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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO. 551 OF 2004
IN
SUIT NO. 3578 OF 2000**

Kamlesh Singh Harnamsingh Chowhan **...Appellant**
Versus
Gangasingh Motisingh Chowhan **...Respondents**
(deceased) and Ors.

Mr. Vivek Kantawala with Mr. Amey Patil, Ms. Bhairavi Waravdekar, Ms. Hetal Jobanputra and Mr. Shanay Bafna, i/b. M/s. Vivek Kantawala & Co. for the Appellant.

Mr. Fredun Devitre, Senior Counsel with Mr. Zubin Behram Kamdin, Senior Counsel and Ms. Vidya Nair i/b. M/s. Wadia Ghandy & Co. for Respondent Nos.2 to 4.

Mr. K.H. Mody, i/b. M/s. S. Pathak & Co. for Respondent No.5.

**CORAM: B.R. GAVAI &
RIYAZ I. CHAGLA, JJ.**

JUDGMENT RESERVED ON 21ST DECEMBER, 2018.

JUDGMENT PRONOUNCED ON 11TH JANUARY, 2019.

J U D G M E N T :- (Per Riyaz I. Chagla J.)

1. This Appeal challenges an order and judgment of the learned Single Judge of this Court dated 22nd July, 2004 (“the impugned judgment”) by which the Suit filed by the Appellant / Plaintiff was dismissed on the ground that no case was made out by the Plaintiff.

2. An Appeal had been preferred by the Appellant challenging the impugned judgment which was disposed of by a judgment of this Court dated 18th December, 2013. The Division Bench of this Court set aside the impugned judgment and remanded the matter for a fresh trial on the ground that it would be unfair on the parties to proceed with the Appeal on record as it stands. The judgment of the Division Bench was challenged by the Respondent before the Supreme Court and the Supreme Court passed an order dated 27th April, 2015 setting aside the judgment of the Division Bench and held that

“the clear finding recorded by the learned trial court that the parties are agreed that no oral evidence was necessary in the suit and that the only document that was required to be interpreted is the deed dated 29th March, 1949, we are of the view that the High Court ought not to have remanded the matter for a de novo trial and ought to have considered all the issues on the basis of the aforesaid position agreed to by and between the parties”.

3. As a result thereof, this Appeal is required to be determined in light of the remand by the Supreme Court for consideration of all the issues on the basis of the position agreed to by and between the parties. Accordingly, we are determining this Appeal on the agreed position recorded by the learned Trial Court that no oral evidence is necessary and that the only document required to

be interpreted is the Deed (Indenture of Trust) dated 29th March, 1949.

4. At the outset, it would be necessary to mention that after substantially hearing the matter a suggestion was made to the parties that the parties may explore the possibility of amicable settlement since the disputes involved were amongst close relatives. The parties agreed to refer the dispute to mediation and agreed on the name of Hon'ble Justice J.P. Devadhar, Retired as mediator. This is recorded in the order dated 6th December, 2018 passed by this Court. Pursuant thereto mediation was held and a mediation report was prepared which is dated 14th December, 2018. It was recorded therein that mediation had failed as the offer of Rs.5 lakhs made by Respondent Nos. 2 to 4 to the Appellant in full and final settlement of his claim was considered by the Appellant to be unreasonable and unacceptable to the Appellant.

A brief background of facts is necessary.

5. An Indenture of Trust was executed on 31st March, 1949 between one Parvatibai Chowhan ("the Settler") and Rai Bahadur Kunwar Motisingh Lalsingh and Kunwar Gagasingh Motisingh (hereinafter referred to as the said Motisingh and the said

Grangasingh) as original trustees which settled the trust property being a plot of land with building constructed thereon and income arising therefrom. The said Indenture of Trust was duly registered.

6. The said Parvatibai died on 24th January, 1963. She was survived by her son Motisingh who had two sons viz. Harmansingh and the original trustee, the said Gangasingh. The said Gangasingh had four sons (Respondent Nos. 2 to 4) who were born prior to the execution of the Indenture of Trust. The Appellant was adopted by the said Harmansingh on 10th July, 1964 i.e. after the Indenture of Trust was executed, by a registered Deed of Adoption. Upon the demise of the said Motisingh, the said Gangasingh was the only surviving trustee. On 22nd September, 1965, the said Gangasingh appointed two of his four sons viz. Digvijaysingh and Kishorsingh (Respondent Nos. 2 and 3) as trustees on 22nd September, 1965. Being aggrieved by the appointment of the said Gangasingh's two sons as trustees, the said Harmansingh filed Suit No.267 of 1968 for removal of the said Gangasingh's sons as trustees and for appointment of Harmansingh as trustee in accordance with the Indenture of Trust. A consent decree came to be passed in the said Suit on 31st July, 1970 removing Respondent Nos. 2 and 3 and thereby appointing Harmansingh as trustee. On 10th November, 1984, the said

Harmansingh expired leaving his widow and adopted son as his only legal heirs and representatives. The Appellant applied for Letter of Administration which was obtained on 21st November, 1986 in respect of the property and credits of the said Harmansingh in Petition No. 641 of 1985.

7. There were disputes which had arisen between the Respondents and the Appellant. It is the case of the Appellant that after the death of his father, the said Harmansingh, the said Gangasingh had defamed him by circulating among tenants of Lalsingh Mansingh Building a letter dated 5th February, 1985 calling the Appellant an outsider and usurper of properties and labelling his intentions as *malafide* which led to a criminal case being filed by the Appellant against the said Gangasingh for defamation which was thereafter compromised and consent terms filed on 8th April, 1991. It is the case of the Appellant that despite the Appellant having a *bonafide* interest in the trust, the original Defendant No.1, the said Gangasingh once again appointed as trustees vide Deed of Appointment dated 28th February, 1992, the Respondent Nos. 2 and 3 who were domiciled in the US since 1974. By the very same Deed of Appointment also referred to as Deed of New Appointment the said Gangasingh appointed from and after his death Respondent Nos. 2 to 4 as the beneficiaries of

the trust property and income thereof in equal shares subject to the terms and conditions of the Indenture of Trust. Further, by a Will executed as last Will and testament of Gangasingh on 7th March, 1992, the said Gangasingh reiterated his having exercised power vested in him by the Indenture of Trust and appointing from and after his death the trust property and income therefrom and cash or securities, if any, representing the same to be held in trust for his sons Digvijaysingh, Kishoresingh and Ishwarsingh, i.e. Respondent Nos. 2, 3 and 4 herein in equal share subject to the terms and conditions of the said Indenture of Trust. On 13th October, 1997, the original Defendant No.1 and Respondent Nos. 2 and 3 herein appointed Respondent No.4 as trustee vide Deed of appointment. Further, the original Defendant No.1 by a registered Declaration Deed dated 17th March, 1998, declared that the appointment made by him of his sons as beneficiaries of the trust property and income thereof exercising power under clause 5(f) of the Indenture of Trust in the registered deed dated 28th February, 1992 is final and irrevocable.

8. It is claimed by the Appellant that the Respondents had committed several breaches of the Indenture of Trust as well as mismanaged the affairs of the trust. The Appellant has referred to a letter of the Municipal Corporation alleging breaches of the lease

arrangement in respect of the Trust property as well as the erection by the original Defendant No.1 of three unauthorised advertisement hoardings as amongst breaches of the lease arrangement. These breaches were committed in the year 2000 and despite the land records in that year showing the names of Respondent Nos. 2 and 3 as trustees, the original Defendant No.1, Gangasingh was acting as sole trustee. The Appellant has further claimed that he learnt of a current account in Bank of India opened in the name of Harganga Mahal Estate being operated by not only the original Defendant No.1 but also by his sons Respondent Nos. 2 and 3 who had at the relevant time been removed as Trustees and by his other son, Respondent No.4 who had no concern with the administration and / or management of the Trust property. The Bank account could only be operated by Trustees duly appointed under the Indenture of Trust. It appears that in view of these breaches and mismanagement of the affairs of the trust by the Respondents, the present Suit was filed by the Appellant bearing Suit No. 3578 of 2000.

9. After the filing of the present Suit, the original Defendant No.1, the said Gangasingh executed a codicil on 1st July, 2003 to his last Will and testament and by which the said Gangasingh once again exercised the power of appointment and appointed

Respondent Nos.2 to 4 as final beneficiaries to the corpus of trust in equal shares. The said Gangasingh died on 4th July, 2003.

10. The Respondent Nos. 2 to 4 herein filed a Written Statement dated 14th August, 2003 in the Suit filed by the Appellant. Issues were originally framed by the Single Judge of this Court (Bobde, J, as his Lordship then was). These issues read as under :-

(1) Whether the Plaintiff is a beneficiary under the Trust Deed dated 31st March, 1949?

(2) Whether the Plaintiff proves that the affairs of the Trust have been mismanaged by the Defendants individually or jointly?

(3) Whether the Defendant No.1 is fit to continue as a Trustee?

(4) Whether the Plaintiff is entitled to maintain the Suit?

(5) Whether the Plaintiff is entitled to a decree for removal of the Trustee?

11. It appears that after these issues were framed by the then learned Judge of this Court, the original Defendant No.1, the said Gangasingh expired on 4th July, 2003 and the issues were re-framed by the then learned Single Judge who has passed the impugned judgment and by which the matter proceeded in an entirely different manner. The manner in which the matter

proceeded is indicated in paragraph nos. 1 and 3 of the impugned judgment which read as under:-

“1. By consent of parties this Suit itself is taken up for final disposal. It was agreed between the parties that no oral evidence is necessary to be led by either of the parties for deciding the suit. It was also agreed between the parties that for deciding this suit only document that needs to be considered by the Court is the deed dated 29-3-1949. Parties are also agreed that though in the suit various reliefs are claimed, only relief that the Plaintiff is now pressing is the appointment of the Defendants Nos.2 & 3 made by the original Defendant No.1 Gangasingh as a person on whom the property devolve in terms of the above referred deed should be cancelled.

3. I have heard the learned counsel for both sides and from the submissions made before me, in my opinion, following issues arise for consideration:

i. Whether the appointment of Gangasingh made by the deed executed by Parvatibai for nominating the person on whom the property would devolve amounts to creation of Trust?

ii. If yes, whether that power is to be exercised in consonance with the principle of equity and good faith?

iii. Whether the power conferred by the deed on Gangasingh of making appointment is a power of the testator delegated to Gangasingh and therefore, it is subject to only to those obligations which are imposed by law on the testator?

The above issues come to be answered against the Appellant/Plaintiff and the Suit was accordingly dismissed by the impugned judgement. Hence, the present Appeal is filed.

12. Mr. Vivek Kantawala, the learned counsel on behalf of the Appellant has submitted that the learned Single Judge in the impugned judgment has erroneously held that the original Defendant No.1, the said Gangasingh had been delegated an exclusive power by the settlor of the Indenture of Trust viz. the said Parvatibai by which the said Gangasingh would get the same power possessed by Parvatibai and by which there could be no restrictions in the exercise of the said power. He has submitted that the then learned Single Judge failed to appreciate that the said Parvatibai as settlor had vested the property in the trustees for the benefit of the grandsons and great grandsons of the settlor. The powers conferred by the settlor upon the trustees were merely the machinery and / or means for achieving the ultimate object i.e. benefit of the grandsons and great grandsons of the settlor.

13. He has submitted that the then learned Single Judge has erroneously found in the impugned judgment that even assuming that the power in the hands of the said Gangasingh was a

discretionary power, there was no material on record placed by the Appellant which could lead to the conclusion that the power has been abused by the said Gangasingh in excluding the Appellant herein. He has submitted that it is further erroneously held that as the exercise of discretion is of subjective satisfaction, it is possible that there could have been good and valid reasons for the said Gangasingh to exclude the Appellant. He has submitted that the said Gangasingh has in an Affidavit dated 14th September, 2001 filed in reply to the Notice of Motion No.273 of 2001 taken out in Suit No. 3578 of 2000 stated that he does not admit that the Appellant is the son of Harnamsingh or that he was adopted as the son of Harnamsingh by a Registered Deed of adoption dated 10th July, 1964. He has further submitted that this statement of the original Defendant No.1, the said Gangasingh only goes to show that the said Gangasingh as trustee had let his personal feelings about the beneficiary i.e. the Appellant come into consideration whilst exercising his alleged discretionary power to exclude the Appellant to the benefits of the trust property. He has relied upon a passage from the Law of Trust by Simon Gardner in that context.

14. He has submitted that the then learned Single Judge has in the impugned judgment not appreciated in proper perspective the

powers conferred by clause 5(f) of the Indenture of Trust which placed a specific restriction upon the surviving trustee viz. that the trust property was to be distributed equally between sons of the said Harmansingh and the said Gangasingh such that they receive an equal share. He has submitted that the original Defendant No.1 has failed and / or neglected to exercise the powers conferred upon him under the Indenture of Trust in good faith and for the objects and purposes of the trust. He has submitted that the exercise of power by the original Defendant No.1 is an abuse of power and that the apparent intention being for avenging the prior losses in litigations between, the original Defendant No.1 and the Appellant's father Harmansingh as well as the Appellant. He has submitted that the intention to exclude the Appellant from the benefits of the trust is also as a result of the Appellant having made complaints regarding the breaches committed by the Respondents of the terms and conditions of the lease of the trust property and which had prejudiced the interest of the Appellant as beneficiaries of the trust. He has submitted that the Indenture of Trust having been created for the benefit of all grandsons and great grandsons of the settlor, the benefit of which could not be taken away by the Deed of new appointment, Will and codicil.

15. The learned counsel has relied upon certain provisions of the Indian Trusts Act, 1882 viz. Sections 11, 17, 49, 60 and 73. Sections 17 and 49 of the Indian Trusts Act enjoin a Trustee to be impartial in exercise of his powers / duties as a trustee and where a discretionary power is conferred, the power is to be exercised by the Trustee reasonably and in good faith. Section 11 is also to the similar effect and provides that the trustee is bound to fulfil the purpose of the trust. Section 60 of the Act provides the right to have proper persons as trustees and that persons domiciled abroad are not proper persons within the meaning of this Section. Thus the beneficiaries right to have the trust property properly protected and held and administered by proper persons cannot be jeopardised by vesting the trust property in the hands of persons domiciled abroad as done in the present case i.e. in the hands of the Respondent Nos. 2 and 3, residing in the USA. Section 73 of the Act provides for the appointment of new trustee in place of the trustees who have left India for the purpose of residing abroad. In the present case, the Respondent Nos. 2 and 3 who had left India and were residing in USA should have been substituted by a new trustee in their place.

16. The learned counsel has submitted that the Indenture of Trust had provided for appointment of the Appellant's father the

said Harnamsingh, in the event of the original trustee, the said Motisingh resigning / expiring. It further provided for at least two trustees to manage the trust. These clauses have been breached by the said Gangasingh. It was upon the said Harnamsingh filing the Suit, that the said Gangasingh by a consent decree agreed to remove his two sons and substituted them with the said Harnamsingh. After the death of said Harnamsingh, original Defendant No.1 acted on his own for several years and thereafter once again appointed Respondent Nos. 2 and 3 as trustees. He has submitted that the learned Single Judge has failed to appreciate that the said Gangasingh has misused his power of appointment of trustees by the Deed of Appointment of Trust dated 28th February, 1992.

17. He has in support of his submissions relied upon the following cases viz. ***Klug V. Klug*¹, *Cecil Libovitz V. Official Trustee of West Bengal*², *M.V. Ramasubbier & Ors. V. Manicka Narasimachari & Ors.*³, *M/s. Shanti Vijay & Co. V. Princess Fatima Fouzia*⁴, *Turner & Ors. Vs. Turner & Ors.*⁵, and**

1 (1918) 2 Ch.67

2 (1965) 69 C.W.N. 1010.

3 AIR 1979 SC 671.

4 AIR 1980 SC 17.

5 (1983) 3 W.L.R. 896.

Krishna Mohan Kul & Anr. V. Pratima Maity & Ors.⁶. The judgments in these cases expressly stipulate that where property is vested in Trust, the Trustee can only exercise power delegated unto him by the settlor for the purposes of the Trust and expressly state that this Court will interfere wherever it notices that the powers delegated are abused and / or misused for purposes other than the objects of the Trust. He has submitted that the learned Single Judge has erroneously placed reliance upon the judgment of this Court in **Bapuji Karawala V. Haji Esmail Haji Ahmed**⁷. He has submitted that this judgment does not deal with a situation as in the present case where the property is vested in the trustee for a particular object and is really a precedent on the rule against perpetuities since the property was bequeathed in that case by way of Will and Testament. He has accordingly submitted that the impugned judgment ought to be set aside and the suit decreed in favour of the Appellant.

18. Mr. Devitre, the learned Senior Counsel appearing on behalf of the Respondent Nos. 2 to 4 has submitted that the original Suit had been filed by the Appellant for removal of Respondent Nos. 2 to 4 as trustees of the trust property and for accounts of the said

⁶ (2004) 9 SCC 468.

⁷ (1921) Bom.L.R. 1259.

trust. He has submitted that upon the demise of the original Defendant No.1 who was the original trustee of the said trust, the issues were re-framed by the learned Judge in the impugned Judgment and which confined itself to the nature of the power exercised by the said Gangasingh making appointment of Respondent Nos. 2 to 4 herein as beneficiaries of the trust property and whether that power has been exercised in consonance with the principles of equity and good faith. The plaint filed in the said Suit was accordingly amended and now challenged the codicil dated 1st July, 2003 executed by the said Gangasingh appointing Respondent Nos. 2 to 4 as beneficiaries of the trust property and for declaration that the codicil is illegal and not binding or enforceable against the Appellant or any one claiming through the Appellant. He has submitted that by virtue of the order passed by the Hon'ble Supreme Court, the parties have agreed that what is required to be interpreted is only the Indenture of Trust dated 29th March, 1949 and that no evidence was necessary.

19. He has submitted that the Indenture of Trust makes it clear that the Appellant was never entitled to any income under the Trust. This is clear from clauses 5(a), 5(b), 5(c) and 5(d). In fact clause 5(e) of the Indenture of Trust provides that on the death of

the said Gangasingh his five annas share of net income will be given to his four sons and clause 5(d) provides that on the death of Harnamsingh his five annas share of net income will be given to the four sons of the said Gangasingh. Clause 5 (f) of the Indenture of Trust provides for the date of distribution and the manner in which the estate is to be distributed once the trust come to an end. In that context, it is submitted that the settlor, the said Parvatibai, in clause 5(f) of the Indenture of Trust had given an absolute and unfettered power to the said Gangasingh to choose the final beneficiaries with the only limitation imposed on him that he must exercise the power of appointment and decide the beneficiaries from amongst the sons and or grandsons of Harnamsingh and Gangasingh. The said Gangasingh could also determine the shares that each beneficiary would be given on appointment. He has submitted that such power could have been exercised by the said Parvatibai herself but she chose to delegate the power to Gangasingh. He has submitted that the said Gangasingh was given the opportunity to exercise the power of appointment by executing a deed or will or codicil or any other testamentary writing.

20. The learned senior counsel has further submitted that from the said clause in the Indenture of Trust it is clear that the settlor

had immense faith in the said Gangasingh and hence he was given exclusive power and benefits in his individual capacity apart from being made managing trustee. He has submitted that from the Deed of Appointment, the Will and codicil as well as the Deed of declaration, it is clear that the said Gangasingh has exercised the power as well as time and again confirmed the appointment of Respondent Nos. 2 to 4 as final beneficiaries of the corpus of the trust. He has submitted that the Deed of appointment executed by the said Gangasingh with Respondent Nos.2 and 3 as new trustees on 28th February, 1992 was for both appointment of new trustees as well as a Deed of new appointment i.e. for executing the power vested in the said Gangasingh by appointing as the beneficiaries of the corpus of the trust in favour of his sons (Respondent Nos. 2 to 4).

21. He has submitted that the Appellant was neither a trustee nor entitled to any income during the subsistence of the trust. He has submitted that the Appellant is not a beneficiary of the corpus of the trust and thus had no locus *standi* to have filed the present Suit being neither a trustee nor a beneficiary. He has submitted that prior to the date of distribution i.e. 4th July, 2003 when the trust came to an end the said Gangasingh had validly exercised the said power of appointment. He has submitted that the portion

of clause 5(f) which provides that the corpus will be distributed to all the sons of Harnamsingh and Gangasingh in equal share would come into operation only if Gangasingh had failed to exercise the power of appointment. Since Gangasingh had during his lifetime exercised the power of appointment / distribution, this portion of clause 5(f) does not come into operation. He has submitted that the said Gangasingh in exercising the power of appointment has excluded his own eldest son, the 5th Respondent apart from the Appellant. He has submitted that it is not open to any party or even the Court to look into the reasons or motive for the action of the said Gangasingh in exercising the said power. He has submitted that under the Indenture of Trust, the said Gangasingh has stepped into the shoes of the settlor, Parvatibai and exercised the power without requiring to give any reasons or his motives being questioned.

22. The learned Senior Counsel has relied upon the judgment of this Court in ***Bapuji Karawalla (Supra)***. He has further relied upon the judgment of this Court in ***Mahadeo Ramchandra Vs. Damodar Vishwanath & Anr.***⁸ and the judgment of the Calcutta High Court in ***Basanti Seal and Ors. Vs. Hiralal Seal and Ors.***⁹.

8 AIR 1957 Bombay 218 (V44 C 76 Oct.)

9 2007 (1) CHN 35 (Equivalent Citation)

In the case of ***Basanti Seal (Supra)*** it was held that where the Trustees of a private trust had the absolute power to appoint beneficiaries of the corpus and exercised the same in favour of two of the sons while excluding the third son, he had committed no wrong and rightly exercised a validly given power. He has submitted that the default clause has also been dealt with in the judgment of ***Basanti Seal (Supra)*** and it has been held that the default clause would arise only when there is no appointment by the joint trustees or surviving trustee. He has submitted that similarly in the present case, the power of appointment of beneficiaries was exercised by the surviving trustee, the said Gangasingh and hence the default clause would not apply.

23. He has submitted that the learned Judge in the impugned Judgment has correctly observed that the Appellant has not made out any case of the said Gangasingh having made the appointment of beneficiaries in a *malafide* manner. He has accordingly, submitted that the appointment of Respondent Nos. 2 to 4 as beneficiaries of the trust property is valid and that the Appellant has no right, title and interest in the trust property. Accordingly, he has submitted that the Appeal be dismissed.

24. Before considering the submissions made on behalf of the Appellant and Respondents, it is necessary to refer to the relevant clauses of the Indenture of Trust which, as agreed between the parties is the only document which needs to be considered. Clause 1 of the Indenture of Trust provides that the settler has assigned upon the trustees the said property. Clause 5 provides that after defraying the expenses mentioned therein, the trustees shall hold the remainder of the gross income in trust to apply and pay the same in the manner stated therein. A 5/16th share of the remainder was to be paid to the said Harnamsingh during his life. A further 5/16th share was to be paid to Gangasingh during his life. The remaining 6/16th share was to be applied *inter alia* as follows:-

“(c) The trustees shall apply and utilize the remaining 6 (six) annas share of the net income

(ii) From and after the construction work referred to in the forgoing sub clause (c) (i) is completed the trustees shall pay the remaining six annas share of the net income to the said Kunwar Gangasingh Motisingh for the maintenance, education, advancement and the benefit of the said four great grand sons of the Settlor being the sons of Kunwar Gangasingh and the survivors or the survivor of them until each of them shall attain the age of 18 years or until the date of distribution which ever may be earlier and from time to time as and when each of the said four great grandsons of the settler shall attain the age of 18 years the trustees shall

divide the said six annas share of the net income into as many as equal parts as there shall be great grandsons of the Settlor then living and – pay one such equal part absolutely to each one of the said four great grandsons of the Settlor who shall have attained the age of 18 years,-- until the death or upto the date of distribution hereinafter mentioned – whichever may be the earlier and pay the balance of the said six annas share of the net income to the said Kunwar Gangasingh for the maintenance, education, advancement and benefit of such of the said four great grand-sons of the Settlor as shall not have then attained the age of eighteen years and in the event of only one of the said four great grandsons attaining the age of eighteen years the Trustees shall pay the whole of the said six annas share to him absolutely until his death or upto the date of distribution hereinafter mentioned whichever may be earlier.

PROVIDED HOWEVER that the said Kunwar Gangasingh shall be at liberty at his discretion instead of spending away the whole of the said six annas share of the net income for the maintenance and benefit of the said great grand sons of the Settlor, to set apart and accumulate not more than two-third of the said six annas share in the net income or such part of the said six annas share as shall be payable to him for the time being and from time to time for the maintenance, education, advancement and benefit of the said four great grand sons who shall not have attained the age of eighteen years as and by way of provision for marriage expenses and higher education of such great grand sons of the Settlor and to use such accumulations or such portion thereof as he may in his absolute discretion deem fit on the occasion of the marriage of each of such great grandsons for the purposes of such marriage or for higher education of each of such great grandsons;

PROVIDED FURTHER that the said Kunwar Gangasingh shall not be liable to render accounts either to the Trustees or to such great grand sons of the Settlor or any one else in respect of the said six annas share in the net income or any portion thereof which shall be paid to him by the Trustee for the purposes aforesaid or as to the disposal thereof or in respect of the application and disposal of the accumulations, if any, that may be made by the said Gangasingh of two-third of the said six annas share in the net income for providing marriage expenses and higher education for such great grandsons.

25. The other relevant clauses are clauses (d) and (f) of Clause 5 which read as under:-

(d) In the event of the said Kunwar Harnamsingh Motisingh predeceasing the said Kunwar Gangasingh Motisingh the Trustees shall pay the said five annas share of the net income which would have had been payable to the said Kunwar Harnamsingh Motisingh if he had been alive to all the said four great grand sons of the Settlor being the sons of Kunwar Gangasingh in equal shares for and during their respective lives and in the event of the death of any one or more of them to the survivors or survivor of them equally for and during the respective lives or life of such survivors or survivor or upto the date of distribution – Hereinafter mentioned whichever may be earlier so as to increase and augment their share in the net income as aforesaid but so that during the minority of each of the said four great grand sons of the Settlor his share of the said five annas share of the net income shall be paid to the said Kunwar Gangasingh Motisingh for the maintenance, education, advancement and

benefit of such minor with the same powers and subject to the same conditions as are mentioned in Clause (5) sub – clause (c) (ii).

(f) On the death of the survivor of them the said Kunwar Harnamsingh Motisingh and the Kunwar Gangasingh Motisingh which point of time is herein referred to as the date of distribution, the trustees shall hold the trust premises and the income thereof and the cash or securities, if any, then standing to the credit of the repair fund in trust, for such one or more sons or grandsons of the said Kunwar Harnamsingh and Kunwar Gangasingh in such shares, at such time or times for such interest or interests and in all respects whatsoever in such manner as the said Kunwar Gangasingh shall by deed with or without power of revocation and new appointment or by will or codicil or other testamentary writing without transgressing the rule against perpetuities or any other rule of law appoint and in default of any and subject to any and every such appointment in trust for all the sons of the said Kunwar Harnamsingh and the Kunwar Gangasingh – in equal share but so never the less that if any son of the said Kunwar Harnamsingh or the Kunwar Gangasingh shall have died before the date of distribution leaving son or sons him surviving and existing at the date of distribution then the last mentioned son or sons shall take and if more than one, face - equally between them the share which his or their deceased father would have taken in the trust premises and the income thereof and in the cash or securities representing the repair fund had he been alive at the date of distribution.

26. The appointment of new trustees is provided in clause 9 of Indenture of Trust which reads as under:-

“9 The power of appointing new trustees conferred by statute shall for the purposes of these presents be vested in the Continuing Trustees or Trustee. After the death of either of them the said Rai Bahadur Kunwar Motisingh or Kunwar Gangasingh or retirement of the former / Kunwar Harnamsingh shall be appointed trustee and thereafter if and when any new trustee is to be appointed any of the sons of Kunwar Gangasingh who shall be major, shall be appointed trustee. Upon any appointment of new trustee the number of trustees may be altered provided that it be not reduced below two and if at any time the number of trustees shall by death or otherwise be reduced to one a new trustee or new trustees shall be appointed as soon as conveniently can be but in the meantime and until such appointment all acts of the sole – trustee shall be valid and effectual”.

27. We shall now proceed to consider the rival submissions. The document which falls for consideration viz. the Indenture of Trust was executed by the settlor viz. the said Parvatibai for vesting the trust property in the hands of the original trustees, the said Motisingh and the said Gangasingh. The beneficiaries being her grandsons and great grandsons. On the date of the Indenture of Trust, i.e. 31st March, 1949, the said Harnamsingh had no son and it was only in 1964 that he had adopted the Appellant. The recital clause (at internal page 3) of the Indenture of Trust also

makes it clear that the trust property was being held upon trust for the benefit of the settlor's grandsons and great grandsons. This is provided in the recital clause (internal page 3) which reads as under:-

Recital Clause (at Internal Page 3):

... AND WHEREAS the Settlor has two grandsons, Kunwar Harnamsingh and the said Kunwar Gangasingh being the sons of her son the said Rai Bahadur Kunwar Motisingh AND WHEREAS the said Kunwar Harnamsingh is married but has at present no issue (Appellant was adopted in 1964) and the said Kunwar Gangasingh is also married and has at present four minor sons namely (1) Bhupendrasingh Gangasingh born on 7th July, 1941, (2) Digvijaysingh Gangasingh born on 18th November, 1942, (3) Kishoresingh Gangasingh born on 13th January, 1944 and (4) Ishwarsingh Gangasingh born on 19th February, 1946 AND WHEREAS the Settlor has decided to settle her said leasehold land hereditaments and premises upon trust for the benefit of her said grandsons and great grandsons.

(emphasis supplied)

28. The other clauses of the said Indenture of Trust which have been extracted aforesaid also make it clear that the trust property was vested in the trustees by the settlor for the intended beneficiaries and which included the grandsons and great grandsons of the settlor. The trustees were to hold the remainder of the gross income (called the net income) in trust and were to apply the same as provided in clause 5(a), 5(b) and 5(c) of the

Indenture of Trust. Clause 5(f) of the Indenture of Trust has been relied upon by the Respondents to claim that there was an independent power vested in the said Gangasingh to distribute the shares in the trust property in whomsoever he deemed fit by Deed of new appointment, Will or codicil provided it was distributed amongst the sons and / or grandsons of the said Harnamsingh and the said Gangasingh as beneficiaries. We cannot accept the Respondent's interpretation of Clause 5(f) of the Indenture of Trust. This clause refers to the date of distribution and from a reading of this clause it is clear that the settlor of the Indenture of Trust had not intended to exclude any of her great grandsons i.e. sons of the said Harnamsingh and the said Gangasingh. In the last part of this clause, which the Respondents have interpreted as applying in the eventuality of a default on the part of the said Gangasingh to appoint the beneficiaries on the date of distribution, provides that "subject to any and every such appointment in Trust for all the sons of the said Kunwar Harnamsingh and Kunwar Gangasingh in equal shares..." Presuming, that the Respondents are correct in their interpretation that sons of the said Kunwar Harnamsingh and Kunwar Gangasingh would be appointed as beneficiaries in equal shares only in the eventuality of the default on the part of the said Kunwar Gangasingh to appoint the

beneficiaries and determine their respective shares in the trust property, it is clear that the settlor had no intention to exclude any of her great grandsons, either existing on the date of Indenture of Trust or born or adopted thereafter. This is apparent from the Indenture of Trust which mentions the beneficiary of the trust property to include the sons of the said Harnamsingh, although at the date of execution of the Indenture of Trust, the said Harnamsingh had no son, the Appellant having been adopted in 1964.

29. We are accordingly of the considered view that the discretionary power which had been conferred on the said Gangasingh as original trustee was required to be exercised reasonably and in good faith and for the benefit of the sons of the said Harnamsingh and Gangasingh by determining their respective shares and as such the discretionary power can be controlled by this Court. This is expressly provided for under Section 49 of the Indian Trust Act, which reads as under:-

49. Control of discretionary power.—Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

30. From the facts emerging in the present case, the said Gangasingh who was appointed as original trustee has taken various measures to favour his sons and exclude the said Harnamsingh and his adopted son, which measures were never intended to be taken by the settlor of the trust who vested the trust property in the hands of the original trustees. This is evident from steps taken by the said Gangasingh in appointing his own sons i.e. Respondent Nos. 2 to 4 as trustees, after the resignation of the original trustee, the said Motisingh. This was effected on 22nd September, 1965, when the said Gangasingh appointed his two sons as trustees, although under clause 9 of the Indenture of Trust, it was provided that upon the expiry / retirement of the said Motisingh, the said Harnamsingh was to be appointed as trustee. It was only thereafter that when a new trustee is to be appointed, any of the sons of the said Gangasingh who was a major shall be appointed as trustee. As a result thereof, the said Harnamsingh was compelled to file a Suit for removal of Respondent Nos. 2 and 3 as well as the said Gangasingh as trustees and for appointment of himself as trustee. This resulted in the consent decree being passed removing Respondent Nos. 2 and 3 as trustees and appointing the said Harnamsingh as trustee. Upon the death of the said Harnamsingh on 10th November, 1984, the said

Gangasingh acted as sole trustee for several years till 28th February, 1992, despite clause 9 of the Indenture of Trust providing that the trust property should be vested in the hands of at least two trustees and in the event the number of trustees are reduced to one, a new trustee or new trustees shall be appointed as soon as conveniently can be so appointed and in the meantime until such appointment all acts of the sole trustees shall be valid and effectual. It further appears that on 28th February, 1992 the said Gangasingh once again appointed vide Deed of Appointment, Respondent Nos. 2 and 3 who had been domiciled in US since 1974. This was clearly in violation of Section 60 of the Indian Trusts Act which provides that persons domiciled abroad are not proper persons to administer the trust property and hence such appointment was contrary to law. Further, the appointment was only in name, as the said Gangasingh for all practical purposes continued as sole trustee contrary to the Indenture of Trust.

31. We find from the Deed of Appointment executed by the said Gangasingh appointing Respondent Nos. 2 and 3 as trustees on 28th February, 1992, the said Gangasingh went one step further by exercising the power vested in him under the Indenture of Trust and appointing from and after his death the trust property and income thereof to be held in trust for his sons Digvijaysingh,

Kishoresingh and Ishwarsingh (Respondent Nos. 2,3 and 4) in equal shares. This exercise of power was done in the very same Deed of appointment although the Deed was executed by the said Gangasingh together with his sons contrary to clause 5(f) of the Indenture of Trust. The said clause provided that such appointment could be made only by the said Gangasingh. We do not accept the argument of the learned Senior Counsel for the Respondents that in effect there are two separate Deeds i.e. one for Deed of Appointment of new trustees and the other a Deed for new Appointment of beneficiaries of the corpus of the trust. This appointment of Respondent Nos. 2 to 4 as the beneficiaries of the trust property from the date of distribution was apart from being contrary to the said clause in the Indenture of Trust was also to the detriment of the Appellant, being a beneficiary under the Indenture of Trust and for whose benefit the trust property was held. Such act on the part of the said Gangasingh as trustee is in violation of Section 17 of the Indian Trusts Act, which provides as under:-

17. Trustee to be impartial.—Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another....

32. The Appellant has claimed that from time to time the said Gangasingh committed breaches as trustees in respect of the trust property, particularly with regard to the lease arrangement with the Municipal Corporation. Further the said Gangasingh together with Respondent Nos. 2 and 3 were operating a current account in the name of Harganga Mahal Estate in Bank of India to the detriment of the Appellant. As a result whereof the present Suit came to be filed by the Appellant. It appears that after the filing of the Suit, the said Gangasingh executed codicil on 1st July, 2003. The said Gangasingh had reiterated the appointment of his sons (Respondent Nos. 2 to 4) as beneficiaries of the corpus of the trust on the date of distribution in the codicil by going to the extent of stating therein that it is his wish to have this appointment in the event that the Deed of Appointment dated 28th February, 1992 is set aside by this Court in the Suit filed by the Appellant. Upon the death of the said Gangasingh on 4th July, 2003, the Respondent Nos. 2 to 4 claimed to be the beneficiaries of the trust property to the exclusion of the Appellant by virtue of the Deed of Appointment as well as the Will and codicil executed by their father, the said Gangasingh. As a result thereof, the issues were re-framed by the learned Judge in the impugned judgement and the plaint was accordingly amended. It appears that the learned

Judge in the impugned judgement has confined his findings to the nature of the power conferred by clause 5(f) of the Indenture of Trust on the deceased, the said Gangasingh by the settlor, the said Parvatibai.

33. The learned Judge has in the impugned judgment arrived at a finding that the said Gangasingh will get same power which were possessed by the said Parvatibai and that no restrictions got attached to that power. He has further held that presuming that the power in the hands of the said Gangasingh was a discretionary power then that power will have to be exercised by him on his subjective satisfaction. With great respect to learned Judge, we are unable to accept such findings as it is clear from clause 5(f) of the Indenture of Trust that the trust property was to be held by the said Gangasingh as the original surviving trustee on the date of distribution i.e. his death for the benefit of the son of the said Harnamsingh as well as his own sons. It is nowhere mentioned in the Indenture of Trust that the son of the said Harnamsingh would be excluded on the date of distribution. We find that the learned Judge has failed to consider the other clauses of the Indenture of Trust including the recital thereof which makes it clear that the trust property was held for the benefit of the settlor's grandsons and great grandsons which would include the Appellant.

34. The learned Judge has further incorrectly found that there was no material placed by the Appellant which would indicate that in 1992, the said Gangasingh made the appointment of his sons as beneficiaries actuated by any malice or was enimical towards the Appellant. This finding overlooks the defamatory statement made against the Appellant by the said Gangasingh by claiming that the Appellant was not the adopted son of the said Harnamsingh. This is reiterated by him in the Affidavit in Reply to the Notice of Motion filed in the present Suit.

35. The learned Judge has also overlooked the well settled law laid down in the judgments of various Court relied upon by the Appellant where it has been expressly held that once the discretionary power is not exercised by the trustee reasonably and in good faith, such power could be controlled by a Court. These judgments have been passed in the following cases viz. **Klug (Supra)** a judgement of the Chancery Division, **M.V. Ramasubbier (Supra)**, judgment of the Supreme Court and in **Re. H.E.H., The Nizam's Jewellery Trust (Supra)**, again a judgment of the Supreme Court. The Supreme Court in **Re. H.E.H., The Nizam's Jewellery Trust (Supra)** at paragraph 52 has held as under:-

52. The power conferred on the Board of Trustees is no doubt discretionary, but on the principle embodied in S.49 viz., that when such discretionary power is not exercised reasonably and in good faith, such power may be controlled by a Court. There was no warrant for the suggestion made by the Board of Trustees before the High Court that the power is absolute. The law on the subject is succinctly stated in Underhill's Law of Trusts and Trustees, 12th Edn., p.472;

....it would seem that, even where trustees claim to exercise their discretion as to investments, the court will, in a proper case, direct an inquiry whether it is for the interest of the beneficiaries that a particular investment should be continued or called in. So, too, where absolute discretion has been given to trustees to do a particular act (e.g. to sell the trust property), the court cannot compel them to exercise the power, but if they do exercise it, the court will see that they do not exercise it improperly or unreasonably."

36. We are of the view that the learned Judge has erroneously placed reliance upon the judgment of this Court in ***Bapuji Karawalla (Supra)*** wherein the facts are in no way related to the facts in the present case. In that case there was a life interest vested by the testator in his nephew (the Plaintiff) to hold for his lifetime one house situated in Popani Gully at Chandanwadi in Bombay. It was provided that the Plaintiff may by his Will or any Deed of Appointment, appoint such person after his demise to receive the house and that if he does not make any Will or Deed

or writing the said house will be given after his demise to his children in equal share. It was held by this Court that the Plaintiff having by a Deed appointed himself to all the interest in the said house, and by which the house belongs to the Plaintiff having taken an absolute estate, he could sell the house as there was no restraint on alienation of the said house. In the present case, there is no such power in the hands of the said Gangasingh to appoint himself as beneficiary of the trust property and thereafter deal with the trust property in any manner he deems fit. The said Gangasingh in the present case has been vested with the power to distribute the trust property to the beneficiaries so appointed but such power is to be exercised reasonably and for fulfilment of the objects provided under the Indenture of Trust.

37. We do not accept the submissions on behalf of the Respondents that the Appellant was never entitled to the trust property and or income arising there from. We find from the Indenture of Trust that the Trustees were to apply the net income in Trust and pay the same to those persons who were in existence on the date of Indenture of Trust. However on the date of distribution of the trust property the sons of the said Harnamsingh and Gangasingh were to benefit. We further do not accept the submissions on behalf of the Respondent that the said

Gangasingh could choose any of the beneficiaries by excluding the son of Harnamsingh. We do not find that the settlor, the said Parvatibai had vested any such power in the said Gangasingh and merely because the said Gangasingh did not appoint his own elder son, the 5th Respondent as beneficiary to the trust property, this does not give him the power to exclude the Appellant. We do not accept the finding of the learned Judge in the impugned judgment that the said Gangasingh had exercised the same power which the said Parvatibai would have exercised by choosing his three sons (Respondent Nos. 2 to 4) in exclusion to the son of the said Harnamsingh.

38. The cases relied upon by the learned Senior Counsel on behalf of the Respondents are distinguishable on facts. In ***Mahadeo (Supra)***, the power was conferred upon the executor of the Will of the testator who was to dispose of all the other estate and money of the testator according to his discretion by giving the same to an institution or institutions of utility as he may deem fit. It is in this context that this Court has distinguished trusts from powers and held that in case of power there can be no question of the testator's direction being defective for uncertainty. The power may even be a purely arbitrary power of disposition according to a discretion which no Court could either direct or control. In the

present case, the power conferred upon the said Gangasingh was in his capacity as a trustee for the distribution of the trust property to the beneficiaries under the Indenture of Trust and by excluding a beneficiary under the Indenture of Trust, such discretionary power was unreasonably exercised and hence could always be controlled by the Court.

39. In the judgment of ***Basanti Seal (Supra)***, the Calcutta High Court has considered a case where the original trustee as settlor executed a deed of trust providing that he and his wife would act as joint trustees in respect of the trust properties. The joint trustees thereafter exercised their power conferred by the said Deed of Trust by executing a Deed of appointment appointing as beneficiaries of two of the trust properties, his two sons and excluding his third son, the Plaintiff in that case. This power was further exercised by the wife upon the demise of her husband, as the surviving original trustee in the same manner as the original trustees had exercised the power and in respect of the other trust property. The Suit instituted by the joint trustees for eviction of the licensee i.e. the son who was excluded as beneficiary, from a portion of the Calcutta property had originally been dismissed by the Court but was upheld in Appeal and the SLP preferred against the order in Appeal was dismissed. The Calcutta High Court had

also considered the default clause in this context and held that only if there was no appointment by the joint trustees or surviving trustee then in that case all the sons would get the trust property in equal shares. It was held that since the two deeds of appointment were legal and valid, the excluded son i.e. the Plaintiff was neither a beneficiary nor had acquired any right, title and interest in any of the trust properties. This case can also be distinguished as in the present case the settlor of the trust has not exercised the power of appointment and this has been exercised by the original trustee, the said Gangasingh later in favour of his sons as beneficiaries by excluding the Appellant. It is clear from the Indenture of Trust that the settlor, the said Parvatibai never intended any such exclusion and hence such power could never have been exercised in the manner exercised by the original trustee, the said Gangasingh. The above cases relied upon by the learned Senior Counsel for the Respondents are accordingly not applicable in the facts and circumstances of the present case.

40. We are of the considered view that the learned Judge has erroneously arrived at a finding that the Appellant herein has not made out a case for getting a decree in the Suit, thereby dismissing the Suit. Hence, the following order:-

- (a) The impugned judgment is hereby quashed and set aside;
- (b) The Appellant is declared as co-owner of the trust property viz. Lease Hold Plot No.45 (South) Dadar Matunga Estate F Ward.6785 to 6789 St. No.352 to 356, 356A C.S. No.134/D 10 admeasuring about 3351.20 Sq.mtrs. together with building standing thereon and known as Harganga Mahal, having 1/5th share in it;
- (c) The Respondents are jointly and severally directed to render to the Appellant the true and correct accounts / dealings including income / profit /rent / compensation / benefit received in respect of the trust properties within a period of four weeks from the date of uploading of this judgment and order;
- (d) The Respondents are directed to determine the Appellant's 1/5th share in the said Harganga Mahal and the said Plot No.45 which shall be determined within a period of eight weeks from the date of uploading of this judgment and order;

- (e) The Respondents are directed that upon determination of the Appellant's 1/5th share in the said Harganga Mahal and the said Plot No.45, the same be handed over to the Appellant either by way of partition or sale of the said trust properties within a period of eight weeks therefrom;
- (f) It is declared that the Respondents or any one claiming through the Respondents have no right under the Deed of new appointment dated 28th February, 1992, registered Declaration Deed dated 17th March, 1998 and the last Will and codicil dated 1st July, 2003 executed by the original Defendant No.1 in so far as it relates to the appointment of the Respondent Nos.2 to 4 as beneficiaries of the trust property and so far as that part of the said Deeds, Will and Codicil is concerned, the same is declared as illegal and not binding or enforceable against the Appellant.
- (g) The Appeal is accordingly allowed and Suit decreed in the above terms with no order as to costs.

(RIYAZ I. CHAGLA J.)

(B.R. GAVAI, J.)