

HON'BLE Dr.JUSTICE B.SIVA SANKARA RAO

Civil Revision Petition No.5994 of 2017

ORDER

The revision petitioners 1 to 3 are the respondents in O.P.No.114 of 2008, that was filed u/ss. 70, 71 and 77(B) of the Indian Trust Act, 1882(for short,' the Act') by the revision sole respondent-Venkatrao Memorial Trust rep. by its Trustee and legal heir Nishit Halwalkar.

2. The averments in the main petition in nutshell are that it is a Trust constituted and registered under the Indian Trust Act, vide registered certificate No.2616 on 21st Amadard 1350 fasli. The petitioner-Trust shows represented by its Trustee and legal heir Sri Nishit Halwalkar, the so called grandson of the alleged creator of the Trust by name late Gunderao Pampad. The Trust was created by donating house bearing No.494 at Laldarwaza, Agricultural land at Nandigam village at Alwal with four members viz; Hanumantharao Saheb Vakil, Sri Janardhan Rao Saheb, Sri Gunde Rao Saheb Halwalkar and D.Rama Rao Saheb Joshi. The further averments show that as per the desire of the Founder-late Gunderson Pampad, a primary school in Kannada medium was established at Shah Ali Banda in the name of Venkata Rao on the amount donated by Sri Pampad and as per Clause-8 of the Trust Deed, a male member of Gunderao Halwalkar family shall compulsory be a Trustee and Nishit Halwalkar being the grandson of Gudnerao Halwalkaar is thereby representing it saying earlier he was in abroad and only in September, 2006 he returned and staying in Bangalore and revision petitioners 1 to 3 are claiming to be a Managing Committee Members of the School viz: Venkat Rao

Memorial Trust. It is further averred that they without any power or authority, registered a supplementary Trust vide No.512 of 2005 by deed dated 26.11.2005 saying the version therein are untrue and without any competence from even terms of the original Trust deed. It is the claim therefrom to declare the Trust deed created by Respondents 1 to 3 vide No.512 of 2006 dt. 26.11.2005 as unlawful and illegal and consequently to declare the Trust created by the petitioner vide deed No.294 of 2007 dt.12.09.2007 as lawful.

3. The respondent No.1 to the main petition supra filed counter opposing the petition claim and the respondents 2 and 3 adopted the same. The contentions in their counter are that the allegations in the petition are false and baseless and the petitioner is not entitled to the so called relief of declaration with consequential relief sought for, that he has no *locus standi* to file the petition based on the alleged Trust deed, dt.12.09.2007 which is also void in the eye of law being against the provisions of the Act, and the petition is thereby liable to be dismissed. It is also averred that there are other proper and necessary parties if at all to be impleaded to declare the Trust Deed Dated 26.11.2005 bearing No.512 of 2005 as invalid and the petition is liable to dismissed thereby for non-joinder of such necessary parties particularly the registered society. It is also specifically denied respective averments in the main petition in the respective paras-4 to 7 of the counter but for to say that the petitioner hails from the family of Gunderao Halwalkar. It is further averred particularly in paras 8 and 9 of the counter that the so called Trust created by the petitioner is even contrary to the provisions of the Act and Section 74 of the Act

is not of any avail and the Court has no jurisdiction to entertain the main petition and thereby same is liable to be dismissed.

4. It is during the pendency of the main matter for enquiry since 2008, the respondents filed I.A.No.152 of 2013 under Order 7 Rule 11 CPC for rejection of the main petition supra on 09.07.2012 with the supporting affidavit of the 1st respondent by reiterating those averments of the counter referred supra which no way requires repetition by referring to the prayer in the petition and by saying the trial Court lacks inherent jurisdiction to grant the reliefs as prayed for in the main petition apart from the requirement of *advolverum* Court fee and the provisions of Sections 70,71 and 77(B) of the Act no way provide for the so called declaratory relief sought for and thereby the petition is not maintainable under law and it is to be rejected or dismissed therefrom.

5. The counter filed by the OP petitioner in opposing the petition for rejection of main petition sought for is that, the Court got jurisdiction and various averments in the affidavit petition are untrue by reiterating the main petition averments to some extent.

6. In the course of hearing the respective learned counsel reiterated their respective pleas as above and drawn attention of the Court to the provisions of the Act.

7. Heard both sides at length and perused the provisions of the Act and material on record.

8. Before going to the provisions of the Order VII Rule 11 (a to f) CPC, particularly clause-a and clause-d of it as to *whether the plaint does not disclose a cause of action or where the suit appears*

from the statement in the plaint barred by any law for rejection, it is relevant to refer scope and objects and some of the provisions of the Act. it speaks from its statements, objects and the reasons that trusts, though unknown to Hindu and Mahammadian laws as legal and equitable estates, in the wider sense trust is nothing but obligations annexed to the ownership of property which arise out of confidence reposed in and accepted by the owner for the benefit of another, are constantly created and are frequently enforced by the Courts in India. It refers to the position of dominion over property coupled with the obligation to use is, either wholly or partially, for the benefit of other than the possessor, which is even otherwise recognized in the uncodified Hindu law like Endowment, leave apart even in Mahammadian law like Wakf. It is mentioned that the object of the enactment is to codify the law relating to Trusts is without touching Mahammadian law as to Wakf and for Hindu law as to endowment (religious and charitable), as the case may be of Hindus, Buddhists etc.

9. The Act mainly deals with private Trusts and Trustees. Chapter I is preliminary. Chapter II from Sections 4 to 10, deals with creation of Trusts. Chapter III Sections 11 to 30 deals with the duties and liabilities of Trustees, Chapter IV Sections 31 to 45 deals with rights and powers of Trustees, Chapter V Sections 46 to 54 deals with disabilities of Trustees and Chapter VI Sections 55 to 69 deals with the rights and liabilities of beneficiaries. Apart from the above, Chapter-7 Sections 70 to 76 deals with vacating the office of Trustee which include as to appointment of Trustee by Court and survival of Trust, Chapter-8 Sections 77 to 79 deals with extinction

of Trust by revocation or otherwise and ultimately Chapter-9 Sections 80 to 96 deals with certain obligations in the nature of Trusts. The Act contains the Schedule which refers to the extent of repeal of Sections 7 to 11 of the statute of frauds, Trustees' and Mortgagees 'Powers Act, 1886, illustration I of Section 12 of the Specific Relief Act, 1877 which are not now necessary to go into but for Sections 6 to 10, 59, 70 to 76.

10. The very Act speaks itself to define and amend the law relating to Trust and Trustees. It is the definition to say public Trusts 'religious and/or charitable' are not governed by the provisions of the Act that is also reiterated in the 3 Judge Bench expression of the Apex Court in *Canbank Finance Services Vs. The Custodian and others*¹ in dealing with the concept of Trust and Trustees by referring to some of the provisions of the Indian Trust Act and Transfer of Property Act in particular.

11. Sections 4 and 6 of the Act speaks that creation of Trust must be for lawful purpose and is subject to the provisions of Section 5 i.e. (Trust of immovable property) to be validated must be by a non-testamentary instrument in writing duly registered by signing by the author of the Trust or the Trustee or by the will of the author of the Trust or the Trustee. Section 6 further speaks that a Trust can be created when the author of the Trustee indicates with reasonable certainty by any words or acts:-

- a) An intention to create and thereby a Trust,

¹2004 8 SCC 355

- b) the purpose of the Trust,
- c) the beneficiary,
- d) The Trust property and (unless the Trustee is declared by will or the author of the Trust himself is the Trustee) transfers the Trust property to the Trustee.

12. Every person competent to contract and with permission of the Principal Civil Court of original jurisdiction by or on behalf of the minor subject to law for the time being in force as to the circumstances and extent in and to which the author of the Trust may dispose of the Trust property. The subject matter of the Trust as per Section 8 must be property transferable to the beneficiary for it must not be merely beneficial interest under a subsisting Trust. Every person capable to hold the property may be a beneficiary as per Section 9, unless the proposed beneficiary may disclaim or renounce. So far as the Trustees concerned. Section 10 says every person capable of holding property may be a Trustee; but, where the Trust involves exercise of discretion, he cannot execute it unless he is competent to contract.

13. From this, coming to Section 59 of the Act, *on right to sue for execution of Trust; it speaks that where no Trustees are appointed or all the trustees die, disclaim, or are discharged or where for any other reason the execution of Trust by the Trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the Trust, and the Trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.* Section 60 also relevant along with Section 61 to some extent which speak that, *the beneficiary has a right to*

say that the Trust property shall be properly protected and held and administered by proper persons and by a proper number of such persons and the beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.

14. Now coming to Sections 70 to 79, Section 70 speaks, *the office of a Trustee is vacated by his death or by his discharge from his office*; Section 71 deals with discharge of Trustee in the specified six contingencies; Section 72 speaks on persons to be discharged from his office of Trust that a Trustee may apply by petition to a Principal Civil Court of original jurisdiction to be discharge from his office to consider if sufficient reason; Section 73 speaks on appointment of a new Trustees on death in his place *by a) the person nominated for that purpose by the instrument of Trust (if any) or b) if there be no such person, or no such person able and willing to act, the author of the Trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representatives of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.*

15. Appointment by Court as referred above in Section 73 of the Act, is covered by Section 74 of the Act, which speaks that *wherever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee u/sec.73, the beneficiary may, without instituting a suit, apply by petition to a principal civil*

court of jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly. It also speaks of the Court shall have regard a) to the wishes of the author of the Trust as expressed in or to be inferred from the instrument of trust; b) to the wishes of the person, if any, empowered to appoint new trustees; c) to the question whether the appointment will promote or impede the execution of the Trust; and d) whether there are more beneficiaries than one, to the interests of such beneficiaries.

16. With this background coming to the necessity of applying the law to apply to the facts of the petition claim on its sustainability; but for Sections 59, 60, 61, 73 and 74 referred supra to the extent of filing suit or application for appointment of a trustee as per the wishes of the founder or person who is authorized to appoint or nominee trustee, as the case may be, in furtherance of the Trust, to continue to be considered by the Court neither Section 70 nor Section 71 nor Section 77 of the Act, enables the petitioner to claim relief for the declaration of petitioner to the so called Trust of 2007 and consequently to declare him as valid Trustee to act much less to declare the so called Trust allegedly created by the Respondents 1 to 3 on 2005 as invalid.

17. As referred supra, from the provisions at best the remedy of the petitioner if at all is, if not by a suit by an application invoking the doors of the Principal Civil Judge of original jurisdiction to say for more clarity, the District Judge or the Chief Judge of the City Civil Court, as the case may be, for appointing him or any other person as a Trustee so that the Court can consider from

availability or not of the required considerations provided by Section 74 of the Trust Act referred supra.

18. Once such is the case, the very petition is barred by law and thus the petitioner cannot get any relief and thereby continuation of the claim is nothing but wasting the valuable time of the Court and putting ordeal of facing trial by respondent and thereby suffice to say the petition is prone for rejection as per the settled expression of the Apex Court in Arivandandam Vs. T.Satyapa²

19. Accordingly and with these observations, the revision is allowed setting aside the dismissal order of the lower Court, in I.A.No.152 of 2013, dt. 09.10.2017, however with the observation that the existing status quo shall continue for one month from date of receipt of the order and in the meantime, the revision petitioners or respondent if at all wants to invoke the powers of the principal District Court or the Chief Judge, City Civil Court, as the case may be, they can. The trial court shall return the documents to the respective parties by virtue of this order so that they can avail all available legal remedies.

20. Consequently, miscellaneous petitions, if any, pending in this revision shall stand closed.

Dr. B.SIVA SANKARA RAO J,

Date:16.11.2017

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² (1977) 4 SCC 467