

A. Swaminathan and ors. Vs. the Official Trustee of Madras and ors.

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Court : Chennai

Decided On : Nov-07-1991

Reported in : (1992)1MLJ518

Appellant : A. Swaminathan and ors.

Respondent : The Official Trustee of Madras and ors.

Judgement :

ORDER

Abdul Hadi, J.

1. These two original side appeals arise out of the order dated 11.7.1986 in Application No. 5441 of 1985 in C.S.No.88 of 1970 on the file of this Court. O.S.A. No. 6.211 of 1986 is by the applicants therein against the dismissal of the said application and O.S.A.No.262 of 1986 is by the 1st respondent-Official Trustee therein. This latter appeal is only against the disallowance of cost, while dismissing the abovesaid application (hereafter the term 'appellants' would refer to the appellants in O.S.A. No. 211 of 1986).

2. The abovesaid application is for appropriate directions to apportion the suit trust properties between the private beneficiaries and public charities as per their respective shares.

3. The suit trust was founded on 30.6.1956 by one Vavilla Subbamma by dedicating large properties inherited from her husband, which mainly included printing and publishing business, under a deed of trust of the same date. (Her husband died on 9.2.1956 issueless leaving only herself). According to the said trust deed, the said inherited properties became her absolute properties under Hindu Succession Act. The relevant terms of the said trust deed may be stated briefly as follows:-The said founder Vavilla Subbamma is the first sole trustee for life. She also reserved for herself, the power to nominate her successors as trustees. 45% of the income from the trust properties are to be spent for certain specified public charities, mainly educational in nature. The balance income shall be divided into 9 equal shares and out of which 2 shares are to be taken by the founder herself. The remaining 7 shares will go to 7 specified beneficiaries for their respective lives. The beneficiaries are: (1) K. Viswantha, (2) K. Gnanambal, wife of K. Ramanathan (3rd respondent in the present application) (3) A. Subramanyam (His sons are applicants 1 to 4 in the present application) (4) A. Kanakavalliamma (2nd respondent in the present application and mother of applicants 5 to 9) (5) C. Vedagirirama Sastry (6) G Seetharama Sastry (4th respondent in the present application) and (7) K. Chandramouleeswara Sastry. The said share of each of them shall revert to the trust after their respective lives. The founder shall have full liberty to make dispositions in regard to her abovesaid 2 shares.

4. By Will dated 10.9.1958, the founder appointed her near relation B.Y. Narayanayya as the trustee to administer the trust after her death and gave him one of her abovesaid two shares as remuneration for his services. She bequeathed her other share for certain other public charities. She died on 12.9.1958 and then, the abovesaid Narayanayya took up the management of the trust.

5. But, since he was mismanaging, he was removed by this Court by its judgment and decree dated 30.11.1972 in the abovesaid C.S. No. 88 of 1970, filed by the two abovesaid beneficiaries, Subramanyam and Kanagavalli of the trust. By the same judgment, this Court appointed the Official Trustee of Madras to manage the trust and he took charge on 8.12.1972 and continues to be in management.

6. In O.S.No.87 of 1974, the same Subramanyam and applicants 5 to 9 herein daughters of the above said Kanagavalli took out originating summons for the interpretation of the deed of trust and the subsequent Will executed by the founder. The Official Trustee contended in that suit that as per the deed of trust, the allotment of 7/9th shares out of 55% of the income of the trust to the seven named beneficiaries was only for the period of their lives and that the said 7/9th share shall revert to the trust on their death and that hence the plaintiffs in O.S.No.87 of 1974, as the heirs of the original beneficiaries mentioned in the deed of trust, had no beneficial interest in the trust.

7. Though this contention was upheld by the trial Court, in appeal therefrom, in O.S.A.No.110 of 1977, a Bench of this Court has held as follows: The trust is a composite one, that is, a public trust in favour of charities and a private trust in favour of the abovesaid seven specified individuals and the founder. Inasmuch as the founder did not make any provision as regards the abovesaid seven shares after the life time of those 7 persons, there is resulting trust in favour of the heirs of the founder. As regards the two shares, which the founder had reserved absolutely to herself, one was given to the abovesaid Narayanayya as remuneration to him. But, since he was removed as stated above, the said share also would be a resulting trust in favour of the heirs of the founder. In respect of the other share of the founder, it will go to the other charity specifically mentioned in the Will. Thus, in O.S.A.No.110 of 1977, the learned Judges concluded that the abovesaid 45% and 1/9th of the remaining 55% of the trust would be utilised for the specified charitable purposes mentioned and that in respect of the remaining 8/9th of 55% there was a resulting trust in favour of the heirs of the founder.

8. Now, in the present application, the applicants (who claim to be heirs of their paternal grandmother A. Saradambamma, sister of the abovesaid Venkateswara Sastrulu and the heirs of the abovesaid Subbamma) have raised several allegations of mismanagement of the trust by the Official Trustee which are briefly as follows : Some of the trust properties had been sold away by the Official Trustee; an extent of 79.62 acres of agricultural lands had been leased out at a nominal rent of Rs. 40 per mensem per acre; there are heavy arrears of rent in respect of the said landed properties, which are allowed to be time barred; the

shares of the income due to the applicants have not been paid all these years. The Official Trustee has not performed any of the public charities so far. The Official Trustee wanted to sell away the abovesaid business of printing and publishing concern of the trust. But, at the instance of the beneficiaries, this Court, has directed lease of the business to some of the beneficiaries (2nd appellant and Alladi Subramanyam) on a monthly rent of Rs. 1,250 and they are running the said business. The interest of the applicants, who are the beneficiaries entitled to the 8/9th out of 55% of the income is seriously jeopardised. Therefore, it is prayed that the properties may be apportioned in the proportion in which the income has to be divided between the private beneficiaries and the public charities.

9. Though the actual prayer in the application is for apportionment only, the learned Counsel for the appellants submits that it implies that after such apportionment, the properties allowed to private trust should be handed over to the applicants for their enjoyment as per the trust deed.

10. The Official Trustee resisted the application, though he did not in his report specifically deny the various allegations of mismanagement made against him. He only states in his report that those allegations are not admitted and are also not relevant for the purpose of the application. He also maintained that the corpus of the properties could not be divided as prayed for and only the income thereof should be divided as per the terms of the trust.

11. The learned trial Judge concurred with the contention of the Official Trustee that the deed of trust contemplated division of profits only and not division of properties. He relied on the following passage in paragraph 11 of the deed of trust:

The entire properties set out in Schedule 'A' hereunder shall vest in the Trustees. They shall keep and preserve them in tact and in sound condition and good repair.

The learned trial Judge felt that if the properties were apportioned as prayed for, the properties could not be kept in tact as envisaged in the abovesaid passage since the applicants, by consensus, might dispose of the properties apportioned to the private trust and share the sale proceeds among themselves. Therefore, the trial Judge dismissed the application, though observing that if the applicants were

aggrieved with the administration of the trust by the Official Trustee, they could move this Court for suitable directions and they could also file a suit under Section 92, C.P.C. for necessary relief. The learned trial Judge did not go in to the specific allegations of mismanagement levelled against the Official Trustee.

12. Aggrieved by the said order, O.S.A.No.211 of 1986 has been preferred by the applicants. The learned Counsel for the appellants submitted that in view of the abovesaid several acts of mismanagement by the Official Trustee and the resultant deterioration of the trust properties and the fact that not even a single pie had been paid so far by the Official Trustee to the applicants, towards the abovesaid 8/9th of 55% of the income, there was no other alternative except to seek for the abovesaid apportionment, particularly in the light of the abovesaid judgment in O.S. ANo.110 of 1977.

13. He particularly pointed out the following passages in the judgment in O.S.ANo.110 of 1977:

In our opinion, this is a clear case where the founder has particularly prescribed the percentage of the fund to be spent on certain specified charities and also the percentage to be spent on specified non-charitable objects. We are therefore in agreement with the opinion expressed by Palaniswamy, J. in C.S. No. 35 of 1962 (Subramanyam v. Yegnanarayanaiah : (1971)1MLJ46 that the trust deed is a composite one containing within its ambit a public as well as a private trust....Mr. Damodara Rao heavily relied on the provisions in paragraph 23, as has been done by the learned Judge, that after the life time of the seven specified individuals the seven shares should revert to the trust and also the further provision that if Vavilla Subbamma did not dispose of her 2 shares the said 2 shares should also revert to the trust. In our opinion, the said provision would not in any manner affect the interpretation we have placed upon the trust deed when once we come to the conclusion that the trust is a composite trust, a public trust in favour of charities and a private trust in favour of certain specified individuals including the founder it would not be possible to construe from the said provision that the said shares would revert only to the public trust....Consequently, inasmuch as we have found that there is a resulting trust in respect of 8/9 shares out of the 55% of the trust

property in favour of the heirs of the founder, the plaintiffs-appellants will be entitled to the same.

The learned Counsel stressed the expression 'will be entitled to the same' in the abovesaid passage.

14. The learned Counsel has also relied on the decision in *Sridhar Jew v. Manindra* : AIR1941 Cal272 where Amir Ali J. has held that where immovable property is vested in trust for the purpose of maintaining the properties and to pay out 'X' a year to a named person or to the heirs, it is open either to the said person or to the heirs to seek an order either separating the properties by metes and bounds or by sale and division.

15. He has also submitted that the apprehension of the learned trial Judge that if the properties are divided as prayed for, the properties apportioned to the private trust would be disposed of by those private beneficiaries violating the intention of the founder, is not well founded, that even after such apportionment, the properties allotted to the private beneficiaries would be only trust properties and would be governed by the law of private trusts and that the Court would still have control over them and particularly to see that they are managed in accordance with the terms of the trust.

16. The learned Counsel has also pointed out that according to Section 7(5) of the Official Trustees Act, the Official Trustee shall not accept any trust which involves the management or carrying on of any business. But, one of the main properties of the trust is the above referred to business of printing and publishing. That has also been entrusted to him by the above referred to order dated 20.11.1972 in C.S.No.88 of 1970 and the Official Trustee had also taken charge of the said business along with the other properties on and from 18.11.1972. As stated above, the Official Trustee subsequently wanted to sell away the said business of printing and publishing. But, at the instance of the abovesaid beneficiaries A. Subramanyam and Kanagavalli, this court in O.S.A.No.50 of 1978, directed the lease of the said business as stated above.

17. The learned Counsel also relied on *Khaw Joo Jeang v. Khaw Joo Chye* A.I.R. 1942 P.C. 28 where it has been held that whenever there is a trust to make annual payments out of the income of the property and the income is larger than required for the purpose, the court will sanction the setting aside and retention of the so much of the corpus of the property as will be sufficient by its income to meet the annual payments in every contingency that is reasonably possible and will permit the distribution of the rest of the corpus among the persons, who, subject to the payment of the annual sums, are absolutely entitled to it. The Privy Council also held that the abovesaid course could be adopted when the total amount of the sums payable out of the income is known or the maximum amount that could ever be so payable, could be ascertained with some degree of certainty.

18. The learned Counsel also relied on *Muffakham Jah v. Mir Barkat Ali Khan* : AIR 1989 AP68 where it has been held that the provisions of Sections 34, 11, 56 and 78 of the Trust Act make it abundantly clear that the trust deed need not be retained in its original form and it can be varied, modified, revoked or dissolved, subject to the conditions mentioned therein, viz., that all the beneficiaries who are competent to contract consent for such procedure. The Court further observed as follows:

In the present case, the petitioners have established that if the trust is dissolved all the beneficiaries including the ultimate beneficiary namely, the 1st respondent would stand to gain. The beneficiaries other than the first respondent who are now getting a monthly allowance ranging from Rs. 50 to Rs. 450 would get a lump sum amount which if invested in other securities would yield more income. This arrangement will reduce the tax burden of the beneficiaries. If the trust is to continue the corpus would get depleted every year with the result that the ultimate beneficiary who has to receive the remaining corpus in 2000 A.D. stands to disadvantage. We have given our serious thought to this matter and in our considered opinion the arrangement pleaded by the petitioners to dissolve the trust and distribute the corpus in the manner suggested by them is in the best interests of all the beneficiaries and we advise them to do accordingly.

19. The learned Counsel for the appellants submitted that for seeking this relief, there need not be a separate suit under Section 92, C.P.C. since provision is made in the trust deed itself for the removal of the trustee and appointment of a new trustee. In this connection, he drew our attention to *Gulam Rasool v. Bijili Sahib* : AIR1965 Mad404 , where it has been held that if in a suit for settling a scheme, provision is made in the scheme decree for the removal of a trustee and appointing a new trustee, there can be no war rant for the contention that an application is not competent and the only remedy is by way of separate suit under Section 92, C.P.C: This Court has pointed out further therein that the clause relating to the removal of the trustees in the scheme decree would amount only to modification of the scheme and there is no reason why the modification could not be obtained by means of an application.

20. On the other hand, the learned Counsel for the Official Trustee maintained the stand he took before the learned trial Judge, though he admitted that he could not carry on business of the abovesaid printing and publishing in view of Section 7(5) of the abovesaid Act. No doubt at one stage, the Official Trustee himself argued when he strangely took a different stand from his counsel on himself carrying on the said printing and publishing business. At any rate the learned Counsel for the Official Trustee did not cite any decision contrary to the abovesaid decisions cited by the learned Counsel for the appellants.

21. We have carefully considered the rival submissions.. One thing that strikes us initially is that as against the several serious allegations of mismanagement made in the affidavit in support of the application, it is strange that in his report, the Official Trustee has only stated as follows:

With regard to the allegations in the applicant's affidavit against the administrations of the Estate by the respondent, it is enough to state that they are not admitted. Those allegations are also not relevant for the purpose of this application.

22. Schedule A to the trust deed contains several properties of the trust. One item therein, viz., item No. 3 no doubt is said to have been sold already. Of the remaining, there appear to be 4 house properties in Madras. Those properties apart, there are landed properties in Ariyalur village, Saidapet Taluk to the extent

of 79-62 acres, which are said to be the subject matter of land ceiling proceeding which is said to be still pending. Even with reference to the said land ceiling proceeding, the learned Counsel for the appellant submitted that in view of the lack of attention shown by the Official Trustee, there is the apprehension that the trust would lose a major part of the said properties to the Government and that in the said proceeding too, it is only the applicants who are taking interest in safeguarding the properties from the clutches of the ceiling law.

23. No doubt, as also pointed out by the learned trial Judge, according to the trust deed, the entire properties of the trust shall vest in the trustees and they shall keep and preserve them in tact. But in the interest of the trust, the sale of certain properties of the trust has been upheld by this Court, it having granted sanction for the said sale. Likewise in the interest of the trust, which is a composite one, as has been held by the Division bench in the above said O.S.A. No. 110 of 1977, if the trust properties are apportioned between the public and private trust for a better management, it will not be anything wrong or impermissible in law, particularly in the light of the principles laid down in the above referred to decisions. Only with a view to 'keep and preserve' the properties 'in tact and sound condition and good repair', the abovesaid apportionment is thought of.

24. At any rate, the abovesaid properties of the trust given in schedule A therein must be very valuable properties and it is strange that so far the Official Trustee could not disburse any amount to the applicants towards their abovesaid 8/9th of 55% of the income. The allegation of the appellants as found in their supporting affidavit is 'They have not been paying anything towards their shares in the income from the very inception and constitution of the trust 29 years ago. As the trust properties are being sold one after one and as the rents have not been fully and properly collected, it is no longer in their interest or benefit that the Official Trustee of Madras manages and administers the trust properties perttainable to their shares'. To this allegation also, there is no specific denial. A somewhat similar situation arose in the abovesaid Muffakham Jah v. Mir Barkat Ali Khan : AIR 1989 AP68 and we feel in such a situation, the principles laid down there could be applied in the present case also. One other allegation in the supporting affidavit, to which also there is no specific denial, is that 'even after the Official Trustees of

Madras assumed the management in 1972, not a single public charity has been performed until now.'

25. Clause 10 of the trust deed says that if for any reason the trustees do not carry on the business smoothly and efficiently in the interest of the trust then the said trust shall vest in the Official Trustees of Madras, who shall manage and administer the said trust in accordance with the provisions of the said trust deed, it being the dominant intention of the founder and that in no event should the trust fail and the aforesaid printing and publishing work be suspended. So, the said clause gives importance to the carrying on of the abovesaid printing and publishing business and the trust deed contemplates that if that business cannot be carried on smoothly and efficiently, there can be change of trustees.

26. In the above circumstances, we think it will be fair if the apportionment sought for is granted, so, that the abovesaid composite trust is divided into public trust and the abovesaid resulting trust and the Official Trustees hands over to a body of trustees (to be constituted by this Court as envisaged below) for the benefit of the heirs of the founder of the trust, the abovesaid 8/9th of 55% of the entire trust properties available now for management, by them, as a private trust in accordance with the terms of the abovesaid trust deed, as interpreted by this Court in the abovesaid judgment dated 17.3.1983 in O.S.A.No.110 of 1977. We do not think that there is any legal bar to this apportionment in the light of the abovesaid decisions, and particularly in the light of the abovesaid judgment in O.S.A.No.110 of 1977.

27. However, as to how actually such apportionment should be made among the properties of trust that are available now, how actually the abovesaid private trust is to be managed hereafter, who all are the present heirs of the founder, how they are such heirs, what are their age, educational qualifications, occupations, addresses, etc, we direct the appellants to file a draft of the proposals in the form of affidavit. Such a draft should contain necessary clauses for preserving and maintaining the corpus of the properties to be allotted to the said private trust and for proper management of the same in accordance with the terms of the trust deed. Time for filing the said draft, after serving a copy of it to the Official Trustees,

is two weeks. Thereafter, within two weeks the Official Trustees shall file a report making his comments on the said draft and giving out his suggestions in implementing the abovesaid decision of this Court. The said report shall also give all necessary particulars about the trust, particularly regarding the trust properties so far sold and the trust properties that are still available with the trust including cash and bank balances, etc., regarding the above referred to ceiling proceedings in relation to the abovesaid 79-62 acres and the names of the lessees of the trust and the rental arrears due from them and the steps taken against the said lessees for recovery of the arrears etc. In case he feels that in view of the abovesaid decision taken by this Court, even the abovesaid public trust and the properties allotted to it may be managed by the same body of trustees, it is open to him to suggest so, in his report. Post the appeals 4 weeks hence.

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