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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1802 OF 2016
IN
TRUST PETITION NO.1 OF 2016

Vicky @ Siddharth Deepak Hakemchand & Ors. ...Applicants/Petitioners
vs
Sureshchandra Shantilal Hakemchand & Ors. ...Respondents

WITH
SUIT NO.85 OF 2008
WITH
NOTICE OF MOTION NO.2223 OF 2015
WITH
NOTICE OF MOTION NO.2224 OF 2015

Sureshchandra Shantilal Hakemchand & Anr. ...Plaintiffs
vs
Bharat Himatlal Doshi And 7 Ors. ...Defendants

WITH
SUIT NO.2034 OF 2009
WITH
NOTICE OF MOTION NO.778 OF 2016
WITH
NOTICE OF MOTION NO.780 OF 2016
WITH
NOTICE OF MOTION NO.1781 OF 2016

Hifzu Rahman Abdul Patel And 2 Ors. ...Plaintiffs
vs
Sureshchandra Shantilal Hakemchand & 7 Ors. ...Defendants

WITH
NOTICE OF MOTION (L) NO.880 OF 2018
IN
SUIT NO.85 OF 2008

Sureshchandra Shantilal Hakemchand ...Plaintiff
vs
Bharat Himatlal Doshi And Ors. ...Defendants

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Mr. Sharan Jagtiani, a/w. Ms. Nirman Sharma, i/b. Mr. M.G. Agre, for the Petitioners in TRP/1/2016; for Defendant Nos. 3(b) to 3(d) in S/85/2008 and for Defendant Nos. 3 and 4 in S/2034/2009.

Mr. Rahul Narichania, Senior Advocate, a/w. Mr. Vivek Kantawala and Mr. Amey Patil, i/b. Vivek Kantawala & Co., for Respondent No.1 in TRP/1/2016 and for Plaintiff in S/85/2008.

Dr. Birendra Saraf, a/w. Mr. Mayur Khandeparkar, i/b. Mr. G.B. Kedia, for Respondent Nos. 2, 3 and 8 in TRP/1/2016; for Defendant Nos. 1, 2 and 4 in S/85/2008 and for Plaintiffs in S/2034/2009..

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CORAM : S.C. GUPTE, J.

DATED : 11 APRIL, 2018

P.C. :

. The dispute between the parties in these matters concerns a private trust created by their predecessor and in which they hold beneficial interest. Trust Petition No.1 of 2016 is filed by the Petitioners, who hold between them 31% of beneficial interest in the trust property and income. According to these Petitioners, the trust has come to an end by efflux of time and the trust property needs to be distributed between the beneficiaries in the manner stated in the indenture of trust. On the other hand, it is the case of the opponent, namely, Respondent No.1 to the trust petition, that the trust continues and the Respondent as a trustee is entitled to manage the trust property and income. The other respondents to the petition, who include Respondent No.8, who claims as a transferee of the beneficial interest of some of the beneficiaries, support the petition. The Petitioners have taken out a notice of motion in the trust petition, namely, Notice of Motion No.1802 of 2016, for interim reliefs. The contesting Respondent (Respondent No.1) has filed his own suit, which is Suit No.85 of 2008. This suit seeks *inter alia* a perpetual injunction against some of the beneficiaries

(Respondent Nos. 2 and 3 to the trust petition) and their transferee (Respondent No.8 to the trust petition) restraining them from acting upon their *inter se* indenture of conveyance transferring 25% of the former's share to the latter. There are three motions taken out by the Plaintiff in Suit No.85 of 2008. Notice of Motion No.2223 of 2015 seeks a decree on admission under Order 12 Rule 6 of the Code of Civil Procedure as also a declaration that the indenture of conveyance is null and void on account of the provisions of the Mental Health Act, 1987. (Defendant No.2 to this suit is said to be a person of unsound mind sued through his next friend and guardian. It is the case of the Plaintiff that his property could not have been dealt with by the next friend and guardian except with a permission of the Court.) Notice of Motion (L) No.880 of 2018 is for a temporary injunction restraining the transferee (Respondent No.8 to the trust petition) from creating any further right, title or interest in or over the suit property. Notice of Motion No.2224 of 2015 seeks certain interim directions against the transferee concerning putting up of a notice board on the suit property declaring his right, title or interest in the property. The transferee, for his part, has filed his own suit (Suit No.2034 of 2009) seeking *inter alia* a decree against Respondent No.1 to the trust petition in the latter's capacity as a trustee, for partition of the property and execution of conveyance of 44% of undivided right, share, title and interest in the trust property in his favour. There are two Notices of Motion in this suit both taken out by Defendant No.1 in that suit (Respondent No.1 to the trust petition). Notice of Motion No.778 of 2016 is for dismissal of the suit under the provisions of Chapter VI of the Mental Health Act, 1987, whilst Notice of Motion No.780 of 2016 seeks an order for rejection of plaint under Order 7 Rule 11 of the Code of Civil Procedure on the same grounds, as are made the basis of Notice of Motion No.778 of 2016. The trust petitioners herein, who are

Defendant Nos. 3 and 4 in that suit, have taken out a motion (Notice of Motion No.1781 of 2016) in that suit praying *inter alia* for a preliminary decree of partition of the immovable property.

2. On 26 February 2018, when this Court heard Notice of Motion No.1802 of 2016 in the trust petition, and the matter was placed for passing orders, some of the parties were of the view that since the motion was heard at length, practically, the merits of the trust petition itself are laid bare before the Court and instead of the motion, final orders may be passed in the trust petition itself. Since there were also these other companion matters, namely, the two suits and interlocutory applications therein, as noted above, the Court gave liberty to the parties to apply to the Hon'ble the Acting Chief Justice for placing all matters before this Court. By an administrative order passed by the Hon'ble the Acting Chief Justice, all matters are posted before me and are heard at length. This order disposes of the trust petition as well as the notices of motion pending in all these matters. Since any decision on the trust petition has a fundamental bearing on the notices of motion in the suits, the trust petition is taken up and decided first. The facts of the case and the nomenclature of the parties are taken from the trust petition.

3. One Shantilal Hakemchand, who is a predecessor-in-interest of the parties, was the owner of a plot of land, bearing Plot No.7, admeasuring 3874 sq. yards, at Gaiwadi Industrial Area, Goregaon (West), Mumbai 400 062, having acquired the same by an indenture of conveyance of 1961. Shantilal, thereafter, constructed a building on this plot. The building consists of ground and first floor and admeasures about 16000 sq. ft. on each of the two floors. The building houses in all four galas, all of which are

in possession of tenants. It is, however, the case of Respondent No.1 that all four tenancies are practically controlled by Respondent No.8, the purported transferee of beneficial interest of some of the beneficiaries. By an indenture of trust dated 19 September 1963, Shantilal settled the suit property in trust transferring the same in favour of the then trustees for the benefit of the beneficiaries named in the indenture of trust. The duration of this trust was 20 years, during which the trustees were obliged to distribute the net income of the trust in the following proportion:

(i) 25% of the net income to Respondent No.1 (son of the settler);

(ii) 31% of the net income to the male issues of Rameshchandra S. Hakemchand (elder son of the settler); one Deepakkumar Hakemchand, the predecessor-in-interest of the two Petitioners herein, being the only male issue of Rameshchandra, was, the sole beneficiary of 31% of the net income;

(iii) 25% of the next income to the male issues of one Nirmala Himatlal Nihalchand (daughter of the settler); Respondent Nos. 1 and 3, being the only male issues of Nirmala, are entitled to this 25% share;

(iv) 19% of the net income to one Indukumar Nihalchand (cousin of the settler); Respondent Nos.4 to 7 claim as legal heirs of Indukumar (since deceased).

After the expiry of 20 years, the trustees were mandated to distribute the corpus of the trust amongst the beneficiaries in the same proportion, as in the case of net income of the trust as noted above. Though under the trust deed and during the subsistence of the trust from time to time four trustees were appointed of the same and possessed of the suit property, it is the case of the Petitioners that Respondent No.1 was always in effective control and management of the trust and its property. Since the date of creation of the trust, there were various accretions in the hands of the trustees. The corpus of the trust, accordingly, includes not only the immovable property described above, but also receivables including cash and bank balances. The immovable property described above has been, as noted above, in occupation of tenants. Three galas are in occupation and possession of one Calama Industries Pvt. Ltd. and one is occupied by Hindustan Type Foundry. Currently there is a pending suit between Respondent No.1 herein as trustee of the suit trust and Hindustan Type Foundry as a purported tenant before the Court of Small Causes at Bombay. It is the case of the Petitioners that the trust having achieved its purpose, and 20 years having elapsed since its creation, the trust corpus is now required to be distributed amongst the beneficiaries in the proportion stated in the indenture of trust. The Petitioners, accordingly, apply for removal of Respondent No.1 as trustee and appointment of some other fit and proper person in his place for the purpose of distribution of the corpus of the trust, including all accretions to the trust property.

4. The petition is opposed by Respondent No.1 on the ground that the trust continues to subsist. It is submitted that the settler had taken an assurance from Respondent No.1 that the trust would not be dissolved during the latter's lifetime. It is submitted that the settler of the trust did not desire the trust to be dissolved till Respondent No.1 was in a position to manage the trust and distribute its income amongst the beneficiaries. It is submitted that, considering the property prices and other factors, the property is capable of generating enough income for the families of all legal

heirs of late Shantilal, who are beneficiaries of the suit trust. It is submitted that, firstly, the settler was very much alive after the passage of 20 years of creation of the trust (i.e. after 18 September 1983) and yet, neither he nor any of the trustees or beneficiaries took any steps till his death (which was on 19 May 1991) for dissolution of the trust and distribution of the corpus amongst the beneficiaries. It is submitted that, even after the death of the settler, and till the date of filing of the present trust petition, none of the trustees or beneficiaries took any steps for dissolution of the trust or distribution of its corpus. It is submitted that the trust was, accordingly, continued with the consent of the settler and the trustees and all beneficiaries and it could be revoked only by their consent.

5. The trust was created for a fixed period of 20 years, after which, the trust corpus was mandated to be distributed amongst the beneficiaries. The indenture of trust is quite plain in this behalf and does not admit of any other interpretation. The submissions of learned Counsel for Respondent No.1 do not in any way add up to a case of continuation of the trust. Even the wishes of the settler in this behalf do not matter save as are reflected in the indenture of trust. If the settler expresses his intent to create a trust for a fixed period of time, going by his intention, as expressed in the indenture, the trust is required to be dissolved and the corpus distributed amongst the beneficiaries at the expiry of the term. That the settler himself around the time of its expiry wants the trust to outlive its original term is neither here nor there. It is not up to him to keep the trust going. It is also not up to the trustees to keep the trust alive after its expiry. After the expiry of the original term, the beneficiaries hold proprietary interests in the corpus of the trust and are in the position of individual owners co-owning the property in the proportion of their respective beneficial interests. It is another matter

that, whilst they continue to be such co-owners, they may allow a certain person or group of persons, may be even named as trustee or trustees, to manage the suit property. In that case, the property must be managed by such trustee or trustees in their fiduciary capacity for and on behalf of all co-owners, who repose trust in him or them, as the case may be. But this management can continue only so long as the leave of the co-owners subsists, and not thereafter. The co-owners may revoke their leave at any time and seek division of the property. That is exactly what appears to have happened in the present case. Even after passage of 20 years, the persons originally in the management of the trust property were allowed to continue to manage the property for and on behalf of all the co-owners. That was by leave of all co-owners, which, as I have noted above, could be revoked at any time. After revocation of leave, the co-owners were free to come before the Court and seek distribution of the property amongst them.

6. None of the grounds urged by Respondent No.1 in his reply to the trust petition or the submissions made at the Bar by his Counsel offers any legal ground to oppose dissolution of the trust and distribution of the corpus amongst the beneficiaries. The trust petition, accordingly, deserves to be allowed.

7. A direct fall-out of this is that Respondent No.1 cannot be allowed to manage the property any longer, particularly since the other co-owners do not have faith in him to do so. This would ordinarily call for appointment of Court Receiver, High Court, Bombay as a receiver of the property. Considering, however, the nature of the suit property and the attending circumstances, including the realities of the process of collection of income and corpus and their distribution amongst the beneficiaries as also prosecution of the pending eviction suit, I am of the view that a private

individual and, preferably, an experienced Advocate well versed with such matters, should be appointed as an administrator of the suit property so as to collect and distribute the same amongst the beneficiaries/co-owners and, in the meantime, take all steps for preservation, management and protection of the property including receipt of its income and meeting of its costs.

8. Learned Counsel for the Petitioners suggests the name of Mr. Rajesh Shah, Advocate for being appointed as such administrator. The other contesting parties have no particular objection to his name, though they object to the very appointment of an administrator. Since the objections of these parties are considered and rejected, as above, it is in the interest of justice to appoint Mr. Rajesh Shah as an administrator.

9. Having thus dealt with the trust petition, let us now consider the pending motions in the two suits as noted above. The suit of Respondent No.1 (Suit No.85 of 2008) questions the rights of the beneficiaries to transfer their interest in the suit property. The notice of motion taken out by Respondent No.1 in that suit seeking decree on admission and declaration of nullity of the indenture of conveyance (between the beneficiaries and the transferee, Respondent No.8 to the trust petition) is on the basis that the conveyance is bad for want of permission of the Court referred to in Section 59 of the Mental Health Act, 1987. Respondent No.3 to the trust petition (Defendant No.2 to Suit No.85 of 2008), who is a beneficiary of the trust holding between him and Respondent No.2, 25 per cent share in the trust property and income, is admittedly a person of unsound mind. By an order dated 4 July 2007, obtained from Bombay City Civil Court, Respondent No.2 has been appointed as his guardian and manager. The argument of Respondent No.1

is that as such guardian and manager, Respondent No.2 could not have transferred by way of sale or otherwise immovable property without having obtained permission of the district court. Section 59 of the Mental Health Act provides for the powers of a manager of a mentally ill person. A manager appointed by the court has all powers in regard to the management of the property of the mentally ill person, but under the proviso to sub-section (1) of Section 59, he cannot mortgage, create any charge on, or, transfer by way of sale, gift, exchange, etc. any immovable property of the mentally ill person, unless he obtains the permission of the District Court in that behalf. No doubt, this cannot be done except upon a permission of the Court, but then, this ground does not hold much significance because not only the transferee, but even the beneficiaries, including Respondent No.3 himself, are parties to the trust petition and seek distribution of the corpus. In other words, the 25 per cent share, which is the subject matter of the first Respondent's suit, is represented not merely by the transferee, whose transfer is impugned in the suit, but even by the admitted owners thereof, including the mentally ill person himself. Respondent No.1, in such a case, cannot expect to hold on to the 25 per cent share purportedly on the ground of a challenge to the disposal of the share. Respondent No.1, besides, has no locus to challenge the transfer. The manager and best friend of the mentally ill person is himself before the Court and is entitled to represent the share of the latter in these matters. If Respondent No.1 has any objection to the former continuing as the manager of the latter, it is open to him, as a relative of the mentally ill person, to sue for removal of the manager/guardian or for account. So long as a court appointed manager/guardian represents the mentally ill person, the cause of the latter cannot be espoused by any other person, and particularly a person whose interest is in an apparent conflict with the interest of the mentally ill person. There is, for these very reasons, no merit even in the two companion motions of Respondent No.1 in Suit No.85 of 2008.

10. No relief can be granted to Respondent No.1 in the transferee's suit (Suit No.2034 of 2009) either. His pleas in the two motions taken out by him in that suit are based on the same grounds under Chapter VI of Mental Health Act, which, as I have noted above, have no merit for any interim relief.

11. As for the third motion in that suit, namely, Notice of Motion No.1781 of 2016, taken out by the trust petitioners herein, since the reliefs prayed for in it are covered by the trust petition and considered as above, no particular order needs to be passed in the motion.

12. In the premises, the following order is passed:

(i) Trust Petition No.1 of 2016 is allowed by declaring that the private trust created by Indenture of Trust dated 19 September 1963 has come to an end and that the corpus of the trust, including accretions thereto, is required to be distributed amongst the beneficiaries of the trust in the proportion as stated in the indenture of trust.

(ii) For carrying out this distribution, Mr. Rajesh Shah, Advocate, is appointed as an administrator with all powers of a receiver for taking steps to collect and distribute the suit property and, in the meanwhile, take all steps as may be necessary for preservation, management and protection of the property. If in the course of carrying out the mandate of this order, the parties have any grievance concerning the property or its management, the same may be brought by them before the administrator, who may then take appropriate steps, including preparation and presentation of report/s to this Court seeking directions in execution. Costs, charges and expenses of the administrator shall be borne from out of the income of the suit property.

(iii) The administrator shall also, pending distribution of the corpus, prosecute matters against tenants, if any, towards protection of the property including the pending eviction suit, namely, RAE Suit No.169/405/2008 pending before the Small Causes Court at Bandra, Mumbai, on behalf of the beneficiaries of the trust including Respondent No.1.

(iv) The administrator shall execute a conveyance of the property on behalf of the then trustees of the trust in favour of the beneficiaries or their assignees or nominees, as the case may be, and take all necessary steps in that behalf.

(v) Since the trust petition itself is disposed of in terms of the above order, the notice of motion taken out therein does not survive. Accordingly, Notice of Motion No.1802 of 2016 is disposed of without any further orders.

(vi) Notices of Motion Nos. 2223 of 2015, 2224 of 2015 and Notice of Motion (L) NO. 880 of 2018 in Suit No.85 of 2008 are dismissed.

(vii) Notices of Motion Nos. 778 of 2016 and 780 of 2016 in Suit No.2034 of 2009 are dismissed.

(viii) Notice of Motion No. 178 of 2016 in Suit No.2034 of 2009 is disposed of with no orders.

(ix) No orders as to costs.

10. At the request of learned Counsel for Respondent No.1, this order shall come into force only after expiry of three weeks from today.

11. It is clarified that insofar as the notices of motion taken out by Respondent No.1 (Notices of Motion Nos.2223 of 2015, 2224 of 2015 and Notice of Motion (L) No.880 of 2018) are concerned, there is no ad-interim relief operating in any of them as from today.

(S.C. GUPTE, J.)