

ORIGINAL CIVIL.

Before Mr. Justice Marten.

In re INDIAN TRUSTS ACT AND *In re* SHIRINBAI MERWANJI
DALAL AND ANOTHER...PETITIONERS.

1918.

August 22.

Trusts—Voluntary settlement—Sale of trust property—Trustees having no express power to sell immoveable property—Remainder estate in favour of issue of the tenant for life—Trustees contracting to sell immoveable property with the consent of beneficiaries living—Such consent not sufficient as issue may include unborn children or grand-children of the tenant for life—Sanction of Court to a sale by trustees under its extraordinary jurisdiction—Sanction given in a case of emergency—The Indian Trusts Act (II of 1882), sections 20, 36, 40.

An immoveable property in Bombay was settled in trust in February, 1898, by a Parsee lady since deceased, the trustees being her two daughters, S and R. The trusts were for the settlor for life with remainder as to one moiety for R for life with remainder "for the issue of the body of the said R in the shares prescribed by law as if the said R had died possessed of the said share intestate leaving such issue only as her right heirs and in default of such issue upon the trusts hereinafter declared in regard to the other half." The other moiety went to the other daughter S for life with a limitation over to her issue similar to that contained as regards R's moiety. There was an ultimate gift over of all the property to charity in case there should be no "person living entitled to take the said premises under the trusts hereinbefore declared." In March 1918, the trustees entered into an agreement of sale of the property at a fairly advantageous price. All the beneficiaries living at the date of the agreement, namely, R, S and her six children had consented to the sale. The trust instrument itself did not contain a power of sale and the purchasers did not accept the title without the sanction of the Court. The trustees accordingly presented a petition to the Court asking for sanction. It was urged that sections 40 and 36 of the Indian Trusts Act, II of 1882, enabled the trustees to effect such a sale, or in the alternative that the case was one of emergency not foreseen by the author of the trust. The property stood at the corner of two streets and was liable to a set-back under Municipal Regulations, and if the set-back arose it would be very seriously depreciated. The property further needed heavy repairs and was defective as regards sanitary conveniences. The trustees apprehended that they might be served any moment with a sanitary notice which might result in a set-back being enforced.

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Held, (1) that the proposed sale could not be said to have been consented to by all the beneficiaries interested under the trust instrument appearing before the Court, inasmuch as it was possible that when the settlement came finally to be construed and the trusts wound up, some child or grandchild born hereafter might be entitled to a share in the property ;

(2) that the present case, however, was one of emergency not foreseen or anticipated by the author of the trust, and the sale though not provided for by the trust instrument ought, in the interests of all the beneficiaries concerned, to be sanctioned by the Court in the exercise of its extraordinary jurisdiction ;

(3) that the extraordinary jurisdiction of the Court to sanction a sale of immovable property in the absence of a power of sale in that behalf in the trust instrument is of an extremely delicate character and should be exercised with the greatest caution.

In re New⁽¹⁾ and *In re Tollemache*⁽²⁾, referred to.

THE petitioners, the trustees of a deed of settlement, applied to the Court to obtain sanction for the sale of immovable property conveyed to them upon trust.

The following is the material portion of their petition :—

1. The petitioners are the trustees of a deed of settlement, dated the 11th day of February, 1898, and made between Goolbai widow of Jehangirji Edulji Ghadiali (hereinafter referred to as the settlor) of the one part and the petitioners of the other part whereby the settlor conveyed a certain immovable property situate at Meadows Street within the Fort, to the petitioners upon trust to hold the same to the use of the settlor for and during the term of her natural life and from and after her death upon trust as to one equal half part of the said property for the petitioner Ratanbai if she should then be living for and during the term of her natural life and from and after her death of the issue of the body of the said Ratanbai in the shares prescribed by law as if the said Ratanbai had died possessed of the said share intestate leaving such issue only as her right heirs and in default of such issue upon the trusts declared in regard to the other half of the said property and as to the other half of the said immovable property upon trust for the said Shirinbai if the said Shirinbai should be living at the death of the settlor for and during the term of her natural life and from and after her death upon trust for the

⁽¹⁾ [1901] 2 Ch. 534.

⁽²⁾ [1903] 1 Ch. 457, 955.

issue of the body of the said Shirinbai in the shares prescribed by law as if the said Shirinbai had died possessed of the said share intestate leaving such issue only as her right heirs and in default of such issue upon the trust declared in regard to the other half of the property and in case there should be no person living entitled to take the said property upon the trusts above-mentioned the trustees were directed to stand possessed of the said property upon trust for such charity for the benefit of the Parsi community as the trustees should think proper. Hereto annexed and marked A is a copy of the said deed of settlement.

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2. The settlor died on the 21st day of April, 1898, and the petitioners are between themselves in enjoyment of the whole of the said property.

3. The said Shirinbai has married and has now living the following issue of her body, namely, two daughters Aimai and Jerbanu and four sons Jehangir, Framroze, Phiroze and Sorab who have all attained the age of majority.

4. The said Ratanbai has never married.

5. The said deed of settlement contains no express provision empowering the trustees to sell the property comprised therein.

6. By an agreement, dated the 27th day of March 1918, made between the petitioners as such trustees as aforesaid of the one part and Abdul Karim Mahomed and Mahomed Miya Mahomedji of the other part the petitioners agreed to sell the said trust property to the said Abdul Karim Mahomed and Mahomed Miya Mahomedji for a sum of Rs. 33,000. A copy of the said agreement is hereto annexed and marked B.

7. The said agreement for sale was entered into by your petitioners after taking the consent of the said Aimai, Jerbanu, Jehangir, Framroze, Phiroze and Sorab who have also consented to join in and execute the necessary conveyance, as will appear from their letter of consent annexed to the affidavit of Ardeshir P. Patel sworn herein on the 5th instant. By their said letter they agree to the petitioners selling the said property and consent to join in executing the necessary conveyance.

8. The purchasers, however, contend that the petitioners are not entitled to sell the said property as there is no power of sale contained in the said Indenture and they refuse to complete the purchase unless and until an order of this Honourable Court has been obtained by the petitioners sanctioning the said sale. Hereto annexed and collectively marked C is a copy of the correspondence on the subject passed between the petitioners' attorneys and the purchasers' attorneys.

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9. The petitioners state that the price offered for the property, namely, Rs. 33,000 is a very handsome one and they are supported in their opinion by their Engineer Mr. N. H. Katrak of Messrs. Katrak and Katrak, a copy of whose report is hereto annexed and marked D. The said Mr. Katrak has in his said report also adduced further reasons to which your petitioners crave leave to refer why it would be advantageous to sell the said property.

10. The petitioners have no ready money in their hands from which to meet either the expenses of providing the water-closet accommodation or of making the heavy repairs which their Engineer according to the said report is of opinion will have shortly to be made to the building and if it becomes necessary to incur any such expenses in the near future the property will have to be mortgaged to raise the necessary funds for the purpose.

Your petitioners therefore pray for an order sanctioning the said sale and authorizing the petitioners to complete it in accordance with the terms of the said agreement for sale on the petitioners getting the said children of the said Shirinbai to join in and execute the conveyance.

The following is the material portion of the affidavit of the Engineer Mr. N. H. Katrak in support of the petition :—

3. The trustees have informed me that they have entered into an agreement for the sale of the said property for a sum of Rs. 33,000. I consider the same a very good price.

4. Besides the high price offered for the property, I say that there are the following other reasons for selling the said property, namely :—

(a) There is a large set-back on the property, and if the set-back is enforced by the Municipality when in future any occasion should arise for the same in case of repairs, a large portion of no less than about 40 sq. yds. out of 103 sq. yds. would be taken up. In the case of this building the set-back is particularly unfortunate one as it lies on both the Eastern and Northern front-ages of the property, the building standing at the junction of two streets. I have had considerable experience of set-backs both while I was in the service of the Municipality of Bombay as a Superintendent of Streets and Buildings and thereafter in private practice, and I am in a position to say that taking all the facts into consideration the effect of the set-back on the future value of this building is particularly depreciating. In view of the enforcement of the set-back the petitioners cannot do any substantial repairs to the two front faces as well as to such portions of the building as lie within the set-back, which they would want to do so as to increase the future life of the property, and although in my calculations I have taken the remaining

life of the building to be thirty years, it may turn out to be less, on account of the petitioners' disability on the above ground to do any necessary repairs that may crop up.

(b) As there is no water-closet accommodation on the property the petitioners might at any time be called upon by the Municipality to provide the same. The building is an old one and, therefore, the work would have to be done very carefully so that the structure may not suffer in any way. Besides as structural alterations would be necessary it would put the petitioners to a fairly good amount say about Rs. 800 of expense for complying with such Municipal requisitions especially during this War-time when prices of all materials have gone up very considerably.

(c) As the structure is an old one it would put the trustees to great expense in case of heavy repairs sometime hereafter.

5. Yet another reason why I advise that this offer for the property should be accepted is that the beneficiaries under the settlement both present and future would very substantially benefit thereby. In the first place suppose the sale price of Rs. 33,000 is invested in the 5½ per cent. free of Income Tax War Bonds, payable in 1928, the net annual income from such investment would be Rs. 1,815, as against the present income of Rs. 1,691, that is, Rs. 123 more every year. If this sum of Rs. 123 is invested at compound interest at 5½ per cent. it will at the end of ten years amount to Rs. 1,584. Besides for every Rs. 100 now invested in the said War Bonds, Rs. 105 will be realised at the end of ten years, so that Rs. 33,000 now invested will swell to Rs. 34,650, to which should be added the Rs. 1,584 the accumulation of 123·25 per annum as stated above. So at the end of ten years the applicants will have Rs. 36,234 in hand without any risk whatsoever. Secondly, supposing everything goes all right with the property and nothing unusual turns up, the depreciation of property in 1928 becomes Rs. 2,347 instead of the present one of Rs. 1,965, i. e., the then value of the property will be Rs. 27,811 instead of the present one of Rs. 28,793.

6. I further say that if the construction of the water-closets is enforced by the Municipality, lesser rents would be realised than at present on account of consequent loss of area; making allowances for the deduction of the taxes, &c., such deduction in the net realization of the rents would be about Rs. 12 per month, i. e., Rs. 144 per annum, which capitalized at 5½ per cent. would be a little over Rs. 2,600, which should be deducted from Rs. 27,811 and the value of the property would be Rs. 25,211.

7. On the above figures the position at the end of ten years would be Rs. 36,234 against Rs. 25,211, a clear gain of Rs. 11,023, i. e., 43 per cent.

8. In these circumstances I consider it most desirable that the property should now be sold for Rs. 33,000 and if it is not sold for Rs. 33,000 I should

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consider that the property is allowed to be ruined and that the beneficiaries' interest will be very adversely affected partly on account of their disability to do the repairs within the regular lines of the streets and partly on account of the inevitable monetary loss.

The petition came up for hearing before Marten J. in Chambers on 8th August 1918, when his Lordship adjourned the matter into Court in order to hear counsel on the question whether the Court had jurisdiction to sanction such sale where no power was expressly given to the trustees by the deed of trust.

Kanga, for the petitioners :—Sections 40 and 36 of the Indian Trusts Act confer an implied power of sale in respect of immoveable property. The latter section speaks of "realization." Sale is authorised if it is clearly for the benefit of the beneficiaries. Under the Indian Trusts Act the Court is invested with general administrative jurisdiction. Moreover, the sale is consented to by all the beneficiaries living. It is uncertain whether children or grand-children of the tenant for life born hereafter would take interest under the trust instrument. In any event, the case is one of emergency and comes directly under the ruling in *In re New*⁽¹⁾ referred to in *In re Tollemache*⁽²⁾. In England the established rule is that whenever there arises an emergency or circumstance not foreseen or anticipated by the settlor which renders it desirable that the strict terms of the trust should be departed from in order to prevent obviously gross injury to the beneficiaries, the Court has jurisdiction to sanction such departure. This rule is founded on the equitable principles of salvage rather than on expediency. As to what amounts in law to actual salvage see Lewin on Trusts, 11th Edition, p. 534, para. 20 and the cases cited thereunder. The affidavit of the Engineer states expressly that if

⁽¹⁾ [1901] 2 Ch. 534.

⁽²⁾ [1903] 1 Ch. 457, 955.

the offer is not accepted he would consider that the property is allowed to be ruined.

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MARTEN, J.—This is an adjourned petition which raises the question whether trustees of land who have no express power of sale in the instrument creating the trust have power to sell that land either with or without the consent of the Court. The parties concerned are all Parsis.

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The trust instrument in question is a settlement made on the 11th February 1898. The settlor was one Bai Gulbai since deceased and the trustees were her two daughters, Shirinbai and Ratanbai, the present petitioners. It was a voluntary settlement, and the only property settled was a certain immoveable property in Meadows Street, Bombay, mentioned in the Schedule. The trusts were for the settlor for life with remainder as to one moiety for Ratanbai for life with remainder, to use the exact words of the instrument, "for the issue of the body of the said Ratanbai in the shares prescribed by law as if the said Ratanbai had died possessed of the said share intestate leaving such issue only as her right heirs and in default of such issue upon the trusts hereinafter declared in regard to the other half of the said premises."

The other moiety went to the other daughter Shirinbai for life with a limitation over to her issue similar to that contained as regards Ratanbai's moiety. There is an ultimate gift over of all the property to charity in case there should be no "person living entitled to take the said premises under the trusts hereinbefore declared." The petitioner Ratanbai is forty-seven and unmarried. Shirinbai, I am told, is fifty-two and has six children, viz., two daughters and four sons, all of whom consent to the proposed sale.

Stopping for a moment at the trust I have read, I do not propose to say what is the meaning of the trust

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“for the issue of the body of the said Ratanbai in the shares prescribed by law” and so on. I think for the purposes of this case it is sufficient to say that it is not clear that the grandchildren of Shirinbai—or for the matter of that of Ratanbai if she married and had children—might not take in certain events, e. g., if the parents of those grand children predeceased the tenant for life, Shirinbai or Ratanbai as the case might be. Accordingly, I do not think it can be said with certainty that I have now before me all beneficiaries, who can in any possible circumstances be entitled to the property, for it is possible that when the settlement comes finally to be construed and the trusts wound up some child or grandchild, at the present moment unborn, may be entitled to a share in the property. The case, therefore, cannot be disposed of on the lines that the trustees only propose to do something with the consent of all the beneficiaries.

Now what the parties wish to do is this. For reasons which I will mention later, they wish to sell the property and have accordingly entered into an agreement for sale at what is considered to be an advantageous price. Very naturally the purchaser declined to accept the title without the sanction of the Court; and accordingly the trustees have presented the present petition asking for that sanction. All the children of Shirinbai have given their written consent to the sale.

The first point that arises is the question of jurisdiction that I have referred to, viz., whether in a case such as I have before me, the trustees have any power to sell the land, and, if not, whether the Court has any jurisdiction to give them that power. Mr. Kanga for the petitioners has referred me to section 40 of the Indian Trusts Act, 1882. That section gives power to trustees to vary investments and the argument is that the trust land is an investment which the trustees may

vary and for that purpose may sell. If that argument is correct, all trustees would have power to sell land and no leave of the Court would be necessary. Section 40 runs as follows :—

“ A trustee may, at his discretion, call in any trust-property invested in any security and invest the same on any of the securities mentioned or referred to in section 20, and from time to time vary any such investments for others of the same nature.”

Now, I think, anybody reading those words must be struck by their inaptitude to deal with the case of the sale of land. To say that a sale of land settled by the settlement itself is a calling in of trust property invested in any security is hardly, I think, what the Legislature intended when they drafted section 40. To start with you do not speak of “calling in land.” Nor is it usual or correct to speak of land as “property invested in any security.” Of course a mortgage of land is referred to as a real security but a power to invest in real securities as in the English Trustee Act, 1893, sections 1 (b) and 5, will not give power to invest in the purchase of land but only in the mortgage of land. This illustrates the importance of the word “security” in section 40 of the Indian Trusts Act. I do not think any other section of the Indian Trusts Act that I have been referred to has much or any bearing on this point, except possibly sections 20 and 36. Section 20 gives power to invest on certain securities and the securities mentioned are those ordinarily described as securities, namely, debentures, mortgages and so on. I cannot help thinking that that was the sort of security that the Legislature had in mind when they referred in section 40 to calling in trust property in any “security.”

Section 36 provides that—

“...a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.”

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Stress was laid on the word "realisation," and it was said that this authorised a sale, particularly if it was, clearly for the benefit of the beneficiaries. However if the case had depended on sections 40 and 36 alone, I should have felt the greatest difficulty in holding that there was any general power for trustees to sell land under both or either of these sections or that the Court had any power to sanction such a sale. There does not appear to be any Indian reported case on the point, but Mr. Kanga was good enough to mention an unreported case he had before my brother Macleod J. where, I understand, the Court felt very much the same difficulty as I do about the meaning of section 40 and in that particular case refused to sanction the sale.

But, I think, in the present case it is unnecessary for me finally to decide whether the trustees have any power under section 40 or section 36, because, I think, this particular case may be decided on another ground, namely, under the extraordinary jurisdiction of the Court which it can exercise in certain cases of what I may call "emergency." I think that class of jurisdiction is exemplified at its highest in *In re New*⁽¹⁾, a decision of the English Court of Appeal, the headnote of which runs as follows :—

"Where in the administration or management of a trust estate by the trustees, especially where the estate consists of a business or of shares in a mercantile company, there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being *sui juris* or not yet in existence, the Court will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees..."

(1) [1901] 2 Ch. 534.

I will only say by way of warning that as pointed out in that case this jurisdiction is of an extremely delicate character and has to be exercised with the greatest caution. The case should be read at the same time with *In re Tollemache*⁽¹⁾, where Lord Justice Cozens-Hardy, as he then was, said (at page 956) :—

“I will only add that, in my opinion, *In re New*⁽²⁾ constitutes the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts.”

Now, have I got here a case of an emergency such as is contemplated in *In re New*⁽²⁾? So far I have not dealt with the facts which have led to the proposed sale. This is not a case where the parties from some mere caprice, or from an ordinary desire to change of investments, or to increase their income, are desirous of selling the property. The facts are that this property is at the corner of two streets and is liable to a set-back, and that if that set-back arose, which would happen on any occasion when it might be necessary to go to the Municipality for their approval of plans, the property would be very seriously depreciated. Then, further, the property is an extremely old one and repairs in the near future are undoubtedly required. Amongst other things it is entirely defective as regards sanitary conveniences and any moment the trustees might be served with a sanitary notice from the Municipality. This notice would be extremely difficult to comply with and would probably result in the set-back being enforced. I will not go into all the details of the affidavit of the Engineer, Mr. Nowroji Hormusji Katrak, but he sums up the situation in the last paragraph in which he says :

“In these circumstances I consider it most desirable that the property should now be sold for Rs. 33,000, and if it is not sold for 33,000 I should consider that

(1) [1903] 1 Ch. 955 and 956.

(2) [1901] 2 Ch. 534.

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the property is allowed to be ruined and that the beneficiaries' interest would be very adversely affected partly on account of their disability to do the repairs within the regular lines of the streets and partly on account of the inevitable monetary loss."

That being so, I think there is an emergency here within the meaning of *In re New*⁽¹⁾. Certainly the settlor here never contemplated the possibility of a set-back nor of these Municipal requirements and the possible disastrous effect they might have on the beneficiaries under the trust instrument. I think really this is a case where it would be almost pedantic on my part to say that the letter of the trust must be kept to and the spirit disregarded and that as it is land which is settled, land it must remain. I accordingly consider that I may properly exercise in this present case the extraordinary jurisdiction which I have and that accordingly the sale ought to be sanctioned.

I notice that the two trustees are the two tenants for life, and usually I do not think that is a very desirable trusteeship. It is true that they were the trustees appointed by the settlor herself, but she settled land and now the trust property may consist of easily convertible investments. If, therefore, there is any desire by the children of Shirinbai that a third trustee should be appointed, I think, it would be a proper case to apply in Chambers to have that third trustee appointed. But, as far as the present application is concerned, I am not going to make that a term of my order. As regards the re-investment of the sale-proceeds, I think that the trustees will have power to invest the proceeds in any investment for the time being authorized by law for the investment of the trust funds and will have power to vary such investment. I also think that I ought to give liberty to the trustees to apply to re-invest the proceeds in the purchase of land if so advised. It

(1) [1901] 2 Ch. 534.

is perhaps unnecessary to say that the sale-proceeds will devolve in the same way as the land would have done, but, if desired, a provision to this effect can be inserted in the order as was done in the order on the files of this Court made by Sir Lawrence Jenkins in *In re Manilal Hurgovan*⁽¹⁾, where he dealt with the extraordinary jurisdiction of the Court to sanction the sale of a minor's interest in Hindu joint family property. Accordingly the order will be as prayed, but the petitioners will have their costs of the petition out of the trust estate between solicitor and client, and, having regard to my order and the letter of consent of 2nd August, 1918, there will be no necessity for the children of Shirinbai to join in the conveyance. The title of the petition and order will be amended by adding "and Extraordinary Civil Jurisdiction" after "Ordinary Original Civil Jurisdiction," and there will be liberty to apply as to re-investing in land and generally.

Solicitors for petitioners: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Order accordingly.

G. G. N.

(1) (1900) 25 Bom. 353.

CRIMINAL REVISION.

Before Mr. Justice Heaton and Mr. Justice Hayward.

EMPEROR v. HAJI GULAM MAHOMED AZAM^o.

Indian Penal Code (Act XLV of 1860), sections 341 and 109—Wrongful restraint—Tenant holding over—Landlord preventing the tenant from going to the demised premises.

The accused having prevented a tenant of his who was holding over from entering the demised premises, was convicted of wrongful restraint

^o Criminal Application for Revision No. 248 of 1918.

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