or Deeds revocable or irrevocable." Mr. Laud contended that clause 18, as framed, therefore, showed clearly that a deed of '' revocation effected pursuant thereto could itself be revoked or varied from time to time.

7. As against that argument of Mr. Laud, Mr. Nariman sought to contend that the said deed of revocation dated October IS, 1958, as drafted, did not bear out the contention of Mr. Laud, in so far as it did dot provide for the new trusts created therein being incorporated in the original deed of settlement. Mr. Nariman also relied on the terms of clause 18 of the deed of settlement dated April 22, 1942, whereby, according to him, the only power of revocation was to revoke the trusts "hereinbefore orated", which would mean the trusts created by the original deed of settlement itself, and not the trusts as varied by the subsequent deed of revocation dated October 15, 1958. Mr. Nariman further submitted that, both u/s 78 of the Indian Trusts Act as well as under the corresponding provisions of law

applicable to public trusts, a document creating a trust cannot be revoked unless it itself provides for a power of revocation therein.

8. The question which I have to decide is, therefore, a very narrow one, bat the Learned Counsel appearing in the matter have stated that the same is not covered by authority, except the decision in the ancient English case of Hele v. Bond (1717) 24 E R (Cb.) 213 in which, on exactly similar facts as those of the present case, it was held that, in the absence of a power of revocation being reserved in the deed of revocation, the new trust declared in the deed of revocation could not be revoked by virtue of the power of revocation contained in the original deed of settlement. Mr. Nariman has also referred to statements of law contained in certain standard works to which I will refer later on.

9. The first point which appears to be fairly clear is the one which was argued by Mr. Nariman, namely, that, as laid down in section 78 of the Indian Trusts Act, a trust created otherwise than by Will cannot be revoked, except in three cases, viz , (a) where beneficiaries are competent to contract, and consent to its revocation, (b) where a power of revocation is expressly reserved to the author of the trust, and (o) where the trust is for the payment of debts of the settlor, and has not been communicated to the creditors. The Court is concerned, in the present case, only with clause (b) of that section. The position in regard to public trusts is also the same, and the proposition in section 78 of the Indian Trusts Act, to which I have just referred, finds place in the statement of the law in Halsbury, 3rd Edn., Vol. 30, p. 267, para. 507, and in Farwell on Powered, 3rd Edn., pp. 306-307, as a general proposition applicable to all trusts, public as well as private. The result of this legal position is that, unless Mi. Laud''s contention with regard to the incorporation of the new trusts in the original deed of settlement is accepted by me, his submission that the deed of revocation dated October 15, 1958, could be revoked, cannot stand. I have considered carefully the form of the deed of revocation dated October 15, 1958. In support of his argument with regard to the incorporation of the new trusts in the original deed of settlement, Mr. Laud has relied strongly on clause 3 of the said deed of revocation dated October 15, 1958, which lays down that, save as modified therein, the original deed of settlement was confirmed and was to remain in full force and effect in every respect. I am afraid, however, the deed of revocation of October 15, 1958, as framed, does not purport to incorporate the new trusts in the original deed of settlement, but purports to create new trust as therein laid down. This is apparent from a comparison of clause 2 of the said deed of revocation dated October 15, 1958, with clause 2 of the subsequent deed of revocation dated August 11, 1962, the latter of which provides, in clear terms, for the incorporation of the new trusts in the original deed of settlement. That is not the way the deed of revocation dated October 15, 1958, is drafted, and, under the circumstances, I am afraid, I cannot accept Mr. Laud''s contention that the trusts created by the said deed of revocation dated October 15, 1958, should be read as if they were incorporated in the deed of settlement dated April 22, 1942, so as to enable the settlor to avail himself of the power of revocation contained in

clause 18 of the latter deed. Clause 2 of the deed of revocation dated October 15, 1958, in terms, purports to ''''declare and direct" the division of the trust fund into six equal parts, and to apply the same in the manner directed therein. There can be no dispute that the said deed of revocation dated October 15, 1958, does not contain a power of revocation or variation of the new trusts created by it. Under the circumstances, I have come to the conclusion that Mr. Laud''s argument on this point cannot be accepted by me.

10. In the result, I answer the questions* formulated in the Originating Summons as follows:

Question No.

1 : In the negative. "

2 : In the negative."

3 : In the negative. "

4 : In the affirmative.

11. As far as costs are concerned, the costs of the plaintiffs and of the Charity Commissioner (defendant No. 3), in separate sets, between attorney and client, to come out of the trust estate. The post of defendants No. 1 and II, also to come out of the trust estate. Solicitors for plaintiffs: Mazagaonwalla and Co. Solicitors for defendants : Payne and Co. The questions were aa follows:-

(a) Whether the Deed of Revocation and New Appointment dated 15th October 1958 was revocable ?

(b) Whether the cancellation of Clause 2 (f) of the said Deed of Revocation and New Appointment dated 15th October 1958 by the Deed dated 11th August 1962 and it substitution by the new Clause 2 (f) is valid ?

(c) Whether the Second Deed of Revocation and New Appointment dated 11th August 1962 is validly executed, and are the Plaintiffs bound to carry out the directions contained therein ?

(d) Whether the Trustees should carry out the directions contained in. Clause 2 (1) of the said Deed of Revocation and New Appointment dated 15th October 1958 ?

(e) What order should be passed for the costs of the Originating Summons ?

