S. Darshan Lal vs Dr. R.E.S. Dalliwall And Anr. on 2 April, 1952

Equivalent citations: AIR1952ALL825, AIR 1952 ALLAHABAD 825

JUDGMENT

Agarwala, J,

1. This is an application in revision against an order of the District Judge of Saharanpur refusing to discharge the applicant from his office of trusteeship.

2. One Mr. H.B.S. Dalliwal, a barrister, residing at Mussoorie and owning considerable property at that place executed two deeds of trust, one on 21-4-1921 and the other on 25-6-1921. On 8-5-1926 he executed a will in respect of some other properties. Mr. Dalliwal died on 12-5-1926. The trustees of the trust deeds and the executors of the will appointed by him did not agree to act and, therefore, the District Judge appointed the applicant, Sri S. Darshan Lal, Barrister-at-law of Dehra Dun, as the sole trustee of the properties by his order dated 19-8-1926. One of the beneficiaries under the trust deeds and the will was Mrs. E.B. Dalliwal, while the two sons of Mr. Dalliwal, Roy and Kenneth, were the other two beneficiaries. Mrs. Dalliwal died on 22-10-1944.

On 29-1-1947 the opposite parties, the two sons of Mr. Dalliwal, made an application to the District Judge alleging that the trust had come to an end and prayed that the properties held by the trustee might be made over to them and the trustee might be asked to explain accounts. Sri Darshan Lal was agreeable to explain the accounts but was unwilling to part with the property as he claimed that he had spent some money out of his own pocket which he was entitled to get back before he could be ordered to hand over the property. On an agreement between the parties the District Judge appointed a commissioner to go into the accounts. The report submitted by the Commissioner was not acceptable to either of the parties.

3. The opposite parties' case before the Court below was that as under the terms of the trust deed of 25-6-1921 the trust had come to an end, the trustee was bound to hand over the properties covered by that deed to them. Sri Darshan Lal's case was that the trust had not yet come to an end. But during the pendency of the proceedings he made an application on 31-5-1948 stating that :

> "the accounts of the entire property upto date have been rendered. The amount of debts borrowed by the applicant under the orders of this Court from time to time as trustee and manager are to be paid by this property of the trust and the beneficiaries and the same are taken therefor.
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> It is, therefore, prayed that an order of discharge under the circumstances be passed in favour of the applicant."

It is obvious that what Sri Darshan Lal meant by this application was not a formal order declaring that he has ceased to be a trustee but a release from the liabilities incurred by him in his capacity as

a trustee.

4. The learned District Judge upon an interpretation of the trust deed of 25-6-1921 held that the trust had come to an end and that, therefore, the trustee stood discharged from his office but that he had no power, in those circumstances, either to order the return of the property to the opposite parties or to pass an order of discharge in favour of Sri Darshan Lal. The opposite parties submitted to the order passed against them but Sri Darshan Lal came up in revision to this Court against that order. During the pendency of the revision application, the opposite parties made an application under Section 18, Trustees Act, No. XXVII of 1866, praying that an order vesting the property in the opposite parties be passed by this Court. These two applications are now before us for disposal.

5. We have heard learned counsel for the parties and have come to the conclusion that both the applications must be dismissed.

6. The first point to be decided is whether the trust has come to an end. The second trust-deed of 25-6-1921 provided that out of the income of the trust property Es. 200 monthly would be paid to the executant's wife Mrs. B.B. Dalliwal, and 2/3 of the remaining income to the executant's son Eoy E. S. Dalliwal so long as he remained in a college and 1/3rd to the executant's second son Kennith H.S. Dalliwal so long as he was in school; but when Eoy E.S. Dalliwal left college, he was to get 1/3rd instead of 2/3rd and when Kennith H.S. Dalliwal went to college he was to get 2/3rd instead of 1/3rd, and when both sons had completed their education and left college, the remainder after paying the executant's wife Rs. 200 monthly was to be divided equally between the two sons, and from and after the death or divorce, if any, of Mrs. E.B. Dalliwal, the said sum of Rs. 200 was to be divided between the two sons in equal shares, and in the event of death of any son, his share was to go to his legal heir or heirs. After making these provisions the trust deed declared :

> "This trust will come to an end at the death of Mrs. B.E. Dalliwal, provided Kennith H.S. Dalliwal has also attained the age of 28 years. It is also provided that when this trust comes to an end as provided above, the trust property or the sale proceeds thereof as the case may be shall be divided in equal shares among my said two sons."

Mrs. E.B. Dalliwal, as stated above, died in 1944 and Kennith attained the age of 23 years long ago. In the terms of the trust, therefore, the trust came to an end on the death of Mrs. B. E. Dalliwal. The provision that on the trust coming to an end the trust property or the sale proceeds thereof, as the case may he, shall be divided in equal shares among the two sons, did not keep the trust continuing. The purpose of the trust was not the division of the property by metes and bounds between the two sons; its purpose was to provide for the maintenance of the executant's wife and the education of the executant's children and to give the property to the two sons. The words of the deed are absolutely clear that the trust is to come to an end at the death of Mrs. E.E. Dalliwal or when Kennith attains the age of 23 years, whichever is later and the property is to be divided after the trust has come to an end. It cannot be maintained that the trust does not terminate so long as the property is not divided between the sons. The expression 'property will be divided in equal shares among the sons' does not imply a physical division by metes and bounds. It is a common expression used for vesting the property in defined shares.

7. Under Section 77, Trusts Act, a trust is extinguished when its purpose is completely fulfilled. In our opinion the purpose of the trust has come to an end and the trust has terminated. Under Section 71, a trustee is discharged from his office by the extinction of the trust. The trustee, in the present case, therefore, stands automatically discharged from his office. But this discharge does not mean that the trustee is relieved from his duty of rendering accounts and delivering the trust property to the beneficiaries. In the present case, the trustee wants an order of discharge in the sense of release from his liabilities. This, in our opinion, cannot be done in a summary procedure upon an application to the District Judge. The only provision in the Trusts Act for the District Judge for ordering a discharge of a trustee is contained in Section 71 which runs as follows:

> Section 71:--"The trustee may be discharged from his office only as follows:
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> (a) by the extinction of the trust;
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> (b) by the completion of his duties under the trust;
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> (c) by such means as may be prescribed by the instrument of trust;
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> (d) by appointment under this Act of a new trustee in his place;
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> (e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract or
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> (f) by the Court to which a petition for his discharge is presented under this Act."

8-9. Clause (f) of Section 71 read in conjunction with the other clauses clearly refers to the discharge of a trustee by the Court in circumstances other than those mentioned in-the earlier Clauses (a) to (e). The language of Section 72 which deals with the manner in which the District Judge may discharge a trustee upon a petition presented to him also leads to the same conclusion.

10. Section 72 is in these terms:

> "Notwithstanding the provisions of Section 11, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and if the Court finds that there is sufficient reason for such discharge, it may discharge him accordingly and direct his costs to be paid out of the trust property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place."

11. The last sentence of the section clearly suggests that the whole of the section applies to a subsisting trust in which when one trustee is discharged another has to be appointed. A consideration of the scheme of the Act also fortifies this conclusion. The Act defines the rights and duties of trustees and beneficiaries. It defines a trust (Section 3), the purposes for which a trust may be made (Section 4), how it shall be created (Sections 5 and 6), and the rights and duties of trustees

and beneficiaries. One of the duties of a trustee is to keep and render accounts (Sections 19 and 57). One of his rights is to have the accounts of the administration of the trust property examined and settled and where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect (Section 35). There is nothing, however, to show that he can have this right to settlement of accounts done through the agency of the District Judge upon a petition.

Wherever the Act authorises the District Judge upon a petition in a summary proceeding to do a certain thing, the Act makes a specific mention of it. For instance in the following sections the District Judge has been authorised to make orders under the Act (Sections 11, 22, 32, 34, 36, 41, 46, 49, 53, 71, 72, 73 and 74) and in none others. All these sections deal with summary matters, and in Section 34 it is specifically stated that a 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. The question of settlement of accounts, is a matter of detail and difficulty. It is not fit for a summary disposal. That is why in Section 35 there is no mention that the right there mentioned may be exercised by a petition to the District Judge. It follows, therefore, that the District Judge cannot under Sections 71 and 72 give a discharge to the trustee in the sense of a release from his liability to render account. When a trustee has ceased to be a trustee by the fulfilment of the object of the trust, he is under a liability to render account to the beneficiaries. As the settlement of accounts cannot be done by the District Judge, his discharge or release from liability cannot be ordered by him. Sections 71 and 72, therefore, when they authorise the District Judge to discharge a trustee refer to a case in which a trustee wishes to go out of his office during the subsistence of the trust when another person may be appointed in his place. This can only be done if there is a sufficient : reason to do so. We are, therefore, of opinion, that the Court below had no jurisdiction to discharge a trustee when he has been discharged automatically by the extinction of the trust, and even if there was such jurisdiction, there was no jurisdiction to release him from his liability to render accounts.

12. The application made on behalf of the opposite parties under Section 18, Trustees Act (27 of 1866) has next to be considered. Act 27 of 1866, as its preamble shows, applies to conveyance and transfer of moveable and immoveable property in British India vested in mortgagees and trustees, in cases to which English law is applicable. Section 3 further clarifies the matter :

> "The powers and authorities given by this Act to the High Court shall and may be exercised only in cases in which English law is applicable."

The parties in the present ease are not governed by the English law. It was, however, contended by Diwan Charanjit Lal, learned counsel for the opposite parties, that the English law applied as the common law of the country in cases in which there was no other provision of law in respect of the particular subject matter in controversy. The proposition that the English law is the common law of this country and has to be followed where no other rule of law is applicable or provided for cannot be accepted.

13. The civil Courts in Bengal, Bihar, D.P. and Assam are governed by the Bengal, Agra and Assam Civil Courts Act, 12 of 1887. The civil Courts in Bengal, U. P. and Assam subordinate to the High Court are to decide cases in certain matters according to Mohammadan or Hindu law if the parties are Mohammadans or Hindus respectively and in other cases by "any other law for the time being in force" or if there be no such law according to "justice, equity and good conscience", vide Section 37, Bengal, Agra and Assam Civil Courts Act, 12 of 1887.

14. The High Court is to apply the law that would be applied by the civil Courts subordinate to it, vide paras 13 and 14 of the Letters Patent.

15. English law has been applied in India as supplying the rule of justice, equity and good conscience but only if it is found applicable to Indian society and circumstances, Waghela Rajsanji v. Shekh Masludin, 11 Bom. 551 (P.C.) at p. 561. English law, therefore, does not apply here of its own force.

16. The matter may be considered upon broader principles. According to English law, Englishmen carry English law with them in countries which were formerly uninhabited and are peopled by them. English common law as well as Statute law brought into force up to the date of the settlement is applicable to such colony to the extent to which such laws are suitable to the conditions of the colony. Statutes passed subsequently apply to the colony only if they are made expressly applicable to it. In an inhabited country, however, obtained by conquest or cessation, law already prevalent therein continues to prevail except to the extent to which English law has been introduced and also except to the extent to which such law is not civilised law at all, vide Yeap Cheah Neo v. Ong Cheng Neo, (1875) 6 p. c. 381. India fell in the category of conquered or ceded country because it was already inhabited and civilised law prevailed therein before the advent of the British and, therefore, prima facie there can be no presumption that English law applied to Indians in India.

17. The history of the acquisition of India by the British is well known. With the exception of the Island of Bombay ceded to Charles II in 1661 by the King of Portugal as part of the marriage dowry of the Infanta and which Charles II granted to the East India Company, the other acquisitions by the East India Company in the earlier stages were confined to certain factories established at Madras, Calcutta and other places. The acquisition of these factories was not made by the East India Company in the exercise of a sovereign power but was made in their capacity of land-owners under the sovereignty of the Moghal Emperor. The history of the matter has thus been given by Lord Brougham in Mayor of Lyons v. East India Co., 1 Moo. Ind. App. 175 (P.C.) at pp. 272-274 :

> "The district on which Calcutta is built, was obtained by purchase, from the Nabob of Bengal, the Emperor of Hindustan's Lieutenant, at the very end of the 17th century. The Company had been struggling for nearly 100 years, to obtain a footing in Bengal, and till 1696 they nerer had more than a Factory here and there, as the French, Danes, and Dutch also had. Till 1678, their whole object was to obtain the power of trading, and it was only then that they secured it, by a Firman from the Emperor; from that year, till 1696, they in vain applied to the native Government, for leave to fortify their Factory on the Hoogley, and it was only then that they made a fortification, acting upon a kind of half consent, given in an equivocal answer of the

> Nabob; encouraged by the protection which they were thus enable to afford the natives, many of them built houses, as well as the English subjects; and when the Nabob, on this account was about to send a Kadi or Judge, to administer justice to those natives, the Company's servants bribed him, to abstain from this proceeding. Some years afterwards the Company obtained a grant of more land and villages from the Emperor, with renewed permission to fortify their Factories; during all this period, tribute was paid to the Emperor, or his officer, the Nabob; first, for leave to trade, afterwards as Zamindars, under the Emperor and in 1757, the year memorable for the battle of Piassey, the Treaty with Jaffier Ally, indemnifying them for their losses, ceding the French possessions, and securing their rights, and binding them to pay their revenues like other "zamindars". Bight years later, they likewise received from the native government, a grant of the Dewanny, or receivership of Bengal, Behar, and Orissa; and of their subsequent progress in power, it is unnecessary to speak; enough has been said to show that the settlement of the Company in Bengal was effected by leave of a regularly established Government, in pogatssion of the country, invested with the rights of sovereignty, and exercising its powers that by permission of that Government Calcutta was founded, and the factory fortified, in a district purchased from the owners of the soil, by permission of that Government, and held under it by the Company, as subjects owing obedience as tenants rendering rent, and even as officers, exercising, by delegation, a part of its administrative authority."

18. So long as the East India Company or rather the British Crown through the East India Company did not acquire rights of sovereignty over Indian soil, there could be no question of the introduction of of English law in India.

19. Even if we assume that the English common law was introduced in the Presidency towns, there is no warrant for assuming that it was also introduced in the Mofassil, except with reference to Englishmen governed by the English law.

20. No statute of the British Parliament has been brought to our notice showing that English Law as such was introduced outside the Presidency Towns. We have the high authority of the Privy Council in support of the view that no such thing was done.

21. In Ram Lal Dutt v. Dhirendra Nath, A. I. R. 1943 P.C. 24, their Lordships had a case in which the question was whether the tenant could refuse to pay the entire rent of a holding in the district of Bengal, when he was dispossessed of a portion only of the holding by the landlord. The Calcutta High Court had in a long series of cases followed the English common law in such cases, that an eviction of a tenant from a part of the lands by title paramount gives rise to an apportionment but eviction by the landlord for a part entails a suspension of the entire rent. The Privy Council observed that :

> "Since 1772, no Court has had authority to apply to the districts of Bengal rules devised upon other principles than justice, equity and good conscience. The doctrine

> of suspension of rent is not the less to be regarded because it has been drawn from the common law, but this origin will not serve by itself for a justification."

22. The result, therefore, is that we dismiss the application in revision and also the application of the respondents under Section 18, Trustees Act. In the circumstances of the case, we order the parties to bear their own costs in this Court.