Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
TRUST PETITION (L) NO. 11 OF 2019

Rameshchandra K Vasani & Ors ...Petitioners

In Re: Lilavatiben Vasani ...Deceased

Mr Anirudh Hariani, *with Mr R Vora and Ms Deeksha Jani, i/b Hariani and Co, for the Petitioners.*

CORAM: G.S. PATEL, J
DATED: 2nd May 2019

PC:-

1. The petition is brought under Section 34 of the Indian Trusts Act 1882. The three Petitioners are one Rameshchandra Kishorelal Vasani, his wife Ila and their son Rahul. Rameshchandra and Ila have daughters, but the present petition, for reasons that will shortly be clear, only concerns Rahul. For completeness, I note that Rahul is married. He and his wife have a daughter who is herself now an adult.

2. The petition raises a question of interpretation of a Will. It seeks an opinion of this Court on an interpretation of that writing. This is akin to an Originating Summons under the Bombay High Court (Original Side) Rules. The petition is framed squarely within Section 34 of the Trusts Act. This allows a trustee without instituting a suit to apply by petition for the Court's opinion, advice or direction on any questions regarding the management or administration of Trust property other than questions of detail or that require evidence.

3. The Will in question is in Gujarati. A photocopy is annexed from page 34. There is a translation from page 53. My Court Associate who is fluent in the language confirms that the translation is acceptably accurate.

4. The Will is of one Lilavatiben Jaykishandas Vasani. She made it on 28th March 1978 at the age of 83. She was Rameshchandra's father's sister, his paternal aunt. This relationship is mentioned in the Will itself. Rahul is thus her grand-nephew. The document says that Lilavati married one Pranjivandas Popat in 1962. The marriage did not work. She left Pranjivandas and returned to her parents' home in Dharampur, District Valsad in Gujarat. It was then that she completed her schooling, went to a women's training college and then moved to Mumbai where she worked as a head teacher for three and half decades in a municipal institute. She retired from that service. She received a pension for the rest of her days. She says in the Will that all the property that she lists in it is self-acquired and she has full title to it. There is both movable and immovable property. A look at the movables tells us that by all accounts Lilavati was prudent, intelligent and aware. She carefully grew her wealth.

5. We are concerned with immovable properties at two locations. One property is Lilavati building at Dr Ambedkar Road, Matunga, Mumbai. The building is tenanted. Lilavati had perpetual leasehold rights to it. In Dharampur there were four properties. There was also another property at Mulund, but we are not concerned with that.

6. By all accounts Lilavati was — perhaps unusually given her community — something of an animal activist in her lifetime. By Clause 3 of her Will, she directed her executor Rameshchandra to establish a Trust called the Swargiya Pujya Matushree Kashibai tatha Putri Lilavati Smarak Trust with an initial fund of Rs.60,000/. This was to be used to provide food (specifically rotis) to dogs and other quadrupeds, as also food grain to the poor. There was a draft Trust Deed already prepared at the time of Will itself. Lilavati said this was not to be changed. Mr Hariani for the Petitioners confirms that this Trust was not only established but is operational and objects are being pursued. In Clause 4 Lilavati said that she was being looked after by her nephew, her brother's son Rameshchandra, the present 1st Petitioner.

7. Clause 5 then contained the following provision in regard to the Lilavati building at Matunga.

> "5. As mentioned hereinabove the building known as Lilavati Building, at Matunga, F/Ward No. 7049 Vincent Road, at line in front of Kapol Niwas Plot No. 211 D-Street No. 44, Mumbai **shall be transferred into the name of Rameshchandra Kishorelal Vasani in his capacity as the executor-trustee and the administration of this property shall be done separately**. **The income from this property shall be used or the purpose as mentioned herein. <u>This property shall not be sold.</u>** This property is giving an income of Rs.11,000.00 (Rupees Eleven Thousand Only) per year. **Rameshbhai shall maintain the said property in**

> **good condition as being the trustees of this property and it required pay for any expenses including all the repairing expenses, taxes etc. then from the income received there from, shall be done and if any money is saved after said expenses then it shall be utilised in the manner given herein below**.
>
> > (a) A drinking pot to be provided for dumb animals at Dharampur and Rameshbhai shall make necessary arrangements for providing continuous water in the said pot.
> >
> > (b) One bag of grains shall be given every month to one poor person at Dharampur.
> >
> > (c) Free water stall for drinking water during four months in summer shall be installed.
> >
> > **(d) If any income is left after the above expenses then it shall be taken by Rameshbhai.**
>
> Above things shall be done by the said Trust. Rameshchandra Kishorelal Vasani is being appointed as first trustee of the said Trust."

(*Emphasis added*)

8. This is therefore the second Trust. Mr Hariani states that a private Trust named the Lilavati J Vasani Trust has in fact been set up to manage this property.

9. Clause 7 is the next material clause. It has several subsidiaries clauses. It will need to be read with clauses 7 to 10.

> "7. If any other property in addition to the property situated at Mumbai, is found then the same shall be occupied by Rameshchandra as being the trustee and get

his name registered against the said property and take charge of the same as mentioned herein below. The income of the said property shall be collected together and accounts shall be maintained in respect thereof. The tax and cost of repairing of the house situated at Dharampur shall be paid out of the income earned and there after the same shall be utilized as mentioned herein below.

(a) My nephew Rameshchandra Kishorelal Vasani shall pay the expenses for the primary, secondary and college education of his daughters and shall pay expenses to each daughter up to Rs. 5000.00 (Rupees Five Thousand Only) for their marriage. However, no expenses shall be paid for education in foreign countries.

(b) My nephew Rameshchandra Kishorelal Vasani is having a son named Rahul and in future if Rahul will have any brother then the expenses of their primary, secondary and college education and for looking after their basic needs, shall be paid from the income earned from the property. However, no expenses shall be paid for education in foreign countries.

(c) My nephew's son Sureshchandra Champaklal Vasani's daughter Sonal's primary, secondary and college education and looking after their basic needs from the income earned. However, no expenses shall be paid for education in foreign countries.

(d) The residential property bearing City Panchayat Property Registration No. 444 and 445 out of the property situated at Dharampur shall be kept vacant for dogs and cooking food for them and it shall not be given on rent to anyone.

(e) After the aforesaid expenses and from the balance income received from the rent of the property and the interest from the fixed deposit money a part thereof shall be reserved for emergency expenses and thereafter the remaining money shall be used by Rameshchandra as he may deem fit. My nephew Ratilal Hargovindas is having son named Shaileshkumar and his son and their primary, secondary and college education and looking after their basic needs from the income earned. However, but no expenses shall be paid for education in foreign countries.

8. None of my properties situated at Dharampur shall be sold and the executor does not have any authority to do the same.

9. If Rameshchandra Kishorelal Vasani gets deceased then in the said case the administration of my property shall be done by Ilaben who is the wife of Rameshchandra Kishorelal Vasani.

10. This property shall not be sold until Master Rahul and his brothers are alive. Thereafter their legal heirs shall, as full owners, be entitled to all my moveable and immovable property and cash money with complete possession and full ownership thereof. In such circumstances, the legal heirs of Rahul and his brothers shall have equal share in the said property."

(*Emphasis added*)

10. Clause 11 appoints five Executors including Petitioners Nos. 1 and 2. Mr Hariani states that the other Executors have never participated. Mr Hariani also confirms that Probate has been obtained to this Will (page 112). The Probate was obtained by the

3rd Petitioner, Rahul, Rameshchandra and Ilaben's son, Lilavati's grand-nephew.

11. The questions in the Trust Petition after amendment are thus:

> "(a) That this Hon'ble Court be pleased to accord its opinion under Section 34 of the Indian Trusts Act 1882 whether upon construction of the said Will and considering the extenuating circumstances set out in the Trust Petition, whether the Petitioners are entitled to sell/transfer/assign/grant development rights in respect of the said Immovable Properties with the consent of and for the benefit of the ultimate beneficiaries to such parties and/or persons as the Trustees may deem fit and proper;
>
> (a-1) That in the event this Hon'ble Court is of the opinion that the Petitioners are entitled to sell/transfer/convey/assign/grant development rights in respect of the said immovable properties then the Hon'ble Court be pleased to pass such necessary directions/clarifications under Section 34 of the Indian Trusts Act 1882 if required with respect ot the proposed sale/transfer/conveyance and assignment of the said Immovable Properties with the consent, confirmation and for the benefit of the ultimate beneficiaries."

12. The provisions of clauses 4 and 7 to 10 deal with separate properties. When clause 10 speaks of "this property" it obviously means the property referred to earlier but which has not separately been impressed with a Trust by a preceding clause. That would therefore operate to exclude the Matunga property. The Matunga property would be governed by, and only by, clause 5.

13. This is of significance because though Cause 5 contains a restraint on sale of the property, it also points out that at the time of the Will, its rental income was Rs.11,000. Mr Hariani points out that this rental income of the property was even then negligible; today it is a pittance. The expenses on the property far exceed its income. This leaves nothing at all for the purposes of the Trust. Rameshchandra has been fulfilling those objectives from personal finances. The interpretative tussle is thus between the restraint on the one hand and the purposes of the trust, viz., the purposes of the restraint, on the other. Evidently, the intention was that the rental income would be used to (i) maintain the property in good repair, a mandate of Clause 5 itself; and then (ii) provide for the purposes (a) to (c) listed in that clause. Sub-clause (d) gave the left over income to Rameshchandra. In my view, Mr Hariani is correct in his submission that the restraint must yield to the overarching objective. It cannot be, he submits, and I believe with complete justification, that the passage of time, rising expenses, a fixed income and a depreciating rupee value all combine to defeat the purposes of Clause 5(a) to (c). The restraint cannot be read in isolation. It has to be read in context, and as the foundation of the purposes listed in the clause itself. The preservation of the structure, i.e. the restraint on sale, if viewed in isolation as an absolute bar, would result in a complete defeasance of the objectives. The result would be an impossibility of realization of Clause 5(a) to 5(c). Correctly read, therefore, the clause can only mean that the Matunga property is not to be sold so long as its income, after meeting maintenance costs, is sufficient to provide for the objectives of 5(a) to 5(c). Today, with repair costs, taxes and duties, those costs leave a negative balance. To permit the sale of the Matunga property is evidently necessary to further the objects of Clause 5 itself. This is obviously on the basis that the sale proceeds will have to be applied towards the purposes set out in clause 5. The 1st Petitioner will therefore proceed accordingly, and will utilize the sale proceeds in accordance with Clause 5.

14. Clauses 7 to 10 stand on a different footing. Correctly read, Clause 10 should actually be a sub clause of Clause 7. Further, Clause 10 must be read with Clause 8 and that in turn must be read with Clauses 7(b). What Lilavati intended was that the Dharampur properties would not be sold while Rahul and his brothers (if any) were minors. The property income was to provide for their college education. Clearly, this was of importance to Lilavati given her own background and the manner in which., after marriage, she quite literally forged her own path in education, going on to becoming a teacher. That narrative is remarkable for any number of reasons. So Clauses 7 (a), (b) and (c) are focused entirely on the question of education of the various persons they name. What clause 8 says, correctly read, is that until this education is complete the Dharampur properties cannot be sold. Then comes Clause 10, which says that properties are not be sold during the *lifetime* of Rahul and his brothers. Rahul has no brothers, although he has sisters. During Rahul's lifetime that property cannot be sold, but thereafter his heirs, i.e. Rahul's wife and daughter would have plenary and complete rights as full owners in the property. There is no impress of a trust properly so called. The educational requirements in Clause 7, specifically 7(a), 7(b), 7(c) and 7(e) have been fulfilled and met. It is only Clause 7(d) that speaks of a residential property being kept entirely free. It is not even to be given on rent. It is to be maintained vacant and its only purpose is to be used apparently as a dog shelter and a place for cooking for the animals. Rameshchandra himself has a beneficial interest in the surplus funds mentioned in Clause 7(e). Conjointly read, in my view, this means that the Dharampur property can be sold by Rahul's wife and daughter but will require from Rameshchandra and from Rahul a legally valid document relinquishing or surrendering any interest they may have, beneficial or otherwise, under Clause 7 of this writing. If those two interests are given up, then the Dharampur estates settle on Rahul's wife and daughter as full owners with an equal undivided share. This necessarily confers on them plenary dispositive powers of the Dharampur properties. That consent is already on hand as both Tejal, Rahul's wife, and their daughter, Vidhi, have filed supporting Affidavits at page 161 and 164. Both have said that they have no objection to the sale of the properties. The only provision that will need to be made from the sale proceeds and which will necessarily be in the discretion of Rameshchandra and Rahul is to ensure the fulfilment of the avowed objectives of Clause 7(d). It could not possibly have been Lilavati's intention to retain a property in perpetuity by requiring continually increasing expenditure on its maintenance but without any discernible income. The object of Clause 7(d) is not the Dharampur City Panchayat Registration No. 444 and 445 property itself but is what it represents, i.e. a canine shelter and facility. Indeed it is entirely possible for Rahul and Rameshchandra to achieve this purpose. In a situation like this, where there exists some level of uncertainty as to testamentary intent or the manner in which it is to be realised, the well settled doctrine of cy-pres can properly be invoked. This means that the object of Clause 7(d) must be realised as nearly as possible.

This is always permissible in the interpretation and construction of Wills and trusts. As I have noted, the object is not the Dharampur house itself but its use, and subject to an undertaking to be given on Affidavit by the three Petitioners Rameshchandra, Tejal and Vidhi that they will make reasonable adequate provision to achieve the purpose of Clause 7(d), I see no difficulty in accepting the interpretation that they now have powers of sale over these properties.

15. In this view of the matter, and subject to these observations, the Petition is made absolute with the opinion recorded that Rameshchandra has power to sell the Matunga property subject to utilisation of the sale proceeds as the manner indicated above; and, similarly, that Dharampur properties may also be sold subject to the foregoing terms and conditions.

16. The Petition is disposed of in these terms. Petition to be finally numbered for statistical purposes within one week of this order being uploaded.

(G. S. PATEL, J)