

**State Vs. Man Singh and ors.**

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**Court :** Delhi

**Decided On :** Feb-15-1974

**Reported in :** ILR1972Delhi582; 1974RLR276

**Judge :** T.P.S. Chawla, J.

**Acts :** [Indian Trusts Act, 1882](#) - Sections 34 and 37; [Charitable and Religious Trusts Act, 1920](#) - Sections 7

**Appeal No. :** Suit No. 117 of 1973

**Appellant :** State

**Respondent :** Man Singh and ors.

**Advocate for Pet/Ap. :** Anoop Singh, Adv

**Judgement :**

**T.P.S. Chawla, J.**

(1) Many years ago there lived in Peshawar a man named Tara Chand Saraf. It appears that he had a Jeweller's business. He had no children. On 20th December 1927 he made a will and had it registered. The original will is lost, or at any rate is not now traceable or procurable. Mr. Partap Singh, one of the present trustees of the trust created by that will, has made a statement before me to that effect. He says that he went to Peshawar in 1964 and tried to locate the original will, but was

unsuccessful. He also says that he was informed that the records pertaining to the will in the office of the Sub-Registrar, Peshawar, had been burnt. I have no reason to disbelieve him. As secondary evidence a printed copy of the will has been proved by this gentleman and marked Ex. P-I. No other copy is available.

(2) The will is in Urdu. A transliteration has been placed on record which I will use for quotation. First of all there is a recital in which the testator says:

'WHEREAS by the grace of the Wahe-Guru (the Almighty) I am possessed of self-acquired property moveable and immoveable and whereas I have no issue and am desirous that no other persons should claim to be my relatives and raise disputes after my death, and whereas life is uncertain, I hereby make the following will to be acted upon after my death'.

THEN after revoking two previous wills, the testator describes five immovable properties owned by him. Under the head 'movable property' he refers to 'the entire cash as per the account books to be found at the shop or the jewellery mortgaged or the amounts owing to us on pronotes, hundies, mortgage-deeds or bonds'. He proceeds to name a committee of six trustees to manage and supervise his estate. He exhorts them to act according to his wishes recorded thereafter.

(3) Next the testator devises some of his immovable properties and makes certain bequests. He continues :

'THE shop together with the Bala Khana situate in Bazar Karimpura should be maintained as such for charitable purposes by the appointed trustees and the rent recovered should be included in the income. The entire movable property aforesaid is dedicated for charitable purposes by me. An amount of Rs. 50,000.00 should be taken out of it and a building be constructed at Hardwar therewith, which should bear my name and the words 'Tara Chand Saraf Arorbans Peshawari Musafir Khana. This building should have two portions: one for Guru Granth Sahib and the other for Idols of Krishan Maharaj and Radhika for which a Granthi Singh and a Pujari should be employed separately. The pilgrims from Peshawar who come there should be allowed to stay without being charged rent, and with a view

to maintaining this place for over a sum of Rs. 50,000.00 should be kept apart and the income therefrom should be spent exclusively on the same. Such amount as remains after paying the salaries of the sewadars and meeting the cost of repairs and other necessary expenses should be used for a daily langar' where every person is provided free meals without any discrimination. Outside Asa Mai Gate, Peshawar city, there is a building of a Gurdwara. I have a desire to construct the same. If it remains unconstructed during my life-time it should be constructed and a board with the words 'Tehal Karai Tara Chand Saraf Yaadgar Apni Pushtaine' should be affixed thereon.'

At this stage a few specific bequests are made, and in conclusion the testator enjoins :

'WHATEVER amount out of the income from my property movable and immovable remains after accomplishing the aforesaid objects should be spent on the construction of a hospital for women on the ground floor of the Dharamsala of Bhai Beeba Singh where treatment should be provided to Hindu and Sikh women. Medicines should be supplied free of charge. The amount required for the construction of the building of the hospital should be taken out of my funds meant for charitable purposes. If the income permits it should be expended on the education of women, girls school, and providing assistance of widows. The hospital should be named 'The Tara Chand Saraf Hospital for Women'.'

(4) In 1934 the testator died in Peshawar. None of the original trustees survive. Six other persons are presently functioning as such. They have moved a petition under sections 34 and 37 of the Indian Trusts Act 1882. The trust now owns two immovable properties in Amritsar, the particulars of which are given in paragraph 6 of the petition. How and when they were acquired by the trust is not clarified. An aggregate sum of Rs. 3,477,982.3 lying in accounts with various banks, of which the details are set out in Schedule A to the petition, also belongs to the trust. Thus, in all the trust property in the hands of the trustees is worth approximately Rs. 5 lacs. In para 10 of their petition, the trustees say, that at a meeting held on 16th November, 1972 they unanimously resolved that the immovable properties belonging to the trust be sold and the entire amount at the disposal of the trust be

spent for useful purposes. They add that 'after the disposal of the entire trust property, the trust may be wound up'-a statement which is repeated in para 11. A copy of their resolution is annexed to the petition as Schedule B. It records the decision of the trustees that after obtaining permission from the High Court the entire trust fund be utilised for-

'BUILDING a Marriage Hall and a house on the land allotted to Akali Baba Phoola Singh Educational Society, Pusa Road, New Delhi'.

ALTHOUGH the resolution does not say more, in para 12 of the petition the trustees elucidate that

'THE basement may be used as store-house, the ground floor as Marriage Hall and house and the upper storey as a school for children'.

Accordingly, trustees now pray for permission to sell the immovable properties at Amritsar owned by the trust and for directions that the trust property may be administered by spending the entire trust fund in the manner resolved by the trustees. And, the question is whether I should give the permission and the directions sought.

(5) In my opinion, the trustees are justified in taking the view, stated in para 11 of the petition, that the testator's wish that a musafir khana be built at Hardwar is not feasible at the present time within the financial limits imposed by the will. It will be unrealistic, current costs being what they are, to attempt to construct a building of worthwhile dimensions in the allotted sum of Rs. 50,000.00. The income of another Rs. 50,000.00 set apart for the maintenance of the musafir khana would be wholly inadequate; especially as a Granthi and a Pujari separately would have to be employed and paid salaries. In addition there would probably have to be a manager-cum-accountant and perhaps also a chowkidar. That, I imagine, is the very least that would need to be done. I doubt if the income from Rs. 50,000.00 invested in trustee securities would be enough even to pay the salaries of the employees, let alone other expenses necessary for the upkeep of such an institution. No other substantial source of income can be visualised for it. Supposing rent were charged from pilgrims coming from places other than

Peshawar, it would still have to be nominal. Taking all these aspects into account and the existing conditions, I agree with the trustees that a musafir khana as envisaged by the testator is not a practicable proposition. Probably they are also right in thinking that there are already more than enough Dharmshalas in Hardwar.

(6) The other wish of the testator that the Commissariat Gurdwara Peshawar be reconstructed is not capable of fulfillment by the trustees. That city is now part of a foreign state. It is exceedingly unlikely that the trustees would be able to obtain permission to reconstruct the Gurdwara, assuming it still exists, or to supervise its reconstruction even if they did. I need say no more as regards this matter.

(7) On the first occasion when counsel for the trustees addressed me, I put it to him that in the circumstances of this case the doctrine of cy-pres would apply. He took time to study the point. Having done so he agreed that it would. Thereafter some oral evidence was led. Apart from proving the will, Mr. Partap Singh affirmed that a hospital had been constructed in Peshawar as mentioned in paragraph 6 of the petition. He explained that the moneys belonging to the trust which are lying in the accounts with various banks were transferred from the branches of those banks in Peshawar.

(8) Another gentleman, Mr. Harnam Singh, General Secretary of the Akali Baba Phoola Singh Society, told me that this society runs a school and has other educational activities. Presently it is running a Higher Secondary School. This is a mixed school, having 484 pupils, to which girls and boys of all communities are admitted. Mr. Harnam Singh said that this school did not have a large hall or enough space for a laboratory and was generally short of accommodation. In consequence many children seeking admission could not be admitted. He confirmed that the Government had allotted a plot of land to the school at a place near Pusa Road, Rajinder Nagar, New Delhi. and that the trustees of the Tara Chand Saraf Trust had approached his society with a proposal that the funds belonging to the trust be utilised for educational purposes. A copy of a resolution passed by the Managing Committee of the society at a meeting held on 2nd November, 1972 was proved as Ex. Public Witness 2/2. It shows that the society has agreed to the proposal of the trust.

(9) Counsel for the trustees contended that there was no reason why the scheme proposed by the trustees should not be endorsed by the Court. When I pointed out to him that the construction of a Marriage Hall and a house were not the charitable objects specified by the testator, he made a statement on 11th December, 1973 that the building proposed to be constructed in association with the Akali Baba Phoola Singh Society would be used solely for educational purposes and no part of it would be let out or used as a Marriage Hall. He then argued that as the education of women was one of the charitable objects mentioned in the will, the scheme ought to be approved. After reserving judgment, I have found it necessary to look further into the law. My conclusion is that, notwithstanding the assurance given by counsel for the trustees, there are weighty reasons why the scheme must be rejected.

(10) A public charity is perpetual. To it the rule against perpetuities does not apply. It can never die though its nature may be changed: see *Re Faraker*. *Faraker v. Durell* (1912) 2 Ch. 488 and *Halsbury's Laws of England* (3rd edition) Volume 4 pages 210, 286 and 300 (1). If the scheme of the trustees were accepted the charity would be wound up. There is no such process known to law in respect of a public charity. Sections 77, 78 and 79 of the Trusts Act visualise the extinction of a trust in certain eventualities. None of them are shown to exist, even assuming that that Act applies a point to which I will revert a little later. On this simple ground I would be bound to reject the scheme in order to save the charity from being destroyed. In legal theory the court is the guardian of a charity as it is of an infant: see *Halsbury (ib.)* pages 212 and 247. Assenting to the scheme would be notional infanticide.

(11) Otherwise, too, the scheme cannot be upheld if the rule of cy-pres is to have proper effect. Cy-pres means 'near to it'. The application of the doctrine to public charities is explained in *Halsbury (ib.)* at page 317, as follows :

'WHEREA clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, can not be executed, but the law will substitute another mode cy-pres, that is, as near as possible to the mode specified by the donor'.

In the same paragraph it is said:

'WHERE the donor has in fact prescribed a particular mode of application and that mode is incapable of being performed but the donor had a charitable intention which transcended the particular mode of application prescribed, the Court in the exercise of this jurisdiction can carry out the charitable intention as though the particular direction had not been expressed at all'.

There is no doubt that the testator had a general charitable intention which transcended the particular modes of application which he prescribed. Everything in the will points towards it not excluding the recital that he has no children. Such a recital was regarded as indicative of an intention to donate to the public in *Deoki Nandan v. Murlidhar and others*, : [1956]1SCR756 . I would draw the same inference here.

(12) Understandably, the primary rule to be observed in the application of the doctrine of cy-pres is that the intention of the donor must be observed as far as possible : see *Ameena Bee Bee v. Mariam Bee Bee and others*, A.I.R. 1939 Ran 347 and *Halsbury's Laws of England*, (3rd edition) Volume 4, page 318 (3). However, if the particular mode of application specified by the donor is impracticable, illegal, impossible of accomplishment, or inexpedient in the changed circumstances the charitable intention is executed cy-pres : see *Halsbury* (ib.) pages 275, 280, 286, 320 and 322. A very full and useful discussion of the doctrine is found in the matter of *Hormusji Framji Warden (deceased) Hirjibhai Bomanji Warden and Another (Petitioners)* I.L.R. 32 Bom 214. That case shows how much the working of the principle is conditioned by the facts. There, moneys donated by a testator for erecting a Hall for the use of Parsis, but found inadequate for that purpose, were directed to be utilised cy-pres for the construction of an Operation Theatre in the Parsi General Hospital. Many common features are discernible between that case and this. Since the doctrine of cy-pres originated in equity it has a wide sweep and is applied liberally, though, of course there are limits within which it is confined : see *Abdul Rauf v. Shamshulkaq and others*, : AIR1969 All35 , *Re Baron Burton's Charity, Queen Anne's Bounty v. Attorney-General* (1938) 3 A.E.R. 90 and *Commercial Union Assurance Co., Ltd.*

v. Central British Fund For Jewish Relief and Rehabilitation and Others (1957) 1 A.E.R. 513. Not only is the doctrine resorted to for the initial application of the fund given to charity, but also for applying any surplus of capital or income or subsequent increases thereof: see Halsbury (ib.) pages 318 and 323. The rule of cy-pres is in harmony with the teachings of the Hindu Shastras and has been applied to charitable gifts by Hindus: see Muthukrishna Naicken v. Ram chandra Naicken and others, A.I.R. 1919 Mad 659.

(13) Applying these principles I have to consider what ought to be done with the funds in the hands of the trustees. I have already held that the construction of a Dharamsala in Hardwar and the reconstruction of the Gurdwara in Peshawar are impracticable. Consequently, the next object of charity must succeed. According to the trustees a hospital for women was constructed in Peshawar and hence that charitable object in the testator's will has been fulfilled. It was there urged on their behalf, that the funds ought now to be applied to the next named object of charity, that is, the education of women. Strictly, the school run by the Society is not exclusively a girls school and therefore does not qualify at all. However, I will not give too much importance to that. But, in his will the testator is emphatic that his estate is to be utilised for the education of women and the assistance of widows if, but only if, any surplus remains after a hospital for women is fully provided for. Clearly, that is the prime residuary charity he had in mind. His second and third preferences were the ones which follow. I am bound to give effect to the testator's choice. So are the trustees. They cannot reverse the order neither by a scheme nor otherwise.

(14) I have only the word of the trustees that a hospital for women was established in Peshawar. No other evidence has been placed before me. Taking that to be true, the funds in their hands must still be applied in the very same way that they would have been when first giving effect to the will. Only the time of implementation has been altered, not the contents of the will. It pre-supposes that the trustees will be maintaining a hospital before they launch any educational projects for women. Admittedly, the trustees are not at present maintaining any hospital. The one in Peshawar, if there were such a one, is financed by others. Whether the trust properly in the hands of the trustees be treated as capital or

income, or whether it be the surplus of either or a subsequent increase, the result is the same. They are bound to apply it as if giving effect to the testator's wishes ab initio. Of which the Corollary is that it must be used for a hospital.

(15) I was told by counsel for the trustees that despite efforts to persuade the authorities of some existing hospitals in Delhi to utilise the trust fund in conformity with the wishes of the testator, no satisfactory arrangement could be made. No evidence in proof of this was put before me. I realise that a fullfledged hospital cannot be either constructed or maintained in the limited funds available with the trustees. Pursuant to the principle of cy-pres the trustees must then do that which is as near as possible to the intention of the testator. I should have thought the obvious solution is for them to arrange with an existing hospital in Delhi for the setting up of a ward or unit reserved for the treatment of women. Such a ward or unit could be named after the testator as he desired. And, it would be as close to his wishes as can be achieved with the finances available. That is what I would advise the trustees to do.

(16) Searching for the law on my own, has revealed other kpal aspects requiring consideration' Section 34 of the Indian Trusts Act 18S2 enables the trustees, on a petition moved for the purpose, to obtain the 'opinion, advice or a direction' of a Court 'on any present question respecting the management of administration of the trust property.' But, section I of that Act states that:

'.....NOTHINGherein contained..... applies to public or private religious or charitable endowments,.....'

THEdistinction between a private and public trust has been explained in Deoki Nandan v. Murlidhar and others, : [1956]1SCR756 and in Halsbwy (ib.) at pages 209 and 228. Briefly, in the case of the former the beneficiaries are specific individuals: in the latter they are the public in general or an appreciable class thereof. Public benefit is the overriding test. Without a doubt the trust constituted by the testator is of a public nature as all the specified charities are for the benefit of the community or an appreciable part of it. This ousts the Trusts Act, and also section 34. However, the petition filed by the trustees would be maintainable under a different Act. The Charitable and Religious Trusts Act 1920. Under section 7 of

that Act the trustees 'of an express or constructive trust created or existing for public purpose of a charitable or religious nature' may apply by a petition to the court for its 'opinion, advice or direction' respecting any question affecting the management or administration of the trust property. Thus there is a provision under which the petition would lie. I have entertained it under that provision as I am not willing to reject it on a mere technical ground, especially as the public interest is involved. Nor do I think it necessary, in the circumstances of the present case, that the trustees be driven to institute a suit under section 92 of the Code of Civil Procedure 1908. When there is no contest and no order is sought which can be had only in a suit under that section of the Code, the more appropriate procedure is for the trustees to proceed under section 7 of the Charitable and Religious Trusts Act 1920: see *Rameswardas Birla & Others v. Advocate General of West Bengal*, 99 C.L.J. 161 (10).

(17) Two other Statutes are germane to the matter. First, there is The Official Trustees Act 1913. According to section 7(1) of that Act the Official Trustee 'may, if he thinks fit,-

(A)act as an ordinary trustee;

(B)be appointed trustee by a court of competent jurisdiction'.

He may decline to accept any trust, either absolutely or except on such conditions as he may impose : see section 7(3). Procedures are provided by the Act for vesting trust property in the Official Trustee. If there be no trustee 'willing or capable to act in the trust' within the jurisdiction of the High Court, that Court may on application make an order for the appointment of the Official Trustee with his consent: see section 10(i). By whom the application is to be made is not indicated. Presumably, it can be made by the trustees, beneficiaries or the Official Trustee. Alternatively, if all the existing trustees and beneficiaries are desirous that the Official Trustee be appointed in the room of such trustees they may so appoint him by an instrument in writing with his consent: -see section 11. Whichever procedure be adopted, the Official Trustee holds the trust property on the same trusts as before: see sections 10(2) and 11(2). In the case before me the unanimous decision of the trustees to wind up the trust evinces their disinclination to act in the

trust. I would suggest to them that they either appoint the Official Trustee in their stead by an instrument in writing or make an application under section 10 for him to be so appointed. The jurisdiction which I am exercising is merely advisory and the trustees are not bound to act upon my advice: see in re. Muhammad Hashim Gazdar and others, A.I.R. 1945 Sind 81; (Maulvi) Abdul Rab v. Hakim Mohammad Hasan Khan, : AIR1936 All801 and Official Trustee, West Bengal and others v. Sachindra Nath Chatterjee and another, : [1969]3SCR92 . For this reason I think it is appropriate that a copy of this order be sent to the Official Trustee to enable him to decide whether he would wish to move under section 10.

(18) Secondly, there is the Charitable Endowments Act 1890. Its purpose as stated in the Objects and Reasons is to provide in India an official capable of discharging the functions which are discharged in England by the Official Trustee of Charity Lands and the Official Trustees of Charitable Funds. The Act is of a purely permissive character. Under it an officer of the Government is appointed to be Treasurer of Charitable Endowments. The Treasurer functions as a bare trustee and must not act in the administration of any trust of which any property is vested in him under the Act: see section 51). He must permit the persons acting in the administration of the trust to have the possession, management and control of the property and the application of its income, as if the property had been vested in them: see section 8(3). On an application made under section 6 of the Act by the majority of the trustees, the appropriate Government may under section 4, if it thinks fit, order that the trust property be vested in the Treasurer of Charitable Endowments on such terms as to the application of the property or the income thereof as may be agreed on between the appropriate Government and the applicants. Thereupon, the property vests in the Treasurer accordingly. With the concurrence of the applicants a scheme may be settled for the administration of any property which has been or is to be vested in the Treasurer, and in such a scheme a person or persons, not being or including the Treasurer, may be appointed, to administer the property: see section 5(1). In the settlement of such a scheme, section 5(5) directs that:

'EFFECT shall be given to the wishes of the author of the Trust so far as they can be ascertained, and, in the opinion of the appropriate Government, effect can

reasonably be given to them'.

SCHEMES can be directed by the Courts in England in certain circumstances; in particular, if the trustees refuse to act: see Halsbury (ib.) pages 309, 310 and 328. But, the Act here in force gives no similar power. The most that I can do is to suggest to the trustees, as a further alternative, that they take advantage of the provisions of The Charitable Endowments Act 1890 and settle a scheme which gives nearest effect to the testator's will.

(19) That concludes all the advice that I am able to offer to the trustees. Permission to sell the immovable properties at Amritsar was sought Under section 37 of the Trusts Act. I have already held that Act to be inapplicable. Even if it applied, that section confers power, not on the Court, but only the trustees. No other provision was referred to under which the permission sought could be granted. For the time being, assuming there were a such provision, I would decline to grant it.

(20) It is not comforting to know that trust property meant for a public charity has not been so used for a score of years or more. The Trustees have vouchsafed me no information as to what they have so far done to carry out the testator's wishes. In Delhi the functions of the Advocate General under section 92 of the Code of Civil Procedure are performed by the Collector. It is his duty to safeguard public charities. I think a copy of this order ought to be sent to the Collector so that he can take such steps, if any, as he thinks necessary for the due administration of the trust.

(21) As to costs, the trustees have acted quite rightly in seeking the opinion of the Court. They will be entitled to recoup the costs of this petition out of the trust funds.

(22) Let copies of this order be sent to the Official Trustee and the Collector, Delhi.