

(2010) 08 CAL CK 0032

Calcutta High Court

Case No: C.O. No. 35 of 2006

Alok Kumar Nundun and
Another

APPELLANT

Vs

Samir Kumar Nundun and
Others

RESPONDENT

Date of Decision: Aug. 2, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 10
- Constitution of India, 1950 - Article 227
- Trusts Act, 1882 - Section 1, 34, 73, 74

Hon'ble Judges: Kanchan Chakraborty, J

Bench: Single Bench

Advocate: Om Narayan Rai, for the Appellant; Sabyasachi Bhattacharya and Shehnaj Tarej Mina, for the Respondent

Judgement

Kanchan Chakraborty, J.

The challenge in this revision application is to the order dated 29.10.2005 passed by the learned Additional District Judge 9th Court at Alipore in Misc. Case No. 18 of 2002 whereby the learned Court found the case not maintainable in his Court and directed to return the application under Order 7 Rule 10 of the CPC with a liberty to file the same in the appropriate Court having jurisdiction to try the same.

2. The backdrops of this revision application is stated below; in short:

a) One Rajani Kanta Nundun, since deceased, the predecessor-in-interest of the parties to the Misc. Case No. 18 of 2002 executed a deed of settlement dated 3.4.1958, registered on 18.4.1958 whereby he created a religious and charitable trust in favour of his family deities, Sri Sri Sridhar Narayan Jiwe Thakur and Srimati Mahalakshmi Thakurani. Rajani Kanta Nundun installed the deities mentioned above in a "Thakurghar" on the roof of the second floor of the premises No. 27A Beni

Nundun Street. By the said deed of settlement creating trust Rajani Kanta Nundun appointed himself as the first trustee and shebiat for the purpose of said trust. The modalities of Shebiatship and Trustees was clearly mentioned in the settlement deed. According to that settlement deed, the male heir in the direct line of sanction would be Trustees-cum-Shebiats. He also made provisions for continuous worship and daily sheva-puja of the deities by appointing priest on payment of monthly salary. He also provided in the settlement deed for remuneration of the trustees and source of money for the maintenance of Trust properties. According to the said deed surplus income of the Trust properties would be spend for hospitalities and charities for relief of needy public.

b) That during his life time the said Rajani Kanta Nundun being the sole Trustees-cum-Shebiats performed his duties and obligations as such in terms of the said deed of settlement and also spend excess amount for charitable purposes. He died intestate on 13.1.1992 leaving behind him surviving his heirs in the direct main line i.e. his widow, Grandson, daughter-in-law, four sons who inherited the property laid by Rajani Kanta Nundun. The petitioner Alok Kumar Nundun is the Grandson of Rajani Kanta Nundun while Gita Nundun, the petitioner No. 2 is his mother. The father of the petitioner No. 1 and husband of petitioner No. 2 Aurn Kumar Nundun predeceased Ranjani Kanta Nundun. The opposite parties 1 to 4 are sons of Rajani Kanta Nundun. All of them mutually started working as trustees-cum-shebiats in respect of the Trust properties. The opposite parties, in order to oust the petitioners from the Trust properties and family dwelling house, disturbed the petitioner from performing any act of Sheba-Puja of the deities and declared that they were the only Shebiats-cum-Trustees in respect of the Trust created by Rajani Kanta Kundun. They started realising the entire amount of rent from the tenants of the Trust properties and misappropriated the same without rendering any account to the petitioners. They also failed and neglected to perform Sheba-Puja of the Deities and maintain the Trust properties properly. There was mismanagement and gross negligence in the matter of Sheva-Puja of the Deities and maintenance of the Trust properties. The petitioner served a notice through their Lawyer on 28.9.1992 on the opposite parties demanding the account of the rent realised by the opposite parties and to pay proportionate share of the same to the petitioners. The opposite parties by a reply dated 5.10.1992 denied the right of the petitioners to act as Shebiats-cum-Trustees. They filed a M.P. Case No. 882 of 1994 in the Court of learned Executive Magistrate making false allegations of overt the act by the petitioners. They instituted a suit being No. T.S. 98 of 1994 in the 4th Court of Civil Judge, Junior Division at Alipore against the petitioners in respect of Trust properties praying for permanent injunction restraining the present petitioners from disturbing their peaceful possession over the same. That suit was contested by the petitioners. The opposite parties also filed another suit being T.S. No. 172 of 1995 in the same Court praying for a decree of eviction of the petitioners from the premises No. 27A, Beni Nundun Street on the ground that the petitioners had no right to act as

Shebiats-cum-Trustees in respect of the suit properties on the basis of deed of settlement and as such had no right to stay and live in the said property. The petitioners have been contesting that suit also by filing written statement.

c) The opposite parties have rendered themselves guilty of deliberate mis-management and maladministration of the Trust properties and mis-appropriation of the Trust fund. So, the petitioners filed a Misc. Case No. 18 of 2002 against the opposite parties praying for removal of the opposite parties No. 1 to 4 from the office of Shebiats-cum-Trustees in respect of the Trust properties and appoint the petitioner No. 1 or some person as Shebiats-cum-Trustees.

d) The opposite parties in their written objection challenged the maintainability of the case u/s 73 and 74 of the Indian Trust Act and prayed before the Court for considering the maintainability of the case first of all.

e) That prayer was opposed by the present petitioners wherein they have taken the plea that maintainability of the case can not be heard isolatedly or separately from the other issues. The learned Court, however, took up the issue of maintainability of the case for consideration as prayed for by the opposite parties and by order No. 31 dated 29.10.2005, the learned Court opined that the application u/s 73 and 74 of the Indian Trust Act filed by the present petitioners was not maintainable in his Court and he ordered for return of the application under Order 7 Rule 10 of the CPC with a liberty to file the application in appropriate Court having jurisdiction to try the same.

3. Being dissatisfied with and aggrieved by the said order this revision application has been filed by the petitioners on the ground:

i) that learned Court committed a serious of jurisdictional error by returning the application u/s 73 and 74 of the Indian Trust Act.

ii) that learned Court erred in coming to a conclusion that proviso to Section 1 of the Indian Trust Act stands in the way for maintaining the application u/s 73 and 74 of the Indian Trust Act before the principal Civil Judge having original jurisdiction in the District.

iii) that learned Court failed to notice that the Trust created by the settler was not only a private trust but also meant for public charitable purpose and as such, made a mistake by saying that the application fall within the mischief of the proviso to Section 1 of the Indian Trust Act.

4. The question arises in this revision application under Article 227 of the Constitution of India is whether the learned Court was correct and legal in stating that the application u/s 73 and 74 of the Indian Trust Act filed by the petitioners was not maintainable in his Court and to be filed in appropriate Court having jurisdiction to try the same.

5. Mr. Om Narayan Rai, the learned Advocate appeared on behalf of the petitioners contended that the learned Court was entirely wrong in not coming to the conclusion that the petition filed by the petitioners u/s 73 and 74 of the Indian Trust Act in the Court Principal Court of the District i.e. the District Judge, South 24 Parganas was not maintainable in view of the "saving clause" of the Section 1 of the Act. Mr. Rai contended that when the learned Court came to a conclusion that the Trust in dispute was a private Trust materially and substantially and not being a public Trust, the petitioners rightly filed the petition for removal of the Trustees and appointment of a new trustee in the proper forum. He also cited a case law reported in [Prafulla Kumar Khan and Others Vs. Jogendra Nath Mahato and Others](#), and contended that since the deed of trust in question did not effect divestment of properties in favour of the Deities and it provided for the utilisation of the income by way of rent on leasing out properties mentioned in deed of trust for several purposes, the saving clause contained in Section 1 of the Indian Trust Act, excluding private religious and charitable endowment from the scope of the act, can not be extended to such a deed of trust.

6. Mr. Sabyasachi Bhattacharya, the learned Advocate for the opposite parties contended that in view of the saving clause of Section 1 of the Act, the Trust in question being a private religious endowment falls within the mischief of the saving clause and the learned Court rightly held that the application u/s 73 and 74 of the Act was not maintainable in the Court of principal Civil Judge of the District. To appreciate the rival contentions of the learned counsels it would be proper to look at the relevant provisions of the Act.

7. Section 1 of the Indian Trust Act says:

1. Short title and commencement.- This Act may be called "The Indian Trusts Act, 1882" and it shall come into force on the first day of March, 1882.

Local extent.- It extends to the whole of Indian except the State of Jammu and Kashmir, the Andaman and Nicobar Islands; but the Central Government, may, from time to time, by notification in the official Gazette, extend it to the Andaman and Nicobar Islands or to any part thereof.

Savings.- But nothing herein contained affects the rules of Mohammedan Law as to Waqf, or the mutual relations of the members of an undivided family as determined by customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the Second Chapter of this Act applies to trusts created before the said day.

8. u/s 73 principal Civil Court of original jurisdiction, on application of a trust, may appoint a new trustee. Under the provision of Section 73 of the Act. The power to remove trustee and appointment of new trustees is vested exclusively in the principal Civil Court of original jurisdiction.

9. u/s 74 Principal Civil Court of original Jurisdiction, on application of another beneficiary, a new trustee may be appointed.

10. Section 34 of the act says:

Right to apply to Court for opinion in management of trust property. - Any trustee, may without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed so far as regards his own responsibility, to have discharged his own responsibility, to have discharged his duties as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made.

11. In the case in hand it is admitted position that Rajani Kanta Nundun since diseased created the trust in question wherein he specifically mentioned the modalities of succession of the office of Shebiats. No outsider of the family was permitted to be included as Shebiats-cum-Trustees in future. No right to sale or mortgage the Trust property was also permitted specifically. Rajani Kanta Nundun, however, permitted the future Trustees-cum-Shebiats to realise rent from the Trust property in order to perform Sheva-Puja of the Deities, maintenance of the Trust property, paying salary to the priest, remuneration to the Trustees-cum-Shebiats and in case of any surplus, income would be spend for hospitality and charity for the benefit of needy people. The recitals of the deed in question altogether leads unmistakably to the conclusion that the Trust created by Rajani Kanta Nundun was a pure and simple private trust. In fact parties are not disputing over that issue. The learned Court also held that the trust in question is, in fact, a private trust.

12. There is no room of doubt that the petitioners being successor in the main line of succession of the creator of the trust, are beneficiaries and have right to apply for removal of Trustees-cum-Shebiats and appointment of new Trustees-cum-Shebiats on the ground of mismanagement of Trust property and mis-appropriation of the fund of the Trust property. The question is whether or not if any beneficiary wants to remove the Shebiats-cum-Trustees from the office of Shebiatship/Trustee and appoint a new Shebiats-cum-Trustees, the saving clause of Section 1 of the Act comes in the way?

13. The Section 73 and 74 and Section 1 of the Act is to be read with Section 34 of the Act. Until and unless provisions Section 34 is taken into consideration co-jointly with Section 73 and 74 of the Act, the spirit of the law will not be cleared. The Section 73 and 74 as well as Section 34 of the Act are couched with unambiguous language stating clearly that application for removal of a trustee from his office and appointment of a new Trustee in his place is to be filed in the principal Civil Court of original jurisdiction. The trust property in dispute is situated within the District of South 24 Parganas. The creator of the deed last resided there also. The District Judge of the District South 24 Parganas is the principal Civil Court with original jurisdiction. Therefore, application u/s 73, 74 or 34 is to be filed in the Court of District Judge, South 24 Parganas so far it relates to the disputed Trust property and in the matter of removal of a Trust and appointment of a new Trustee in his place.

14. I have already stated that the Trust in dispute is a private trust and that fact is not disputed. The learned Court also came to such a finding while passing the order impugned. The trust-in-question not being a public trust and not being a charitable trust in strict sense, an application u/s 73 and 74 of the Act is maintainable in the Court of principal Civil Judge or original jurisdiction of the District of South 24 Parganas.

15. In [Girish Chandra Kar and Another Vs. Kartick Chandra Banerjee](#), cited by the learned Counsel appeared on behalf of the petitioners, comes in aid in considering the legal position in this respect. The facts of the case although are not similar to that of the case in hand, the principle laid down therein squarely applies in this case. It was held by the Court that the saving clause contended in Section 1 of the Act excluding private religious and charitable endowment from the scope of the act can not be extended to a deed of trust which did not effect divestment of properties in favour of the Deities providing utilisation of the income by way of rent on leasing out property mentioned in the deed of trust for several purposes.

16. In [Khetan Industries Pvt. Ltd. and others Vs. Manju Ravindraprasad Khetan](#), it was held that the power to remove trustee and appointment of new trustee is vested exclusively in the principal Civil Court of original jurisdiction. In the trust deed in question the beneficiary are defined and ascertained individuals. There is a complete prohibition of sale or mortgage of the trust property. The creator of the trust in question permitted to realise rent from the trust property for some definite purposes mainly for Sheva-Puja of the Deities, maintaining of the trust property, payment of salary to the priest, payment of remuneration to the Trustees-cum-Shebiats and in case of surplus, to spend the income for charitable purposes. Therefore, the trust in question is purely a private trust not even partially charitable trust in strict sense. A beneficiary can maintain an application in the principal Civil Court of original jurisdiction of the District wherein the trust property is located for removal of Shebiats on the ground of mis-management of the trust property and mis-appropriation of the fund of the trust property of the trust.

17. The learned Court observed that the application u/s 73 and 74 of the Indian Trust Act filed by the petitioners has become a misnomer because the trust deed in question does not effect the mutual relationship of the members of a undivided family as determined by any customary or personal law. I do not find any reason for the learned Court to make such an observation. The learned Court as Additional District Judge of Alipore, South 24 Parganas obviously received the record from the Court of the District Judge i.e. the principal Civil Judge of original jurisdiction of the District wherein the petition was filed. Therefore, under the Act, the Additional District Judge is empowered to entertain and dispose of such an application filed by the petitioner.

18. In my humble estimate, the application filed by the present petitioner in the Court of principal Civil Judge of original jurisdiction of the District South 24 Parganas does not fall within the mischief of saving clause of Section 1 of the Indian Trust Act and as such, it is maintainable in that Court.

19. In the premises above, I allow the revision application and set aside the order under challenge.

20. The revision application is disposed of.

21. No order as to costs is passed.