

Basil Lang Vs. Moolji Karsonji and Bhagwan Revashankar

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Court : Mumbai

Decided On : Aug-12-1919

Reported in : (1919)21BOMLR1111

Judge : Marten, J.

Appeal No. : O.C.J. Suit No. 653 of 1897

Appellant : Basil Lang

Respondent : Moolji Karsonji and Bhagwan Revashankar

Judgement :

Marten, J.

1. This is a motion for the appointment of a new trustee in the place of a trustee who is alleged to be of unsound mind. The applicant is his co-trustee.
2. The trust is an old charitable trust of a public or religious nature created by the will of a Hindu lady who died in 1873. This suit was begun in the year 1897, and by orders or decrees of the 29th July 1898 and 11th April 1899 the validity of the trust was established: new trustees were appointed: the charity funds were lodged with the Accountant General to the account of this suit, and the income was directed to be paid to the new trustees.

3. In course of time, there have been certain changes of trustees, and for that purpose the parties have adopted a course which seems to me unnecessarily expensive, viz., of applying by motion in Court for the appointment of new trustees. It was said that this course was adopted, because liberty to apply was reserved. I do not find in the orders that any such liberty was in fact reserved to the applicant. Even if there was such liberty, it does not mean that you are obliged to apply in open Court. It means liberty to apply in accordance with the ordinary practice of the Court. Section 40 of the Indian Trustees Act 1866, expressly authorizes a petition; and Rule 75(z) of the Bombay High Court Rules provides for such a petition being heard in Chambers. I think, therefore, that applications for the appointment of new trustees should normally be made by petition or summons to be heard in Chambers. There is all the more reason for doing that in the present case, as the matter concerns the personal incapacity of one of the trustees, and such matters are, I think, more properly dealt with in Chambers.

4. It is no doubt true, as the applicant points out, that on two previous occasions in this suit, the appointment has been made by motion in Court. It would not, therefore, be fair on the present application to penalise the applicant for following these precedents. If, however, in future a further appointment should be necessary, then, if the application be once more made by motion instead of in Chambers, it will, I think, be a matter for the Judge hearing the application to consider whether the applicant should not be disallowed any extra costs thereby caused.

5. Turning next to the motion itself, counsel first contended that Section 92 of the Civil Procedure Code gave me the necessary jurisdiction. In my opinion, it does nothing of the sort. This suit of 1897 cannot be turned twenty-two years afterwards into a suit for the removal of a trustee, who was not even appointed till 1913. Nor is there any consent in writing of the Advocate General thereto.

6. The matter is far simpler than that. It is an ordinary application for the appointment of a new trustee in the place of a trustee who is no longer capable of acting in the trusts. I however, wished to be told under what particular section of the Indian Trustees Act or otherwise this application was being made. Care is, I

think, required over appointments of new trustees and vesting orders, and I think it would be a wise precaution if it were made obligatory to specify in the application itself the particular Act and section which are relied on, as indeed is the practice in England at any rate as regards vesting orders (see *In re Moss's Trusts* (1888) 37 Ch.D. 513 and R. S. C, Order 54 b, Rule 4 A). I was not, however, given the necessary information, and in consequence there have been at least two adjournments for that purpose. Section 6 of the Indian Trustees Act, 1886, was next relied on but that applies to vesting orders, and in the present case a vesting order is not required nor indeed is it asked for in the notice of motion.

7. Today I have been referred to Section 35 of the Indian Trustees Act 1866, which gives power to the Court to appoint a new trustee in all cases in which it shall be expedient to appoint a new trustee or new trustees, and it 'shall be found inexpedient difficult or impracticable so to do without the assistance of the Court.' This may be read with Section 6, which gives an express power to make a vesting order in the case of a lunatic trustee. Prima facie, therefore, Section 35 would appear to give the Court the necessary jurisdiction. Counsel was unable to refer me to any Indian authority on the point, but I think the careful judgment of Mr. Justice West in *In re Kahandas Narrandas* I.L.R(1881) 5 Bom. 154 has a distinct bearing on the present case. It disposes for one thing of a possible objection that having regard to Section 3, the Indian Trustees Act 1866 does not apply to a Hindu charitable trust such as I have to deal with. There, as here, the application was for the appointment of a new trustee of a Hindu charitable trust. It was objected that the Court had no jurisdiction on petition as opposed to a suit, as the case was not one to which English law was applicable within the meaning of Section 3 (see p. 170). That objection the learned Judge overruled. Further, I think it reasonably clear that he would have appointed a new trustee under Section 35, but for the fact that the trust instrument contained an express power for the respondent (the surviving trustee) to appoint a new trustee with the consent of the petitioner (settler), and that the respondent was willing to exercise such power. The petition was accordingly directed to be dismissed. It would, however, appear from the foot-note to the report that the parties subsequently agreed to the Advocate General nominating a new trustee, and that such nomination was embodied in the order eventually made.

8. The English authorities are only useful by analogy; but the analogy is rather close. Section 35 of the Indian Trustees Act, 1866, is practically the same as Section 32 of the English Trustee Act, 1850, and Section 25 of the English Trustee Act 1893. In *In re M.* (1899) 1 Ch. 79 Mr. Justice Stirling held that under the Acts of 1850 and 1862 and in cases where no vesting order was required, the Court of Chancery had power to appoint a new trustee in the place of one who had become a lunatic (see p. 83): and that the Chancery Division had still that power under the 1893 Act. As regards vesting orders, the law was different, but that depended partly on a consideration of the English Lunacy Acts; and since the above decision, the Lunacy Act 1911 has restored or given to the Chancery Division the necessary jurisdiction in several cases. The case does not therefore apply to India as regards vesting orders. But as regards the appointment of new trustees, it is useful as a decision in support of the jurisdiction under legislation very similar to the Indian legislation.

9. *In re Weston's Trusts* (1898) W.N. 151. (10) is a decision by the same Judge to the same effect. There, however, the trustee was suffering from heart disease, old age (eighty) and consequent impairment of mental faculties. The incapacity to act arose there-fore from physical and not from mental infirmity.

10. Under the above circumstances, I am of opinion that I have jurisdiction under the Indian Trustees Act, 1866, to appoint a new trustee in the present case. I need not, therefore, consider whether I have any general jurisdiction apart from that Act.

11. On the facts, I am satisfied that Harilal Narbheram owing to his mental condition is no longer capable of acting in the trusts, and that another trustee should be appointed in substitution for him. I think it unnecessary to direct any inquiry under Section 50 as to his state of mind, or to direct the medical evidence to be on oath and brought up to date. I think I may properly save the Charity that expense; but I hope that the medical certificate accepted in the present case will not be adopted as a precedent in any other case. Nor have I thought it essential in the present case to have the application served on Harilal Narbheram (see Memorandum as to Practice (1901) W.N. 85). I think, however, that the title of the application should be amended by being made in the matter of the Indian Trustees

Act 1866, in addition to the existing title.

12. In the result, there will be an order appointing Mr. Amratlal Bhagwani to be a trustee in substitution for Mr. Harilal Narbheram. The order should state in effect that Mr. Harilal is unable owing to his infirmity of mind to act further in the trusts. The order will then go on to appoint Mr. Amratlal Bhagwani to be a trustee in substitution for him, and to act jointly with the continuing trustee Mr. Bhagwan Rewashankar (the applicant). Then there will be an order directing the Accountant General to pay all arrears of income and future income to the new trustees until further order.

13. The costs are to come out of the estate, except that the costs of hearing are to be confined to the costs of one day's hearing only:

14. Draft order to be shown to me, before it is passed and entered.

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